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**Original Title:**

A World of One's Own: Property and Belonging in Ecological Thought

**New Title:**

"Habitation versus Improvement": The Politics of Home and Ecological Populism

**Abstract:**

The idea of private property presupposes that property can be conceived as having a sole owner who holds the right to make final decisions about the object's use. In this paper I seek to critique this idea, emphasizing the fragility of ownership in light of social and especially ecological flows that unsettle any single (legal) person's claim to a piece of property. At the same time, following Margaret Radin's distinction between personal and fungible property, I seek a theory of property that can be personal while avoiding the mistake of supposing sole ownership over any one thing. Thus we can continue to take seriously the claims made by those who have a personal connection to a particular thing or place to personal property in it, while also making room for social claims to regulate the use and disposal of property—i.e., allowing for the sorts of regulations that are especially relevant in our time of ecological crisis. Perhaps paradoxically, my theory opens up private property to much needed regulation of use while also providing a strong defense against many instances of state takings (eminent domain).

**Note:** The paper has changed in the process of execution. The abstract above describes the current state of the paper only loosely. The emphasis has moved away from the fragility of ownership and toward the distinction between personal and fungible property and what that means for eminent domain, regulation, and an ecological populism that regulates fungible property to protect personal property from destruction and degradation.

### Introduction—Donald Trump and Eminent Domain

During this election cycle the candidacy of Mr. Donald Trump looms large. In addition to signaling a sea-change in the Republican Party and a repudiation of party elites—and despite his emphasizing personality over substance—both Trump’s campaign and its many critics reveal a cleavage within and outside the conservative movement regarding private property. It is old news by now that many conservatives and libertarians oppose Donald Trump out of principle, seeing in his past stances a striking, if inconsistent, commitment to state power on such issues as health care and taxation against which the contemporary conservative movement mobilizes. Of particular relevance here, however, is the controversy surrounding his unusually consistent support for eminent domain, or takings of real property by the state, for private economic development.<sup>1</sup>

Two episodes in Trump’s business career stand out as exemplars of his favorable stance toward eminent domain. First, in 1994, Trump approached the municipal government of Bridgeport, Connecticut with a plan to build a \$350 million entertainment complex that he promised would revitalize the city and make it into a “national tourist destination.” As for the five small businesses that owned the land in question, Trump urged the city to use its powers of eminent domain and then sell the land to him.<sup>2</sup> Second, just a few years later Trump sought to expand his Trump Plaza casino in Atlantic City and moved to acquire housing properties nearby to make room for a parking lot and limousine waiting area. Several holdouts, including elderly widow and decades-long resident Vera Coking, refused to leave, even after a quasi-public body,

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<sup>1</sup> “Real property” is a legal term that distinguishes fixed property—including land and buildings—from more mobile forms of property, like furniture and clothing, as well as fungible money.

<sup>2</sup> Edmund Mahony, “Trump Park Complex Planned in Bridgeport,” *Hartford Courant*, June 3, 1994. Retrieved March 1, 2016, <[http://articles.courant.com/1994-06-03/news/9406030357\\_1\\_trump-connecticut-casinos-in-atlantic-city-trump-s-lawyers](http://articles.courant.com/1994-06-03/news/9406030357_1_trump-connecticut-casinos-in-atlantic-city-trump-s-lawyers)>.

the Casino Reinvestment Development Authority (CRDA), payed compensation and ordered them to vacate. Coking and others successfully challenged Trump and the CRDA in court and the incident received national press attention, but Trump's consistent support for eminent domain remains. He praised the infamous Supreme Court decision in *Kelo v. City of New London* (2005) which ruled that pursuit of private economic development qualified as "public use" under the takings clause of the 5<sup>th</sup> Amendment, and he renewed his support in October 2015—during the primary race—when he insisted that "eminent domain is wonderful."<sup>3</sup> Conservative outlets from the *National Review* to the Cato Institute have derided Trump for his record on government takings, and the market-oriented advocacy group *Club for Growth* even ran a television ad in 2015 warning conservatives not to vote for a candidate who favors "eminent domain abuse."<sup>4</sup> Along with Trump's inconsistencies on health policy, abortion rights, and gun control, this is another opportunity for conservatives to paint Trump as a statist imposter.

Yet the outcry following the 2005 *Kelo* decision speaks to a much broader concern among the American public and some scholars about the dangers of private economic interests using the public power of state takings to aggrandize themselves at the expense of private property owners. As George Mason law professor Ilya Somin notes,

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<sup>3</sup> Ilya Somin, "Donald Trump's History of Eminent Domain Abuse," *Washington Post*, August 19, 2015. Retrieved March 1, 2016, <<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/19/donald-trumps-abuse-of-eminent-domain/>>; *RealClearPolitics*, "Trump: Eminent Domain 'Wonderful.'" October 6, 2015. Retrieved March 1, 2016, <[http://www.realclearpolitics.com/video/2015/10/06/trump\\_eminent\\_domain\\_wonderful.html](http://www.realclearpolitics.com/video/2015/10/06/trump_eminent_domain_wonderful.html)>.

<sup>4</sup> Robert VerBruggen, "Donald Trump and Eminent Domain," *National Review*, April 19, 2011. Retrieved March 1, 2016, <<http://www.nationalreview.com/article/265171/donald-trump-and-eminent-domain-robert-verbruggen>>; David Boas, "Donald Trump's Eminent Domain Love Nearly Cost a Widow Her House," *Cato Institute*, previously published in *The Guardian*, August 19, 2015. Retrieved March 1, 2016, <<http://www.cato.org/publications/commentary/donald-trumps-eminent-domain-love-nearly-cost-widow-her-house>>; Joel Rose, "Get Off My Lawn: Conservatives Critique Trump On Eminent Domain," *NPR: All Things Considered*, September 24, 2015. Retrieved March 1, 2016, <<http://www.npr.org/sections/itsallpolitics/2015/09/24/443131389/get-off-my-lawn-conservatives-critique-trump-on-eminent-domain>>; Russell Berman, "Seizing Private Property Is No Problem for Donald Trump," *The Atlantic*, October 7, 2015. Retrieved March 1, 2016, <http://www.theatlantic.com/politics/archive/2015/10/seizing-private-property-is-no-problem-for-donald-trump/409432/>>.

Polls showed that over 80% of the public disapproved of the ruling, and that overwhelming opposition persisted even in surveys taken several years after the ruling came down. The opposition cut across conventional partisan, ideological, racial, and gender divisions. This was a rare issue on which Rush Limbaugh, Ralph Nader, libertarians, and the NAACP were all on the same side.<sup>5</sup>

Why the widespread and often visceral reaction against a court decision about the takings clause of the U.S. Constitution? First, especially in the wake of the Great Recession, populist hostility toward the entanglement of state and corporate power figures prominently across the ideological spectrum and is asserting itself powerfully in the presidential primaries of both major parties.<sup>6</sup> Second, and more important for my argument here, opponents of the *Kelo* ruling, and eminent domain abuse in general, have focused attention and framed the issue around *a particular kind of property*—the home.

Consider the Club for Growth ad mentioned above. Below is my transcription of the ad's audio narration track. I have bolded the text where the narrator references property rights.

The Supreme Court's *Kelo* decision gave government massive new power to **take private property** and give it to corporations. Conservatives have fought this disaster. What's Donald Trump's say about the decision? [Recording of Fox News interview of Trump:] "I happen to agree with it one hundred percent." Trump supports eminent domain abuse because he can make millions while **we lose our property rights**. Trump. The worst kind of politician.

During each of the references to property, the ad shows images of residential homes being demolished by shovel trucks (see Appendix below). Thus, the ad seeks to draw attention not to just any kind of property, but to a specific kind of private property that is held especially dearly

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<sup>5</sup> Ilya Somin, "The Judicial and Political Reaction to *Kelo*," *Washington Post*, June 4, 2015. Retrieved March 1, 2016, <<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/>>. See also "Congress Assails Domain Ruling," *The Washington Times*, July 1, 2005. Retrieved March 1, 2016, <<http://www.washingtontimes.com/news/2005/jul/1/20050701-010419-9346r/>>.

<sup>6</sup> It is noteworthy in this regard that Bernie Sanders, whom one might consider to be the Left's populist candidate, criticized *Kelo* back in 2005 because "the result of this decision will be that working families and poor people will see their property turned over to corporate interests and wealthy developers" (then-U.S. Representative Bernie Sanders, I-Vermont, 2005, quoted in Ilya Somin, "The Judicial and Political Reaction to *Kelo*").

by its owners because its value—both monetary and existential—is fundamentally different from other kinds of property.

My argument is that the home serves as a politically potent icon for a specific kind of property, one that scholars of environmental political thought would do well to study. I seek here to take John Meyer’s invitation for political theorists to explore “the question of what it *means* to own [something]—i.e., the character of ownership.”<sup>7</sup> First I will explore the *Kelo* ruling with an eye to the role that homes and threats to their survival play in the case and its aftermath. Next, I will turn to Margaret Radin’s theory of property and argue that the meaning of ownership varies across types of property, and that her distinction between personal and fungible property allows environmentalists to advocate for strong regulations of one kind of property (fungible) for the sake of protecting another kind of property (personal, especially the home). Finally, I will turn to Karl Polanyi and his concern that economic “improvement” will come at the cost of “habitations,” and close with a brief note on an ecological populism that might stand in defense of home—understood both as a house of one’s own and as the habitats and habitations we share with other beings, both human and nonhuman.

As a mode of political thought that concerns itself with the material foundations of society and organic life writ large, environmentalism is inescapably economic. Environmental concerns require policymakers and citizens to navigate between the various means and ends to which their material resources are devoted. This means ideas about property are of crucial importance in environmental politics. Scholars in environmental political thought have long

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<sup>7</sup> John Meyer, “The Concept of Private Property and the Limits of the Environmental Imagination,” *Political Theory*, 37.1, February 2009, 107. See also p. 123, note 16, where Meyer repeats that “it is [...] helpful to recognize that the question of what it *means* to ‘own’ property is itself at stake.”

acknowledged the importance of economic concerns for a politics of ecological stewardship, urging us not to ignore the vital importance of property and political economy.<sup>8</sup>

Meyer, for example, argues that American political discourse is dominated by an “absolutist concept” of property, according to which “owning property means that we have something of an absolute natural right to it—a right protected by legitimate government, but that should not be limited or modified by government.”<sup>9</sup> Importantly, this concept of property is not only held as a normative standard by libertarians. It also constrains critics of unfettered private property rights because it forces them to frame government regulation of property use as a contingent departure from a coherent norm—the absolutist concept of private property as a sovereign right. Against this view, Meyer draws on the economic theorist Karl Polanyi in “outlining a pragmatic concept of property as necessarily—not contingently—embedded in social and ecological relations.”<sup>10</sup> Meyer hopes his theory “can allow us to recognize and accept the undeniable attraction of private property, while also tracing the equally undeniable and to-be-anticipated sources of resistance to absolute ownership.”<sup>11</sup> I share both his regard for Polanyi and his desire to acknowledge the appeal of private property while refuting the absolutist concept of property and its implied rejection of needful regulation and limitation of property use and exchange. My contribution in this paper is to sketch an approach that makes home the center of both the defense of (a particular kind of) private property *and* the economic regulations necessary to protect that private property from the ravages of market forces.

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<sup>8</sup> For example, see Robyn Eckersley, *Environmentalism and Political Theory: Toward an Ecocentric Approach*, SUNY Press, 1992; Andrew Dobson, *Green Political Thought*, 4<sup>th</sup> Edition, Routledge, 2007; John Meyer, *Political Nature: Environmentalism and the Interpretation of Western Thought*, MIT Press, 2001; John Meyer, “The Concept of Private Property.”

<sup>9</sup> Meyer, “The Concept of Private Property,” 100.

<sup>10</sup> *Ibid*, 102.

<sup>11</sup> *Ibid*, 101.

### ***Kelo* and Eminent Domain—Destruction of Homes for Economic Improvement**

The circumstances surrounding *Kelo* serve as a case study for what is at stake in the politics of eminent domain. Of special importance to my argument is the extent to which the facts of the case point to a confrontation between economic interests seeking redevelopment and the homes that stand in their way. I seek to critique the *Kelo* ruling on behalf of residents and against corporate capture of state institutions. However, I also caution against the prevailing interpretation of eminent domain law as being predominantly about preserving “property rights” *in general* against state intrusion. Property rights, understood in this reductive sense, fail to distinguish between the claims of home dwellers to their places of residence and the claims of the corporate interests who think they can put the land to more productive use.<sup>12</sup>

The circumstances leading up to *Kelo* are quite telling. The City of New London, Connecticut, like many cities of the post-industrial North, had fallen into a protracted economic and demographic decline exacerbated by the closure of the Federal Government’s Naval Undersea Warfare Center.<sup>13</sup> In pursuit of economic revitalization, in 1997 the City resuscitated a dormant quasi-public nonprofit called the New London Development Corporation (NLDC) to be headed by Claire Gaudiani, a professor and president at Connecticut College whose husband, Dr. David Burnett, happened to be a high-level employee at the pharmaceutical giant Pfizer.<sup>14</sup>

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<sup>12</sup> Notice the parallel between this justification of eminent domain and John Locke’s insistence that land ownership requires productive use. Just as Locke’s property theory was used to justify dispossessing both the indigenous in colonial America and English peasants, the argument that private economic development is sufficient grounds for eminent domain helps justify forcing (predominantly poor) residents from their homes today. In both cases, grounding property rights in efficient productivity risks depriving inhabitants of their homes. See John Locke, *Two Treatises of Government*, ed. Peter Laslett, Cambridge University Press, 2012, esp. 285-302.

<sup>13</sup> This fact is noted in Justice Stevens’ majority opinion in *Kelo v. City of New London*, 545 U.S. 449 (2005), at 2; majority opinion, Justice John Paul Stevens, Cornell University Law School Legal Information Institute, retrieved August 26, 2015 in PDF form. <<https://www.law.cornell.edu/supct/pdf/04-108P.ZO>>.

<sup>14</sup> Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*, University of Chicago Press, 2015, p. 15.

The NLDC brought Pfizer executive George Milne onto their board and it was not long before talks began for the company to build a facility in New London. Pfizer insisted, however, that it would need more land than was currently available for private development to accommodate the company's needs.<sup>15</sup> The City Council granted NLDC the power of eminent domain to secure the requisite properties from unwilling sellers, including over one hundred privately owned properties.<sup>16</sup> With the help of the libertarian Institute for Justice, nine unwilling sellers who owned fifteen properties took the City to court, partially winning their case before a Connecticut Superior Court but losing in close decisions at both the Supreme Court of Connecticut (2004) and, most famously, the U.S. Supreme Court (2005).

At issue in all three court decisions were two related questions. First, does the public use requirement of the Constitution's takings clause—"nor shall private property be taken for public use, without just compensation"—permit eminent domain when the "public use" is private economic development?<sup>17</sup> Second, are the eminent domain takings by NLDC necessary for that public use? The first court answered the first question in the affirmative but threw out most of the takings because their answer to the second question was "no," while the U.S.

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<sup>15</sup> "As a condition of moving to the New London site, Pfizer insisted that the city and state acquire ninety acres of property in [the neighborhood of] Fort Trumbull—including the former naval research facility and some sixty acres of other property—in order to turn them into upscale housing, office space, a conference center, a five-star hotel, and other facilities that would be useful to the corporation and its employees who would work in the area. While Pfizer would not be the new owner of the properties in question, it expected to benefit from their redevelopment." (*Ibid*, 15-6).

<sup>16</sup> See *Kelo* majority opinion (PDF, 3). Indeed, Somin (*Grasping Hand*, 19-23) shows that, even before the power of eminent domain was granted to NLDC, the City undertook persistent efforts to pressure—even harass—residents into selling their land and moving out to make way for the development project. Once the power of eminent domain was brought to bear on remaining holdouts, it is questionable to what extent ostensibly "voluntary" sales were in fact voluntary in the face of threatened property condemnation.

<sup>17</sup> The Constitution of the United States of America, 5<sup>th</sup> Amendment.



Supreme Court answered both questions in the affirmative.<sup>18</sup> The exact legal reasoning of the courts is of little importance for my purposes here.<sup>19</sup> Instead, I will focus the justices' views on the legitimacy of private economic development as a justification for state condemnation of private property—especially residential homes.

First, we need to call the NLDC's plan what it is—a land grab facilitated by a non-elected quasi-public legal body on behalf of a private corporation and its promises of *future* economic growth and revitalization, all at the expense of the homes of city residents.<sup>20</sup> What is more, these are not just anyone's homes. As Ilya Somin reports:

David Burnett, a high-ranking Pfizer employee and husband of Claire Gaudiani [the head of NLDC], told a reporter that the houses had to be destroyed because 'Pfizer wants a nice place to operate,' and 'we don't want to be surrounded by tenements.' Gaudiani herself stated that the houses had to be knocked down because otherwise they would have looked 'ugly and dumb.' In 2005, NLDC lawyer Ed O'Connell told the *New York Times* that the homes owned by the preexisting owners had to be torn down in order to make way for 'housing at the upper end, for people like the Pfizer employees ... They are the professionals, they are the ones with the expertise and the leadership qualities to remake the city—the young urban professionals who will invest in New London.'"<sup>21</sup>

Aside from the obvious problems of conflict of interest (which the majority in *Kelo* are remarkably unwilling to acknowledge),<sup>22</sup> it is worth noting the class politics behind homes

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<sup>18</sup> See Somin, *Grasping Hand*, 26-7; *Kelo* majority opinion (PDF 5, 6-20); *Kelo* concurrent opinion (PDF 1-4), Justice Anthony Kennedy, Cornell University Law School Legal Information Institute, retrieved September 26, 2015 in PDF form. <<https://www.law.cornell.edu/supct/pdf/04-108P.ZO>>.

<sup>19</sup> For example, the extent to which judicial deference to local legislatures figured into both higher court decisions, while legally important, is beyond the scope of my argument here.

<sup>20</sup> It is worth noting that within a few years after moving into New London, Pfizer moved out again. The supplemental development on the condemned land never materialized, and much of it remains a vacant lot. See Patrick McGeehan, "Pfizer to Leave City that Won Land-Use Case," *New York Times*, November 12, 2009, retrieved March 3, 2016. <[http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html?\\_r=0](http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html?_r=0)>.

<sup>21</sup> *Ibid*, 17.

<sup>22</sup> Justice Clarence Thomas (PDF, 1) castigates the majority opinion for holding, "against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a 'public use.'" *Kelo*, Dissenting Opinion, Justice Clarence Thomas, Cornell University Law School Legal Information Institute, retrieved September 26, 2015 in PDF form. <<https://www.law.cornell.edu/supct/pdf/04-108P.ZO>>.

occupied by predominantly poorer and older residents being condemned and replaced by “upper end” housing for “young urban professionals” who will not abide the eyesore of “tenements.” Thus, when Justice Stevens points to NLDC’s goal of “mak[ing] the City more attractive and [creating] leisure and recreational opportunities,” we have to ask the question: *for whom?* The answer seems to be: for young professionals valuable to Pfizer, so valuable that the homes of poorer and predominantly elderly residents are a fair price for the promised development. As Justice O’Connor notes in her dissent,

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.<sup>23</sup>

Pfizer’s role in lobbying the City of New London to use eminent domain to make space for its facility is telling enough, but Somin also points out that not all property-owners in the redevelopment zone were forced out—a private civic organization called the Italian Dramatic Club was spared condemnation, perhaps in part because it happened to be a “hot spot for politicians seeking votes and financial support.”<sup>24</sup> Evidently, those who have the means to resist the union of state and corporate power can do so, and those who cannot are out of luck.

Even beyond considerations of both procedural and distributive fairness, however, the *Kelo* decision marks the nearly limitless capacity of private corporations to use the state’s

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<sup>23</sup> *Kelo*, Dissenting Opinion, Justice Sandra Day O’Connor, Cornell University Law School Legal Information Institute, retrieved September 26, 2015 in PDF form (PDF, 12-3). <<https://www.law.cornell.edu/supct/pdf/04-108P.ZO>>. Justice Thomas agrees, arguing that “these loses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful” (*Kelo*, Thomas’ dissent, pp. 17-18 in PDF). On the subject of race, Thomas adds that the history of eminent domain use has “long been associated with the displacement of blacks” and alludes to James Baldwin’s quip that “urban renewal [...] means Negro removal” (Thomas, pp. 18-19 in PDF).

<sup>24</sup> Somin, *Grasping Hand*, 23.

power of eminent domain to demolish preexisting claims to property. Whereas the 5<sup>th</sup> Amendment’s “public use” requirement was once read to allow primarily for the provision of public goods, such as roads, bridges, and public parks, the Court’s ruling in *Kelo* appears to expand “public use” to mean any property taking that might increase tax revenue, economic growth, job creation, and other quantitative metrics that, while plausibly related to the public good, are “far more indirect and nebulous benefits than the building of roads and courthouses or the elimination of urban blight,” as the Supreme Court of Connecticut’s dissenters argue.<sup>25</sup>

As a result, Justice O’Connor concludes,

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.<sup>26</sup>

As we will see shortly, O’Connor falls into the common trap of talking about private property as if it is monolith, with the unfortunate result that the difference between one’s right to one’s primary residence and one’s right to the billionth dollar in a hedge fund is elided. Even so, we can and should take seriously O’Connor’s anxiety over the prospect of economic development becoming the standard by which the public good is measured and the resulting opening of the floodgates for eminent domain takings.

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<sup>25</sup> Quoted in Somin, *Grasping Hand*, 29. The dissent continues: “Indeed, plans for future hotels and office buildings that purportedly will add jobs and tax revenue to the economic base of a community are just as likely to be viewed as a bonanza to the developers who build them as they are a benefit to the public. Furthermore, in the absence of statutory safeguards to ensure that the public purpose will be accomplished, there are too many unknown factors, such as a weak economy, that may derail such a project in the early and intermediate stages of its implementation.” This warning about the uncertainties of development was unfortunately prescient, given the fact that Pfizer departed New London shortly after the ruling and the promised development never materialized (see note 20 above).

<sup>26</sup> *Kelo*, O’Connor dissent, PDF 1.

The problem, as O'Connor notes, is that “nearly any lawful use of real private property can be said to generate some incidental benefit to the public,” in large part because private and public benefit are so difficult to untangle in the case of economic development takings:<sup>27</sup>

The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs. [...] The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.<sup>28</sup>

This means that, in theory, eminent domain can be practiced on any piece of real property that could be developed by another owner such that the market value of the real property would increase. As the facts of the case illustrate, this means open season for corporate interests.

#### **Radin's Property Theory—Protecting Personal Property and Regulating Fungible Property**

Here the reductionism involved in treating private property as a monolithic right becomes clear. It is not only the case that particular people will be targeted by eminent domain. It is also likely that particular kinds of property will, and often have been, targeted. This returns us to the potency of the Club for Growth ad in which eminent domain's assault on property rights is illustrated by images of houses being destroyed. Why houses? Put simply, because the makers of the ad—as well as the Institute for Justice, which provided legal services to the petitioners in *Kelo*—know that the American public will react more strongly to destruction of *homes* than of other kinds of property.<sup>29</sup> The Supreme Court, on the other hand,

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<sup>27</sup> *Ibid*, 8.

<sup>28</sup> *Ibid*, 10-11.

<sup>29</sup> See *ibid* (25) for a discussion of the reasons the Institute for Justice chose long-time homeowners Susette Kelo, Pasquale and Margarita Cristofaro, Byron Athenian, and the other petitioners as the right litigants for their efforts to overturn existing precedent in eminent domain law. In addition to the public use in question being solely about economic development (and not, say, provision of a public good) and the Institute's confidence that the

appears unwilling to see the difference in kinds of property that the American public seems to see.<sup>30</sup> All four written opinions treat the issue as a matter of “property rights” pure and simple, and focus on the rationale of the government and its claim to a public use, not the nature of the particular kinds of property in question.<sup>31</sup>

With legal scholar Margaret Radin, I find this lack of distinction between different property claims dissatisfying. Taking inspiration from Hegel’s account of property in his *Elements of the Philosophy of Right*, Radin grounds her theory of property in personal self-development, arguing that “[m]ost people possess certain objects they feel are almost part of themselves” and that “these objects are closely bound up with personhood because they are a part of the way we constitute ourselves as continuing personal entities in the world.”<sup>32</sup> These objects are difficult, if not impossible, to replace, which means the loss of a personal object is uniquely painful. Other objects, however, are not held so dearly, or at least not in the same way, and might even be replaced by a like object or compensated with money without a sense of loss. With this in mind, Radin sets up a spectrum with two “theoretical opposites: property

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petitioners would not sell their properties to the city for a higher price during litigation, the law firm saw the facts of the case and the situation of the litigants as well-suited to garner public sympathy.

<sup>30</sup> Justice O’Connor repeatedly raises the prospect of homes being condemned, but she always talks about the threat to the home alongside threats to other real property, such as stores, churches, farms, and factories, thereby eliding the differences between these different kinds of property. See *Kelo*, O’Connor’s Dissent, esp. 8, 10-11, 12 (PDF), and the block quote on the top of page 11 of this paper. To Justice Thomas’ credit, he considers the condemnation of petitioners’ homes to be especially egregious. He insists that “no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes” and notes the cruel irony that, given the Court’s rulings on privacy in the home, “[t]hough citizens are safe from the government in their homes, the homes themselves are not” (*Kelo*, Thomas’ dissent, p. 14, 17).

<sup>31</sup> Even Somin concludes that we should “give greater protection for property rights,” treating the destruction of homes only as an especially egregious example of the failure to respect a general right to property.” (*Grasping Hand*, 102). To be fair, however, Somin also acknowledges that “[ma]ny property owners attach ‘subjective value’ to their land over and above its fair market value, for example those with strong ties in a particular neighborhood,” and draws directly from Thomas’ dissent in arguing that “if searching a home can infringe constitutionally protected privacy rights, the same is surely true when the government decides to destroy the home and force its residents to move elsewhere” (*ibid*, 95, 110).

<sup>32</sup> Margaret Jane Radin, *Reinterpreting Property*, University of Chicago Press, 1993, p. 38. See also G.W.F. Hegel, *Elements of the Philosophy of Right*, trans. H.B. Nisbet, Cambridge University Press, 1992, esp. §§41-71.

that is bound up with a person and property that is held purely instrumentally—personal property and fungible property respectively.”<sup>33</sup> Examples of personal property include “a wedding ring, a portrait, an heirloom, or a house,” whereas the paradigmatic example of fungible property is money.<sup>34</sup> Especially important here is Radin’s observation that the same object can be either personal or fungible depending on the owner. Radin illustrates this with the example of a wedding ring:

For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so.<sup>35</sup>

The same can be said for a house. A real estate agent—or the NLDC, or Pfizer—might see a particular house as perfectly substitutable with another house or any other commodity of equivalent market value, whereas the homeowner likely has a deeply personal relationship to the house, just as many of the petitioners in *Kelo* apparently did.<sup>36</sup>

The market economy’s tendency to treat homes as *fungible*, or perfectly substitutable for goods or money of like value, can be pathological, especially when wedded with the state’s power of eminent domain.<sup>37</sup> The pathology is a result of a failure, both in theory and in practice, to distinguish properly between personal and fungible property. As Radin suggest,

All entitlements are treated alike in the [economist’s] model. Economists typically rely on efficiency criteria and not on the perspective of autonomy or personhood in seeking to determine whether certain entitlements should be accorded greater protection than

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, 37.

<sup>36</sup> Radin also offers the example of the differing relations tenants and landlords have to an apartment. For the most part, argues Radin, the landlord would treat the property as fungible whereas the tenant—especially a long-term occupant—will likely view the apartment as personal property. See *ibid.*, 57-59.

<sup>37</sup> Radin herself suggests that the distinction between personal and fungible property might warrant “limitation on the eminent domain power” because “there might be a prima facie case against taking” personal property (66).

others. In a neo-Lockean natural rights scheme, property rights might swallow up other concerns.<sup>38</sup>

There is a particularly dangerous kind of reductionism involved in treating all property rights as the same because doing so in a market economy risks having personal property treated as fungible. Recall Justice O'Connor's fear that any Motel 6 could be condemned by the state so long as a more lucrative Ritz-Carlton was promised to replace it. In her *Contested Commodities*, Radin identifies a worldview which takes all property to be fungible and calls it "universal commodification."<sup>39</sup> This worldview takes all values to be commensurable and all losses capable of perfect compensation, reducing "all values to sums of money," and, I would add, reducing human homes and nonhuman habitats alike to commodities and rubble.<sup>40</sup>

It is noteworthy, then, that Justice Thomas, Margaret Radin, and (I suspect) most of the public see the difference between a home and other kinds of property claims. As Radin suggests, "the thought persists, for whatever reasons, that some kinds of entitlements are more worthy of protection than others."<sup>41</sup> Indeed, this is why the Institute for Justice saw Susette Kelo and the other New London homeowners as the right litigants for "an ideal public interest case," and why the Club for Growth chose the images of *homes* being demolished as the best way to appeal to the fears and sympathies of ad viewers.<sup>42</sup> As a particular kind of property, the home resonates with many, as do perceived threats to it. People rightly fear the involuntary commodification of their personal property, and especially their homes. This threat

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<sup>38</sup> *Ibid*, note 81, p. 216.

<sup>39</sup> Radin, *Contested Commodities*, Harvard University Press, 1996, p. 2. She traces this worldview back to the Chicago School of neoclassical economics, which seeks to analyze all human behavior through the metaphor of free market transactions and monetary costs and benefits.

<sup>40</sup> *Ibid*, 8.

<sup>41</sup> Radin, *Property*, 52.

<sup>42</sup> John Kramer, Institute for Justice vice president for communications, quoted in Ilya Somin, *Grasping Hand*, 25. See also this paper's appendix (p. 21).

becomes especially forceful when it is backed by the state's power of eminent domain let loose by a lax reading of the Fifth Amendment's takings clause.

With Radin, I argue that our theory and our practice should better match the widespread recognition of a difference between the personal attachment one has to one's home and more fungible property right claims.<sup>43</sup> She alludes repeatedly to a "hierarchy of entitlements" that her theory of personal property provides in the hopes of "avoid[ing] some distortions that might result from justifications in which all entitlements are considered alike."<sup>44</sup> One of those distortions was already identified by Somin and Justice Thomas—that American constitutional law treats the home as one's castle, a refuge for privacy and a firewall against state intrusion, yet turns a blind eye to houses being demolished for private economic gain thinly veiled as an opportunity for (future) public benefit.<sup>45</sup> A related distinction in need of recovery, one immediately relevant to ecological politics, is that between eminent domain and regulatory takings. In brief, whereas classic eminent domain involved the state taking title to a piece of real property and compensating the owner, "regulatory takings" are understood as state regulations of property *use* that deprive the owner of the property's present or future economic value, and thus amount to a taking under the 5<sup>th</sup> Amendment.<sup>46</sup> John Meyer points to a 2004 Oregon ballot initiative that imposed an expansive definition of what constitutes a regulatory taking as emblematic of the absolutist concept of property he seeks to critique.<sup>47</sup> However, he also notes that three years later the Oregon public voted in another ballot

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<sup>43</sup> As I will point out shortly, this insight has special importance for ecological political thought.

<sup>44</sup> Radin, *Property*, 53, 55. See also 48, 52, 52, 56, 69-70.

<sup>45</sup> For a helpful survey of American constitutional and statutory law related to the home that draws on Radin's work, see D. Benjamin Barros, "Home as Legal Concept," *Santa Clara Law Review* (46.2), 2006, pp. 255-306.

<sup>46</sup> For an important Supreme Court case on regulatory takings, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>47</sup> Meyer, "Property," 100. The 2004 ballot initiative was Measure 37, which received 61 percent of the vote.



initiative to reverse parts of the 2004 law that applied to commercial and large residential development projects.<sup>48</sup> Debate surrounding both measures focused on environmental regulations and especially land-use ordinances. Meyer notes the paradox that “while this [absolutist] conception of property generates popular support, citizens also routinely endorse policies to protect themselves from environmental harms...”<sup>49</sup> In light of Radin’s hierarchy of entitlements, it is possible that the paradox points to a difference in valuation between personal and fungible property. In light of the outcry following *Kelo*, the public seems to want laws that protect personal property from expropriation and undue interference. On the other hand, citizens might be more supportive of regulations that target uses of fungible property that pose a threat to themselves and their homes. Whether or not the American public feels this way is, of course, an empirical question, but at the very least a politically and theoretically powerful case can be made for treating personal and fungible property differently. In the following section I will argue that such a case is especially strong on ecological grounds.

#### **“Habitation versus Improvement”—Karl Polanyi on the Destruction of Ecological Homes**

This returns us to Meyer’s question of the character and meaning of ownership. I agree with Meyer’s assessment, inspired by Karl Polanyi, that the absolutist concept of property and its claims to uncontested ownership and use are utopian—that is to say, impossible. However, just as opponents of *Kelo* risk insulating all property claims from state takings when they fail to distinguish between personal and fungible property, Meyer’s rejection of the absolutist concept of property might be tempered by way of a distinction between personal property to be protected and fungible property to be regulated. I raise this possibility not a libertarian

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<sup>48</sup> *Ibid.* This second ballot initiative, held in 2007, was Measure 49.

<sup>49</sup> *Ibid.*, 100-101.

rejoinder to Meyer, however. Instead, I see the failure to leverage such a distinction as a lost opportunity for environmental advocates.

The ecological argument has two prongs. First, advocates of property rights would do well to expand the list of relevant threats to the home beyond the state power of eminent domain. Second, in pursuit of this goal we might also take on a more expansive conception of what “home” is. Especially in our time of ecological crises—climate change, resource depletion, and pollution of soil, water and air—many of the gravest threats to people’s homes are ecological. Phenomenologically speaking, inhabitants of the earth experience these ecological dangers in the same way as Wendy Brown describes the experience of global capitalism, as “a range of earthly forces appear[ing] too big and too wild for anyone or anything to capture or direct.”<sup>50</sup> What is more, these ecological threats are caused in large part by the economic processes through which fungible property is produced, exchanged, and consumed. Thus, the processes and interests that constitute the motive force of fungible property and its development threaten to degrade and demolish the homes of humans and nonhumans alike.<sup>51</sup> The threat to homes posed by the corporate cooptation of the state’s power of eminent domain is only one of many threats posed by the side effects of economic development.

One of the ecological benefits of a theory of politics that distinguishes between personal and fungible property is that it guards against environmentalists *solely* conceiving of their cause as one of preserving such abstract, and almost fungible, measures of ecological health as biodiversity, acres of restored land, and so on. Instead, as Radin suggests, “paying attention to

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<sup>50</sup> Wendy Brown, “Is Marx (Capital) Secular?” *Qui Parle: Critical Humanities and Social Sciences*, 23.1 (Fall/Winter 2014), pp. 109-124 (122).

<sup>51</sup> An ecological conception of home will include nonhuman habitats as homes worthy of political consideration and protection, although not on the same grounds as Radin’s personhood-centered defense of human homes.

the notion of personal property would lead not merely to a right to shelter in general, but a right to a particular house or apartment.”<sup>52</sup> Environmentalism may be at its best when, in addition to advocating abstract rights to life and well-being, it energetically defends *particular* homes—human and nonhuman—against the full range of threats against them. Treating food, shelter, wilderness, and biodiversity as if they are fungible across time and space ignores the fact that it is particular homes, ecosystems, and food-sources that are at stake. Without treating places as particular and often personal, environmentalists risk protecting far too little.

The economic theorist Karl Polanyi is well-known for his argument that free markets are a utopian fantasy because all economic relations are fundamentally embedded—that is to say, inseparable from and dependent on—nature and society, law and custom, land and labor.<sup>53</sup> In his view, the modern economic order is stupendously productive, to be sure, but its operation comes at the cost of destruction to natural and human habitats because the market order treats land and labor as “fictitious commodities”—in Radin’s parlance, as *fungible*. For Polanyi, the Industrial Revolution was a series of “stages in the subjection of the surface of the planet to the needs of an industrial society.”<sup>54</sup> The problem for society, says Polanyi, is that land and labor—nature and society—are inextricably intertwined, such that a threat to one is a threat to both. “What we call land,” argues Polanyi, “is an element of nature inextricably interwoven with man’s institutions. To isolate it and form a market for it was perhaps the weirdest of all the undertakings of our ancestors.”<sup>55</sup> As a result, the attempts at universal commoditization

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<sup>52</sup> Radin, *Property*, note 86, p. 216.

<sup>53</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Beacon Press, [1944] 2001.

<sup>54</sup> *Ibid*, 188.

<sup>55</sup> *Ibid*, 187.

enacted by partisans of the free market, while futile, are a threat to both the land and labor—to both nonhumans and humans alike.

To illustrate the threat posed to homes by the economics of development—or what he calls the confrontation of “habitation versus improvement,” he recounts the history of the English enclosure movement during the process of industrial modernization stretching from the 16<sup>th</sup> through the 19<sup>th</sup> centuries during which common lands inhabited by peasants were confiscated and privatized, often with the force of parliamentary legislation.<sup>56</sup> These takings, motivated by a “new creed [which] was utterly materialistic and believed that all human problems could be resolved given an unlimited amount of material commodities,” destroyed human habitations to make way for economic improvement.<sup>57</sup> In terms that remind one of the *Kelo* case, Polanyi describes the problem in this way:

The formula [trading habitation for improvement] appears to take for granted the essence of purely economic progress, which is to achieve improvement at the price of social dislocation. But it also hints at the tragic necessity by which the poor man clings to his hovel doomed by the rich man’s desire for a public improvement which profits him privately.<sup>58</sup>

Uncritical adherence to the imperative of economic improvement, then, has rendered masses of human beings homeless in the past. In the case of *Kelo* it did so again, and this time with the eventual approval of the U.S. Supreme Court. The parallels between English enclosures and American public use takings illuminates the extent to which one kind of property (fungible and commoditized) threatens another (personal and centered in our habitations) with degradation

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<sup>56</sup> For an analysis of the English enclosures, see E.P. Thompson, *The Making of the English Working Class*, Vintage Books, [1963] 1966, esp. Chapters 6-7, pp. 189-233. Thompson famously regards the enclosure of peasant lands as “a plain enough case of class robbery” (218, see also 231). Similarly, Polanyi reports that “enclosures have appropriately been called a revolution of the rich against the poor” (37).

<sup>57</sup> Polanyi, 42.

<sup>58</sup> *Ibid*, 36-7.

and destruction. In both cases, economic improvement “involved, in effect, no less a transformation than that of the natural and human substance of society into commodities”—and, adds Polanyi, “obviously, the dislocation caused by such devices must disjoint man’s relationships and threaten his natural habitat with annihilation.”<sup>59</sup> The climate crisis, habitat loss, species extinctions, and global refugee crises stand testament to the consequences.

### **Conclusion—Note on a Populist Environmentalism**

Following Polanyi’s reasoning one more step, such destructive threats to homes—conceived both as a personally meaningful house and more broadly as the natural habitats which human and nonhumans inhabit—could be the locus of an environmental politics that would pit the two sides of Donald Trump against one another. On the one hand, Trump is tapping into populist anger over the destructive sides of America’s political economy. On the other hand, Trump himself is a privileged, wealthy, and corrupt businessman whose conduct contributes to those destructive activities—including eminent domain for private economic development—that engender the populism he is riding to the Republican nomination. I agree with Wendell Berry when he insists that “[a]ll of these people, who are fighting sometimes lonely battles to preserve things of value that they cannot bear to lose, are the conservation movement’s natural allies.”<sup>60</sup> With that in mind, perhaps an environmental populism that is centered on protection of personal and ecological homes from the market economy is in order. Given his support for private development takings, Donald Trump is, of course, not welcome.

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<sup>59</sup> *Ibid*, 44.

<sup>60</sup> Wendell Berry, “The Whole Horse,” in *Citizenship Papers*, Counterpoint, 2004, p. 78. As both a powerful explanation for anti-market populism and an exhortation to join its ranks, Polanyi offers this cogent question: “For if the market economy was a threat to the human and natural components of the social fabric, as we insisted, what else would one expect than an urge on the part of a great variety of people to press for some sort of protection?” (156).

### Appendix—Images from Club for Growth Anti-Trump Ad



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