Eminent Domain: Is It Justified to Take in Order to Give?

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## Table of Contents

**Introduction** ........................................................................................................ 3

**The History of Eminent Domain** ........................................................................ 4

**The Modern Eminent Domain Framework** ......................................................... 7
  - What Constitutes a Taking? .............................................................................. 7
  - What Constitutes a Public Use? ...................................................................... 8
  - What Constitutes Just Compensation? ............................................................ 11

**Reactions Post-Kelo** .......................................................................................... 12

**Finnis' Theory of the Basic Good** .................................................................... 13
  - Life .................................................................................................................. 13
  - Knowledge ...................................................................................................... 14
  - Play .................................................................................................................. 15
  - Aesthetic Experience ...................................................................................... 16
  - Sociability (Friendship) .................................................................................. 17
  - Practical Reasonableness .............................................................................. 18
  - Religion .......................................................................................................... 19

**Practical Reasonableness and Morality** ............................................................. 20
  - A Coherent Plan of Life .................................................................................. 21
  - No Arbitrary Preferences Amongst Values .................................................... 22
  - No Arbitrary Preferences Amongst Persons ............................................... 22
  - Detachment .................................................................................................... 23
  - Commitment ................................................................................................... 24
  - Relevance of Consequences: Efficiency, Within Reason ............................... 25
  - Respect for Every Basic Value in Every Act ............................................... 26
  - Requirements of the Common Good ............................................................. 27
  - Following Ones Conscience ......................................................................... 28

**Conclusion** .......................................................................................................... 28
I. Introduction

The Takings Clause of the Fifth Amendment of the United States Constitution provides that “private property shall not be taken for public use, without just compensation.” The Takings Clause is the most important protection of property rights in the Constitution and is a substantial limit on federal power. The Takings Clause is an implied assertion that upon just compensation, private property may be taken by the federal government.

The Takings Clause, commonly referred to as eminent domain, is one of the earliest Bill of Rights absorbed into the Fourteenth Amendment’s due process guarantee that no state shall “deprive any person of life, liberty, or property, without due process of law.” Through the 14th Amendment, the Takings Clause has been applied to the states and thus, both the federal and states governments have the power to take private property when it is necessary for public use. States possess the power of eminent domain as a traditional police power. In Kelo v. City of New London, in dicta, the Supreme Court stated, “we emphasize that nothing in our opinion precludes any State from placing further restrictions on it’s exercise of the takings power.” Thus, an eminent domain dispute brought under a state constitutional provision may require a different analysis and may lead to a different result than if it were brought under the federal constitutional Takings Clause.

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1 U.S. Const. amend. V.
5 Id. at 667
6 Id.
8 1 Nichols on Eminent Domain § 1.3 (2018).
For the purpose of this academic analysis, the Fifth Amendment of the United States Constitution Takings Clause will be the primary focus.

The Supreme Court has identified two types of takings.\(^9\) A possessory taking is when the government physically confiscates or occupies property.\(^10\) A regulatory taking is when the government regulates a property so much so as to leave no reasonable or economically viable use of the property.\(^11\) For the purpose of this academic analysis, possessory takings will be the primary focus.

The Takings Clause guarantees that the government does not have the power to confiscate the property of some in order to give to others.\(^12\) The Takings Clause also bars “the federal from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\(^13\) If the government confiscates one person's property to benefit society, then society as a whole should pay for it.\(^14\) In this way, eminent domain weighs the delicate balance between governmental power and the rights of the individual citizen.\(^15\)

II. The History of Eminent Domain

Hugo Grotius, a 17th century natural-law jurist, theorized that the power of eminent domain was based upon the known principle that the state has absolute ownership of the whole property maintained by the individual and that the individual’s current possession and enjoyment of the

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10 Id.
11 Id.
property was derived from the grant of the state.\textsuperscript{16} The individual was subject to an implied reservation that the individual’s rights to the property might be extinguished by a rightful exertion of ultimate ownership by the state.\textsuperscript{17} Samuel von Pufendorf, Grotius’ contemporary, called the power of eminent domain, “the exercise of transcendental property whereby the sovereign resumed possession pursuant to the tacit agreement implicit in the original grant that the property might be resumed to meet the necessities of the sovereign.”\textsuperscript{18} The power of eminent domain was known in Great Britain by the time of the founding of the United States of America.\textsuperscript{19} According to Blackstone, Great Britain longtime viewed eminent domain as a natural consequence of the royal birthright inherent in the concept of feudalism.\textsuperscript{20} However, the Magna Carta expressed the need for just compensation when the sovereign seized property.\textsuperscript{21} The Magna Carta, just as The United States Constitution does, represents a restriction on the power of the sovereign and greatly influenced the United States Bill of Rights.\textsuperscript{22}

Although eminent domain was known in Great Britain at the founding of the United States of America, the Constitution, in its original form, did not mention the power of eminent domain explicitly.\textsuperscript{23} During the time of the founding fathers, federal takings power was plainly denied. The Supreme Court in \textit{Pollard’s Lessee v. Hagan} held, “the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, except in the District and territories.” The federal government relied on the traditional state policing power when it

\textsuperscript{16} I Nichols on Eminent Domain § 1.13 (2018).
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Baude, \textit{supra} at 1745.
\textsuperscript{20} I Nichols on Eminent Domain § 1.13 (2018).
\textsuperscript{22} Id.
\textsuperscript{23} Baude, \textit{supra} at 1745.
needed land for federal projects. The federal government would either have the state take the land and the state would transfer the land to the federal government or the federal government would have federal agents proceed as plaintiffs under state condemnation law.24

Upon the ratification of the 5th Amendment of the Constitution, which states “private property shall not be taken for public use, without just compensation,” a modern view that the Constitution itself contained an implied recognition of eminent domain emerged.25 The indisputable authority of the federal government to exercise the power of eminent domain was clearly recognized and asserted by the Supreme Court in Kohl v. United States.26 In Kohl v. United States, eminent domain was used to seize private property for the construction of a post office in Cincinnati, Ohio.27 The Supreme Court held that the federal government had an implied power of eminent domain, stating, “the power to establish post-offices and to create courts within the states...included in it...authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate.”28 The court reasoned that although the power of eminent domain was not enumerated in the constitution, the power was implied. The court also held that the 5th Amendment intended to give the federal government an implied power of eminent domain.29 The Supreme Court reasoned that, because the 5th Amendment was intended to restrain the federal government’s eminent domain power by requiring the government to pay just compensation, that the federal government must have had the power of eminent domain in the first place.30

24 Baude, supra at 1761.
25 Baude, supra at 1790.
26 1 Nichols on Eminent Domain § 1.24 (2018).
28 Id.
29 Id.
30 Id. at 373.
Upon the *Kohl v. United States* decision in 1875, there was no question that the federal government had the right to acquire private property, upon just compensation, regardless of whether such property was located in the District of Columbia, the territories, or the states.\(^{31}\)

### III. The Modern Eminent Domain Framework

The modern analysis under the Takings Clause of the 5\(^{th}\) Amendment of the United States Constitution can be divided into three questions: (1) Is there a taking?, (2) Is the taking for a public use?, (3) Has just compensation been paid?

#### A. What Constitutes a Taking?

As previously discussed, there are two categories of takings the Supreme Court has identified.\(^{32}\) A possessory taking is when the government physically confiscates or occupies property.\(^{33}\) A regulatory taking is when the government regulates a property so much so as to leave no reasonable or economically viable use of the property.\(^{34}\) For the purpose of this academic analysis, possessory takings will be the primary focus.

The Supreme Court has generally found a taking when the federal government confiscates or physically occupies private property.\(^{35}\) In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court stated, “When faced with a constitutional challenge to a permeant physical occupation of real property, this court has invariably found a taking.”\(^{36}\)

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\(^{31}\) Nichols on Eminent Domain § 1.24 (2018).


\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id.

Government confiscation of private property has always been considered a classic taking. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, the government confiscated the interest accruing on an interpleader's bank account. The Supreme Court held this to be a classic taking because the government expropriated the money in the account, which is private property.

The Court has also found a taking when the government physically occupies private property. In *United States v. Causby*, the Supreme Court found a taking when the government's use of airspace for military drills destroyed the use of land which was used as a chicken farm. The Court stated, "the government's action was as complete as if the United States had entered upon the surface of the land and take exclusive possession of it."

A court will find a valid taking pursuant to the Takings Clause of the 5th Amendment of the United States Constitution, when the federal government confiscates or physically occupies private property.

B. What Constitutes a Public Use?

The 5th Amendment of the United States constitution authorizes a valid taking only if the property has been taken for public use. If the taking is for private use, then the taking is invalid and the government must return the property to the original private owner.

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38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id. at 669.
44 Id. at 691.
45 Id.
Towards determinations of public use, the Supreme Court has historically given deference to the state legislature. In *Berman v. Parker*, the Supreme Court held there to be a proper public use when a District of Columbia law authorizing the taking of private property for the purpose of redeveloping blighted areas was challenged. The court showed deference to the legislature by stating, “when the legislature has spoken, the public interest has been declared in terms well nigh conclusive and that the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”

Like other economic liberties granted in the constitution, the Supreme Court awards the rational basis test. In *Hawaii Housing v. Midkiff*, the Supreme Court found a proper public use, where the Hawaii Land Reform Act, which sought to break up large land holdings, was challenged. The Hawaiian legislature found that 72 private landowners owned 47% of the State’s land and the state and federal government owned 49% leaving only 4% for other private owners, which was responsible for inflated land prices. The Supreme Court held, “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”

In 2005, through its *Kelo v. City of New London* decision, the Supreme Court expanded its view of what constitutes a public use one step further. In *Kelo v. City of New London*, the state approved a developmental plan that was intended to create jobs, increase tax revenue, and

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49 Sandefur, *supra* at 717.
51 *Id.*
52 Sandefur, *supra* at 718-719.
revitalize the economically distressed area of the City of New London. In accordance with the approved developmental plan, Pfizer Inc. announced it would build a $300 million research facility. To build this facility, the state purchased property from willing buyers and used the power of eminent domain to acquire the remainder of the property needed. Petitioner, Suzette Kelo, who had owned a property in New London for over sixty years, challenged the project on the grounds that it violated the Public Use Clause of the 5th Amendment. The Supreme Court held that because increased jobs and tax revenues can be rationally related to a conceivable public purpose, that the judiciary should give deference to the legislature, and that there was a valid taking.

In Justice O'Connor's dissenting opinion, she makes clear that the decision in Kelo takes the power of eminent domain too far by distinguishing Kelo from the decisions in Berman and Midkiff. Justice O'Connor reasons that in Berman and Midkiff, the targeted properties inflicted affirmative harm on society and in both instances the legislature found that eliminating the existence of the properties was necessary in order to remedy the harm. Justice O'Connor distinguishes these two cases with the facts in Kelo, where O'Connor argues that Suzette Kelo's "well-maintained home" is not a source of any social harm.

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55 Id.
56 Id.
57 Kelo at 2660.
58 Id. at 2665.
59 Id. at 2671.
60 In Berman, the affirmative harm was through blight that resulted in extreme poverty. In Midkiff, the affirmative harm was through oligopoly which resulted from extreme wealth.
61 Id.
62 Id.
The 5th Amendment of the United States constitution authorizes a valid taking only if the property has been taken for public use. Towards determinations of public use, the Supreme Court has historically given deference to the state legislature. And like other economic liberties granted in the constitution, the Supreme Court awards the rational basis test.

C. What Constitutes Just Compensation?

The 5th Amendment of the United States Constitution clearly authorizes the government to seize property for a public purpose, so long as the private owner is justly compensated. The requirement to pay just compensation provides an important constraint to the government’s overuse of the government’s eminent domain power. If not for the limitation of just compensation, it would be far easier for the government to abuse their power of eminent domain.

The constitutional measure for just compensation is “fair market value.” The Supreme Court has defined “fair market value” as “what a willing buyer would pay to a willing seller at the time of the taking.” However, the government is not responsible for paying for any increases in value that occur solely because of its plan to seize the property.

The law of just compensation also fails to acknowledge the home as anything other than an exchangeable commodity. Sentimental value, which is valued by homeowners, has no bearing on determining the fair market value and thus has no bearing on the just compensation received by the homeowners.

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64 Id.
65 Id.
66 Id.
67 Id.
69 Fee, supra at 789.
70 Id.
Just compensation will be found valid if it represents the fair market value of the property at the time of taking.

**IV. Reactions Post-Kelo**

In *Kelo v. City of New London*, the Supreme Court stated, “we emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”71 This made clear to state legislatures that if they did not agree with the expansive view of the Public Use Clause decided upon in *Kelo*, then they could make further restrictions in their state’s constitution.72 Public reaction to *Kelo* was swift and intense.73 State legislatures in every region of the United States of America amended their constitutions to make clear that “public use” was not expansive enough to include private economic development projects.74 Only one year after *Kelo* was decided, more than half of the states enacted eminent domain reform legislation.75

The common changes in eminent domain reform legislation include, (1) a narrower definition of public use to prevent takings solely to increase tax revenues; (2) tightened definitions of blight and in a few instances the elimination of the use of eminent domain to eradicate blight; (3) enhanced public notice, hearing, and good-faith negotiations requirements prior to condemnation; (4) a shift in burden to the condemning authority to demonstrate the public use and need for a taking; (6) more generous payments for relocation of property owners; (7) additional compensation for residential landowners above the fair market value level; and, (8) opportunities for landowners

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72 1 Nichols on Eminent Domain Special Alert (2018).
73 *Id.*
74 *Id.*
75 *Id.*
to repurchase their property should the condemnor not proceed with the planned project after a
specified amount of time.76

Following the Supreme Court decision in Kelo v. City of New London, state legislatures swiftly
amended their state constitutions to include stronger restraints on eminent domain.

V. Finnis' Theory of the Basic Good

In Natural Law and Natural Rights, John Finnis explains that there are seven basic human
goods, which include (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) sociability
(friendship), (6) practical reasonableness, and (7) religion.77 Finnis describes how these seven
basic goods serve as an explanation of why we do things.78 He believes that any worthwhile
activity is only worth doing if it partakes in one or more of the seven basic goods.79 He further
explains that the basic goods are intrinsic goods, which are worth having for their own sake, and
are not meant as a means of obtaining other goods.80 The seven basic goods are exhaustive and all
are equally fundamental.81 By good, Finnis does not mean moral good.82 Instead, Finnis believes
we need these seven goods in order to live a worthwhile and valuable life.83

A. Life

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76 Id.
77 John Finnis, Natural Law & Natural Rights 85-89 (Oxford University Press, Second Edition
2011).
78 Id. at 85.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
Finnis describes the first basic value, life, as corresponding to the drive for self-preservation. The term life signifies, “every aspect of vitality which puts a human being in shape for self-determination.” Finnis realizes that the basic human good of life may vary. Life includes “bodily health and freedom from the pain that betokens organic malfunctioning or injury.” Finnis singles out the transmission of life by procreation as an example of the basic good of life. Finnis explains why procreation falls under this category by stating, “We can distinguish the desire and decision to have a child, simply for the sake of bearing a child, from the desire and decision to cherish and educate the child. The former desire and decision is a pursuant of the good of life...are aspects of the pursuit of the distinct basic values of sociability and truth, running alongside the continued pursuit of the value of life that is involved in simply keeping the child alive and well until it can fend for itself.”

As it pertains to Finnis’ example of procreation, eminent domain does not apply. However, it can be argued, that because the government can only take property if it is for a public benefit, that eminent domain falls under the category of life. If the government is taking away property from a private owner and is building on that property something that is for the health and well-being of the community, such as a medical clinic, then this form of eminent domain would be promoting the basic good of life. Therefore, depending on what for which the government takes land, there is an argument that eminent domain promotes the basic good of life.

B. Knowledge

84 Id. at 86.
85 Id.
86 Id.
87 Id.
88 Id. at 87.
89 Id.
Finnis contends that knowledge is an intrinsic good that is considered to be desirable for its own sake and not simply as a means or instrument to obtain other goods.\textsuperscript{90} Finnis explains, “any proposition, whatever its subject matter, can be inquired into in either of the two distinct ways, (i) instrumentality or (ii) out of curiosity, the pure desire to know, to find out the truth about it simply out of an interest in or concern for truth and a desire to avoid ignorance or error as such.”\textsuperscript{91} Curiosity is the “desire or inclination or felt want that we have when, just for the sake of knowing, we want to find out about something.”\textsuperscript{92} After reflecting upon this curiosity, Finnis finds that it becomes clear that knowledge is a good thing to have, not merely for its utility.\textsuperscript{93} Finnis contends that ignorance and muddle are to be avoided.\textsuperscript{94} Finnis determines that the good of knowledge is self-evident and obvious and therefore, formulates a real and intelligent reason for action.\textsuperscript{95}

It can be argued that eminent domain does apply to the basic good of knowledge. Eminent domain takes public property for the benefit of the public. In situations where the government takes property and uses that property to build a public library or a public school, it can be argued that eminent domain, in that case, would be promoting the basic good of knowledge. Because through the law of eminent domain, the government would be making it easier for the public to access information. In \textit{Kelo}, the government used eminent domain to build a research center. This research center would promote knowledge. Thus, it can be argued that eminent domain promotes the basic good of knowledge.

C. Play

\textsuperscript{90} Id. at 62.
\textsuperscript{91} Id. at 60.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 61.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 64.
Although Finnis acknowledges that a moralist analyzing human goods may overlook the basic good of play, Finnis believes that it would be a mistake to overlook play as an intricate and important element in human culture. 96 Engaging in performances that have no point beyond the performance itself is enjoyed for its own sake. 97 Play can be varied. 98 Play can be solitary, social, intellectual, physical, strenuous, relaxed, highly structured, relatively informal, or ad hoc. 99 Play can enter into any activity, so long as the play is distinguishable from the rest of the activity. 100 Finnis concludes that play has, and is, its own value. 101

It can be argued that the law of eminent domain can in some capacities promote the basic good of play. If the government takes property in order to convert that property into a recreational center that has activities like dance class, art class, and recreational sports, then eminent domain can be said to promote the basic good of play. But, inversely, the government may be taking a property where a child uses the backyard of their home to play with their family and friends. If the government builds a public forum for activities to be enjoyed through play, then the law of eminent domain can be argued to promote the good of play.

D. Aesthetic Experience

Aesthetic experience and play may intertwine. 102 Many forms of play, such as dance and song, can be considered aesthetic experience as well as play. However, beauty is not an essential of play, as it is for aesthetic experience. 103 Finnis states, “aesthetic experience, unlike play, need

96 Id. at 87.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
not involve an action of one's own; what is sought after and valued for its own sake may simply be the beautiful form ‘outside’ one, and the ‘inner’ experience of appreciation of its beauty. But often, the aesthetic experience is found in the creation or active apperception of some work of significant and satisfying form."  

It can be argued that eminent domain promotes the basic good of aesthetic experience. If the government uses the taken land to build a public park, then it could be said to be promoting the good of aesthetic experience. On the other hand, many find aesthetic pleasure in their own home. Many find beauty in their own backyards watching the sun rise and fall. By taking their homes away, the government may be taking away the homeowners personal aesthetic experience.

E. Sociability (Friendship)

Finnis explains that there is a range of the good of sociability which “in its weakest form is realized by a minimum of peace and harmony amongst persons, and which ranges through the forms of human community to is strongest form in the flowering of a full friendship.” Friendship involves acting for the sake of your friend’s well-being, whereas a mere collaboration between two individuals is no more than instrumental to the realization to their own individual purposes. To be in true friendship with at least one other person is a basic and fundamental good.

The basic good of sociability can be argued applicable to eminent domain. When the government uses the power of eminent domain, they do so to build a public benefit, such as a post office or a retail development. These public benefits create communities and meeting places for
neighbors to connect and to be social. For example, in Kelo, the City of New London used eminent domain in order to have the land necessary to build a large gathering center. This center was meant to be enjoyed by the entire community and would promote the basic good of friendship. For this reason eminent domain can be argued to promote the basic good of sociability.

F. Practical Reasonableness

Finnis defines practical reasonableness as “the basic good of being able to bring one’s own intelligence to bear effectively on the problems of choosing one’s actions and life-style and shaping one’s own character.”¹⁰ He explains that negatively, this is someone who has a measure of effective freedom and that positively, this is someone who seeks to bring an intelligent and reasonable order into one’s own actions and habits and practical attitudes.¹¹ Practical reasonableness has an internal and external aspect.¹² The internal aspect is when one “strives to bring one’s emotions and dispositions into the harmony of an inner peace of mind that is not merely the product of drugs or indoctrination nor merely passive in its orientation.”¹³ The external aspect is when one “strives to make one’s actions authentic, that is to say, genuine realizations of one’s own freely ordered evaluations, preferences, hopes, and self-determination.”¹⁴ Finnis concedes that this value is complex. Practical reasonableness encompasses the unity between freedom, reason, integrity and authenticity.¹⁵ He identifies nine (9) basic requirements of practical reasonableness: (1) a coherent plan of life, (2) no arbitrary preferences amongst values, (3) no arbitrary preferences amongst persons, (4) detachment, (5) commitment, (6) the (limited)

¹⁰ Id.
¹¹ Id.
¹² Id.
¹³ Id.
¹⁴ Id.
¹⁵ Id.
relevance of consequences: efficiency, within reason, (7) respect for every basic value in every act, (8) the requirements of the common good, and (9) following one’s conscience.\textsuperscript{116}

I will discuss practical reasonableness as related to eminent domain in a later part of this essay.

G. Religion

Finnis accepts that many may doubt or deny that one of the basic human values is the establishment and maintenance of the proper relationship between oneself and the divine.\textsuperscript{117} However, Finnis explains that, “there is the order of means to ends, and the pursuit of life, truth, play, and aesthetic experience in some individually selected order of priorities and pattern in specialization, and the order that can be brought into human relations through collaboration, community, and friendship, and the order that is to be brought into one’s character and activity through inner integrity and outer authenticity...”\textsuperscript{118} Based on this order of means to ends and the pursuit of life, truth, play and aesthetic experience, Finnis possess two questions: (1) “How are all these orders, which have their immediate origin in human initiative and pass away in death, related to the lasting order of the whole cosmos and to the origin, if any, of that order?”, (2) “Is it not perhaps the case that human freedom, in which one rises above the determination of instinct and impulse to an intelligent grasp of worthwhile forms of good, and through which one shapes and masters one’s environment but also one’s own character, is itself somehow subordinate to something which makes that human freedom, human intelligence, and human mastery possible no

\textsuperscript{116} Id. at 100-125.
\textsuperscript{117} Id. at 89.
\textsuperscript{118} Id.
human being can be?" Finnis intimates that regardless of inclination to doubt or deny, we should be establishing and maintaining a relationship with the divine.

The basic good of religion is inapplicable to this analysis because the law of eminent domain does not involve Finnis' concept of religion. This does not have a negative impact on whether eminent domain is viewed as "moral", because Finnis believes not every moral act involves all seven goods.

**VI. Practical Reasonableness and Morality**

Finnis contends that each of the seven basic forms of human good "can be participated in, and promoted, in an inexhaustible variety of ways and with an inexhaustible variety of combinations of emphasis, concentration, and specialization." Finnis explains that practical reasonableness is participated in by shaping one's participation with other basic goods. Practical reasonableness guides our commitments, our selection of projects and what we do in carrying them out. Only one who has experience (both of human wants and passions and of the conditions of human life) and intelligence and a desire for reasonableness stronger than the desires that might overwhelm it, may tell that a decision is practically reasonable. Finnis explains that practical reasonableness is "both a basic aspect of human well-being and concerns one's participation in all the other aspects of human well-being." The basic forms of good are opportunities of well-being. Meaning, the more fully one participates in them, the more one is what one can be. Finnis illustrates nine basic

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119 *Id.*
120 *Id.* at 100.
121 *Id.*
122 *Id.*
123 *Id.* at 102.
124 *Id.*
125 *Id.*
requirements of practical reasonableness: (1) a coherent plan of life, (2) no arbitrary preferences amongst values, (3) no arbitrary preferences amongst persons, (4) detachment, (5) commitment, (6) the (limited) relevance of consequences: efficiency, within reason, (7) respect for every basic value in every act, (8) the requirements of the common good, and (9) following one’s conscience. All of the requirements are interrelated and can be regarded as aspects of one another.

A. A Coherent Plan of Life

Finnis defines a coherent plan of life as “a harmonious set of purposes and orientations, not as the ‘plans’ or ‘blueprints’ of a pipe-dream, but as effective commitments.” However, he distinguishes that although it is unreasonable to live moment to moment, following immediate cravings, it is also irrational to devote all of one’s attention to specific projects. A coherent plan of life requires “both direction and control of impulses, and the undertaking of specific projects; but they also require the redirection of inclinations, the reformation of habits, the abandonment of old and adoption of new projects...and, overall, the harmonization of all one’s deep commitments.” Finnis reasons that basic aspects of human goods are not definite objectives of projects; instead they are participated in. Finnis regards this first requirement as significant.

The takings clause can arguably promote a coherent plan of life, not for the individual, but for the United States as a whole. Eminent domain is enacted to bring services for the greater good that are to be used for public use. The citizens of the United States trust that their government is

126 Id. at 100-125.
127 Id. at 105.
128 Id. at 104.
129 Id.
130 Id.
131 Id. at 105.
going to give them services such as museums and schools which help individuals to have a coherent plan of life. On the other hand, the individual citizen, who is having their property taken by eminent domain may not have that invasion of their privacy part of their coherent plan of life. And thus, eminent domain does not promote a coherent plan of life for that individual citizen.

B. No Arbitrary Preferences Amongst Values

Finnis believes that any commitment to a coherent plan of life must not leave out, or arbitrarily discount, any of the basic human values for the exaggeration of another basic human value.¹³² Finnis concedes that “any commitment to a coherent plan of life is going to involve some degree of concentration on one or some of the basic forms of good, at the expense, temporarily or permanently, of other forms of good.”¹³³ However, the commitment will only be rational if, “it is on the basis of one’s assessment of one’s capacities, circumstances and one’s tastes” and would be irrational if, “it is on the basis of a devaluation of any of the basic forms of human excellence…”¹³⁴ In essence, Finnis believes that one can prioritize certain goods or others in pursuit of a coherent life, however one must not prioritize those goods for arbitrary reasons.

Private property is not an absolute good. Therefore, if the power of eminent domain is used to further a good, even exclusively, such as esthetic experience, it is just. It is not arbitrary. There is a good reason to further a good over a non-good such as the right to private property. For this reason, eminent domain promotes this value.

C. No Arbitrary Preferences Amongst Persons

¹³² Id.
¹³³ Id.
¹³⁴ Id.
Finnis explains that to have no arbitrary preference amongst persons is a human good and this good can be pursued, realized, and participated in by any human being. This third requirement makes known the fundamental impartiality among the human subjects who may be partakers of the basic goods. Finnis explains that although another person’s involvement and enjoyment of the basic good does not interest, concern, or affect us, we still have no reason to deny others partaking in those goods. This third requirement is “a pungent critique of selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help, and all other manifold forms of egoistic and group bias.” Finnis cites the Golden Rule as an example of this requirement. The Golden Rule states, “Do to or for others what you would have them do you or for you.” Finnis explains that “one’s moral judgments and preferences be universalizable.”

The takings clause does promote this requirement of practical reasonableness. For example, in *Kelo*, the dispute was between a cooperation, Pfizer, and a private citizen, Suzette Kelo. Some may argue that by taking Suzette Kelo’s land, the corporation was being arbitrary towards one person. However, that is not the case. The corporation was building in order to achieve the common good for the individuals of New London. This was for a good reason and was not arbitrary, because as was previously stated, Suzette Kelo’s right to private property is not a good.

D. Detachment

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135 *Id.* at 106.
136 *Id.* at 107.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.* at 108.
Finnis believes that "in order to be sufficiently open to all the basic forms of good in all the changing circumstances of a lifetime, and in all one's relations, often unforeseeable, with other persons, an in all one's opportunities of effecting their well-being or relieving hardship, one must have a certain detachment from all the specific and limited project which one undertakes."  

Meaning, one must not take up an attitude if one's project fails.  

If a project does fail, one must not feel life is drained of meaning. Finnis believes that, "such an attitude irrationally devalues and treats as meaningless the basic human good of authentic and reasonable self-determination, a good in which one meaningfully participates simply by trying to do something sensible and worthwhile, whether or not that sensible and worthwhile project comes to nothing."

Finnis believes that if an individual becomes too attached, that is if the individual becomes fanatical in his or her pursuits, it goes against this basic value. Depending on how fanatical the corporation or municipality is in pursuing eminent domain will determine whether eminent domain supports this basic value. For example, in *Kelo*, it is clear that Pfizer and the City of New London were not fanatical in their pursuits. Pfizer and the City of New London were not so focused on this project that if it did not succeed they would not find meaning in their life. This is further evidenced by the fact that the Pfizer development never actually came to fruition. It is apparent that because the city and Pfizer were not fanatical in their commitment to build the proposed development that they were detached enough to support this basic value.

E. Commitment

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141 Id. at 110.
142 Id.
143 Id.
Commitment, Finnis explains, is the requirement that one’s general commitments should not be abandoned arbitrarily. Someone who follows the requirement of commitment, should be looking for new and better ways of realizing one’s commitments and should not restrict one’s project by sticking with efforts, methods, and routines which are familiar. Finnis explains that, “such creativity and development shows that a person, or a society, is really living on the level of practical principle.”

Eminent domain supports the basic value of commitment. For the individual actor, they make commitments that have to do with their land and based on those commitments they make choices and plans. When their private property is taken for eminent domain the value of commitment is still supported because they are not giving their property for arbitrary reasons. Public actors, such as government and corporations, take property through eminent domain in order to give the public basic goods, which means the reason for the taking is not arbitrary. They make a commitment to give to the public. In this way, the basic value of commitment is supported. Anything that the government or corporations do to promote the common good shows commitment.

F. The Relevance of Consequences: Efficiency, Within Reason

The sixth requirement, Finnis believes, goes to the heart of morality. This requirement compels one to bring about good in the world by actions that are efficient for their reasonable purpose. Finnis believes it is wrong to waste opportunities by using inefficient methods.
“One’s actions should be judged by their effectiveness, by their fitness for their purpose, by their utility and their consequences.”150 For example, it is reasonable to prefer human goods to instrumental goods.151 Finnis believes that the choices we make, as well as the reasoning behind those choices, is significant.152

The takings clause promotes this requirement if the taking is the most efficient way in order to bring about the public use. If there is another, more efficient, way to give a particular public benefit to the community, then the takings clause does not promote this requirement. If the government uses eminent domain where it is needed, then it supports this basic value. For example, in Kelo, The City of New London used eminent domain to create jobs and economic wealth for the town. The town used eminent domain because they needed to economically revitalize the town, therefore, in this example, the sixth requirement was realized.

G. Respect for Every Basic Value in Every Act

Finnis introduces the seventh basic requirement by stating that it may be formulated in many ways.153 Finnis describes the first formulation as, “one should not choose to do any act which of itself does nothing but damage or impede a realization or participation of any one or more of the basic forms of human good.”154 Finnis denounces the consequentialist “weighing” of goods.155 Finnis believes, “if consequentialist reasoning were reasonable, acts which themselves do nothing but damage or impede a human good could often be justified as parts of, or steps on the way to

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150 Id.
151 Id.
152 Id.
153 Id. at 118.
154 Id.
155 Id.
carrying out, some project for the promotion of some forms of good.” Essentially, Finnis asserts that “reason requires that every basic value be at least respected in each and every action.”

Finnis describes that all of the seven basic goods must be valued and respected. Eminent domain respects this basic value in a very simple sense: the right to private property is not a basic value or good. Therefore, the taking of private property does not go against this value.

H. Requirements of the Common Good

Finnis describes the common good as, “the factor or set of factors which, as considerations in someone’s practical reasoning, would make sense of or give reason for that individual’s collaboration with others and would likewise, from their point of view, give reason for their collaboration with each other and with that individual.” There is common good for human being so long as the basic human goods (life, knowledge, play, aesthetic experience, friendship, religion, and freedom in practical reasonableness) are good for any and every person. Finnis explains, “each of these human values is itself a ‘common good’ inasmuch as it can be participated in by an inexhaustible number of person in an inexhaustible variety of ways or in an inexhaustible variety of occasions.”

This basic requirement is extremely applicable to eminent domain. Private property can only be taken through the power of eminent domain if it is being taken to further a public use. Typically, this public use includes developments such as schools or post offices. In Kelo, the court found that the town was furthering an economic public benefit by erecting a complex that would create more jobs and would increase tax revenue. Eminent domain is used for the common good –

156 Id.
157 Id. at 120.
158 Id. at 154.
159 Id. at 155.
160 Id.
so that individuals can experience the seven basic goods. Eminent domain clearly promotes this basic value.

I. Following One’s Conscience

The ninth requirement, Finnis explains, is a summary of all the previous requirements, yet it is also distinct in its own right.\textsuperscript{161} This requirement is that one must act in accordance with one’s own conscience.\textsuperscript{162}

When discussing this basic requirement, one must ask if a person with an informed conscious would make the decision to use the power of eminent domain to take someone’s private property. A person who has an informed conscious understands how their decisions interact and intersect with the seven basic goods and the nine principles of practicable reasonableness. An informed conscious shows practical judgment. As previously discussed, eminent domain is enacted for the common good. It is used to build public benefits. Therefore, because it is used for the common good, it is clear that a person with an informed conscious would support the decision to use the power of eminent domain.

\textbf{VII. Conclusion}

Finnis would find the doctrine of eminent domain morally just because it promotes many of the basic goods and follows all the requirements of practical reasonableness. Even though the doctrine of eminent domain does not promote all of the basic goods, Finnis does not require that for the law to be morally just. Therefore, according to the Finnis’ teachings, eminent domain is morally just.

\textsuperscript{161} \textit{id.} at 125.
\textsuperscript{162} \textit{id.}