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The Rhetorical Invention of Laws of Sacrifice: *Kelo v. New London*

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This paper studies the relationship between American legal rhetoric and public ritual of sacrifice through the analysis of Kelo v. The City of New London*, a 2005 U.S. Supreme Court landmark decision affirming the regulatory seizure of private homes for commercial redevelopment. Particularly, this paper explores the rhetorical invention and expansion of the law of irresistible public sacrifice as articulated in the* Kelo *decision. The rhetorical analysis of the* Kelo *decision finds that the SCOTUS tacitly affirmed the legitimacy of neoliberal logos of governance as the guiding principle for applying the Takings Clause of the Fifth Amendment. Furthermore, the judicial rhetoric in the* Kelo *decision, in effect, re-framed solely private commercial interest as a sufficient exigence for suspending legal protections of the right of quiet enjoyment of private property. The judicial rhetoric deployed in the* Kelo *case effectively provided constitutional legitimacy for the privatization of eminent domain power as generally applied in urban redevelopment contexts. More importantly, the* Kelo *decision also rhetorically transformed a previously exceptional transgressive government act of seizure into a repeatable ritual sacrifice, in full conformity with an updated constitutional memory*

Background

The first man who, having enclosed a piece of ground, to whom it occurred to say this is mine, and found people sufficiently simple to believe him, was the true founder of civil society.

– Jean Jacques Rousseau[1]

When cities have far outgrown their original size, and their revenues have increased, all the citizens have a place in the government… and they all, including the poor who receive pay, and therefore have leisure to exercise their rights, share in the administration.

– Aristotle, *Politics*[2]

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[1] Jean-Jacques Rousseau, *On the Inequality among Mankind. Vol. XXXIV, Part 3.* Trans. Charles William Eliot (New York City, NY: P.F. Collier & Son, 1909).
[2] Aristotle, *Politics,* trans. Benjamin Jowett (Batoche Books, 1999), 89.

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Ritual human sacrifice has been continuously practiced for as long as human civilization has existed.[3] Although people in modern society seldom consider ritual sacrifice an ongoing practice, it nonetheless remains an organizing structure in the contemporary institutions of authority.[4] Capital punishment, for instance, is arguably one of the oldest continuously practiced forms of ritual human sacrifice.[5] Ritual human sacrifice may refer to those instances of *total oblation,* which involve prescribed takings of human lives via killing. Human warfare and capital punishment are among the most historically obdurate examples of this *total oblation* form of ritual sacrifice. However, killing is far from being the only form in which ritual human sacrifice can be conducted. As Freud famously observed, the core social element of human cannibalism is not the act of eating, but the act of taking: "[b]y absorbing parts of the body of a person through the act of eating we also come to possess the properties which belonged to that person."[6] There are also instances of *modified* human sacrifice that involve the ritual taking of human offerings other than biological life itself. Eminent domain is a representative

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[3] *See generally*, Sigmund Freud, "Civilization and Its Discontents" (London: Penguin, 2002). *See also,* Walter Burkert, René Girard, Jonathan Z. Smith, and Robert Hamerton-Kelly. *Violent Origin* (Stanford, Calif: Stanford University Press: 1987), at Introduction: "More can be said for the thesis that all orders and forms of authority in human society are founded on institutionalized violence."

[4] Roberta M. Harding, "Capital Punishment as Human Sacrifice: A Societal Ritual As Depicted In George Eliot's *Adam Bede,*" 48 Buff. L. Rev. 175 (2000), p.175-297:

> The ritual slaughter of humans for sacrificial purpose has an ancient provenance.' Few members of modern society would be inclined to believe that killing humans for sacrificial purposes continues. Of those, most probably envision it only being practiced by individuals who belong to "uncivilized," or non-"First-World" cultures. Upon closer scrutiny, however, it becomes apparent that this is a misconception because the past and present practice of capital punishment includes a thinly disguised manifestation of the ritualized killing of people, otherwise known as human sacrifice.

[5] Roberta M. Harding, "Capital Punishment as Human Sacrifice: A Societal Ritual as Depicted in George Eliot's *Adam Bede,*" 48 *Buff. L. Rev.* 175 (2000), 1-72.

[6] Sigmund Freud, *Totem and Taboo: Resemblances between the Psychic Lives of Savages and Neurotics*, translated by A. A. Brill (New York, NY: Random House, 1961), chapter 2.

example of a *modified* form of human sacrifice.[7]

Forms of ritual sacrifice, ancient and modern, encompass a broad and diverse array of social phenomena that involve the strategic deployment of mythic narratives and rituals for the justifying of collective *acts of taking*.[8] While the precise elements of ritual sacrifice are understandably difficult to generalize, it is sufficient to say that they invariably involve formalize acts of collective taking – the seizure, transfer and/or destruction of things of perceived or real human value.[9] By highlighting ritual as a "collective" act, it refers to the automatic identification of the ritual act as reenactment of a collectively shared past.[10] When practiced in communal settings, ritualized acts of takings have been known for their liminal functions in regularizing and normalizing traumatic human transactions.[11] Public rituals may also serve institutions of authority by transforming a coercive or violent transaction into something that seems inescapable or even palatable.[12]

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[7] Keren Wang, "Atlas of Sacrifice: Three Studies of Ritual Sacrifice in Late Capitalism," (PhD diss., Pennsylvania State University, University Park, 2018), 64.

[8] Walter Burkert, Rene Girard and Jonathan Z. Smith, *Violent Origins: Ritual Killing and Cultural Formation,* ed. Robert G. Hamerton-Kelley (California: Stanford University Press, 1987).
See also, Richard E. DeMaris, "Sacrifice, an Ancient Mediterranean Ritual*," Biblical Theology Bulletin* vol. 43 no.2 (2013), 60-73. See also, Michael Rudolph, *Ritual Performances as Authenticating Practices* (Berlin: LIT Verlag Münster, 2008); John Noble Wilford, "Ritual Deaths at Ur Were Anything but Serene," New York Times, October 26, 2009; *see also,* Austine Waddell, *Tibetan Buddhism: With Its Mystic Cults, Symbolism and Mythology, and in Its Relation to Indian Buddhism* (London: W.H. Allen & Co., 1895), 516: "Human sacrifice seems undoubtedly to have been regularly practised in Tibet up till the dawn there of Buddhism in the seventh century."

[9] Walter Burkert, Rene Girard and Jonathan Z. Smith, *Violent Origins: Ritual Killing and Cultural Formation,* ed. Robert G. Hamerton-Kelley (California: Stanford University Press, 1987), 8.

[10] Burkert et al., *Violent Origins*, on page 8 the authors defined the concept of ritual as the "reenactment of a prior event."

[11] Nicola Perugini and Neve Gordon, "Distinction and the Ethics of Violence: On the Legal Construction of Liminal Subjects and Spaces" *Antipode,* Vol. 49, Issue 5 (Wiley, 2017), pp. 1385-1405.

[12] Keren Wang, "Atlas of Sacrifice: Three Studies of Ritual Sacrifice in Late Capitalism," (PhD diss., Pennsylvania State University, University Park, 2018), 66.

Therefore, ritual sacrifice can be understood as a public memory act – it is the reenactment of taking which automatically implies certain continuity with the collective past. The ritual situation for the human sacrifice can be distinguished as a rather special enactment (and perversion) of the rhetorical situation. The basic components of exigence, audience and constraints remain present. They are often deployed as "appropriate response" for the regularization of violent transactions, while at the same time cultivating and reaffirming certain shared values and habits among the audience community. Paradoxically, the rhetoric of ritual tends to be deployed as an anti-rhetorical frame, given that the legitimacy of ritual repetition would be automatically implied by its audience-in-consubstantiality.[13] The rhetoric of ritual invokes its audiences in good-faith to automatically identify the ritual situation as being self-referential and self-justifying, in effect transforming the legitimacy of the ritual not subjected to the common constraints of reasoning and debate. On the one hand, ritual sacrifice vis-a-vis the collective act of taking has been continually reenacted throughout the development of human civilization.[14] On the other hand, the mythic justification framework for this ancient reenactment continuously reinvents and adapts itself to the changing beliefs, senses, and sensibilities of its contemporaneous audience.[15]

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[13] For additional info on the rhetorical concept of consubstantiality, *see* Kenneth Burke, *A Grammar of Motives* (University of California Press, 1969), 29-30 and 110-112.
[14] Walter Burkert, Rene Girard and Jonathan Z. Smith, *Violent Origins: Ritual Killing and Cultural Formation,* ed. Robert G. Hamerton-Kelley (California: Stanford University Press, 1987). See also, Richard E. DeMaris, "Sacrifice, an Ancient Mediterranean Ritual*," Biblical Theology Bulletin* vol. 43 no.2 (2013), 60-73. See also, Michael Rudolph, *Ritual Performances as Authenticating Practices* (Berlin: LIT Verlag Münster, 2008); John Noble Wilford, "Ritual Deaths at Ur Were Anything but Serene," New York Times, October 26, 2009; See also, Austine Waddell, *Tibetan Buddhism: With Its Mystic Cults, Symbolism and Mythology, and in Its Relation to Indian Buddhism* (London: W.H. Allen & Co., 1895), 516: "Human sacrifice seems undoubtedly to have been regularly practised in Tibet up till the dawn there of Buddhism in the seventh century."
[15] Keren Wang, "Atlas of Sacrifice: Three Studies of Ritual Sacrifice in Late Capitalism," (PhD diss., Pennsylvania State University, University Park, 2018), 65.

The post-WWII global marketization process is in part driven by the proliferation of a specific mode of the state-market relationship, one that is grounded in a preference for market-driven allocation of economic resources. This neoliberal governmentality is marked by an ideological emphasis on a predisposition of market-based behavior management over direct coercive control. Jeremy Engels highlighted neoliberalism's tendency to reproduce and privatize violence in the rhetoric of its representative voices of authority.[16] What is relatively less-studied, however, is the ways in which violence and antagonistic transactions are *deprivatized* and normalized through the rhetoric of neoliberalism. While the concept of violence can be extremely broad, context driven, and self-contradictory, it is nonetheless sufficient to say that rituals often function as a rule-framework for managing antagonistic social transactions. Historical records have shown that communally practiced ritual sacrifices are often strategically formulated responses to various material exigencies – issues concerning the distribution of resources among community members. In the study of liminality, rituals are known for its role in regulating and normalizing traumatic human experiences. In the context of public liminality, rituals may also serve institutions of authority, by transforming coercive or violent transactions into something that seem inescapable or even palatable.

This paper examines the role of ritual framing in American judiciary rhetoric, especially in relation to the rhetorical invention of the laws of sacrifice. Specifically, this chapter seeks to study the ritual framing of laws of sacrifice in the 2005 U.S. Supreme Court landmark decision *Kelo v. City of New London*, which the court affirmed the use of eminent domain to seize private homes for commercial redevelopment.[17]

The basic facts of the case are as follows. In 2000, the city of New London,

[16] Jeremy Engels, *The Politics of Resentment: a Genealogy* (University Park: The Pennsylvania State University Press, 2015), 124-143.
[17] Keren Wang, "Atlas of Sacrifice: Three Studies of Ritual Sacrifice in Late Capitalism," (PhD diss., Pennsylvania State University, University Park, 2018), 69-99.

Connecticut announced a "comprehensive redevelopment plan" for its economically depressed neighborhoods. The city government invoked its eminent domain power to condemn several privately-owned residences in the city and planned to sell seized properties to private developers. The New London city government argued that the purpose of its regulatory seizures of private homes was to create jobs and raise tax revenue through redevelopment of the seized land. The city further argued that the condemned residential neighborhood was a financial burden for New London, and its market-driven redevelopment plan would bring economic growth for the city as a whole and should be considered a valid public cause under the Fifth Amendment. In short, the legal issue of the *Kelo* case revolves around conflicting interpretations of the Taking Clause of the Fifth Amendment, specifically on the meaning of "public use" in the line: "No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[18]

The petitioners, represented by the lead plaintiff Susette Kelo, sued the city government for condemning their private residences for economic redevelopment. The city of New London planned to sell all 33.1 acres of condemned parcels in the historical Fort Trumbull neighborhood to a commercial developer, Renaissance City Development Association. [19] The vast majority of seized parcels under New London's "comprehensive redevelopment plan" were residential parcels. The petitioners argued that the city's actions violated the Fifth Amendment's public use clause, which prohibits government from taking private properties except for public use and with just compensation. In 2002, the Connecticut state court affirmed the regulatory seizure by the New London city government. The petitioners appealed but the Connecticut Supreme Court upheld the lower court's decision. The case was eventually forwarded to the Supreme

[18] U.S. Constitution. Amend. V
[19] Renaissance City Development Association, "Fort Trumbull Municipal Development" (2014). Available: http://www.rcda.co/parcel-map/

Court of the United States (SCOTUS). On June 23, 2005, in a 5–4 decision, the SCOTUS upheld the Connecticut Supreme Court's decision, affirming the constitutionality of using eminent domain for private redevelopment.[20]

As evidenced in its majority opinion authored by Justice John Paul Stevens, the SCOTUS in Kelo is aware of the fact of the New London government's intent to transfer those seized properties to private real estate developers, for exclusively commercial redevelopment projects.[21] Justice Stevens also acknowledged much of the taken land would not even be accessible to the general public. In his own words: "this is not a case in which the City is planning to open the condemned land–at least not in its entirety–to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers." Yet SCOTUS maintained a particularly broad interpretation of the "public use" requirement for exercising eminent domain, as Justice Stevens noted, "the public end may be as well or better served through an agency of private enterprise."[22] SCOTUS in the *Kelo* decision grounded its decision upon the tacit assumption that private business growth would lead to more jobs and tax revenue, thus satisfying public purpose for seizing private properties as claimed by the city. The *Kelo* decision greatly expanded the scope of the "public use" requirement for the Fifth Amendment takings clause. While the New London authority formally labels the purpose its redevelopment plan as "public," in substance the plan exclusively involves private developers and commercial projects.[23] By deferring the interpretation of "public purpose" entirely to the discretion of the city authority, the SCOTUS implicitly greenlighted the complete privatization of the Takings Clause as applied in urban redevelopment

[20] 545 U.S. 469, 472-473 (2005).
[21] Renaissance City Development Association, "Fort Trumbull Municipal Development" (2014). Available: http://www.rcda.co/parcel-map/
[22] 545 U.S. 469, 486 (2005)
[23] RCDA, "Fort Trumbull Municipal Development Plan," available: http://www.rcda.co/fort-trumbull2/

policies in the U.S. By maintaining a policy of total "deference to legislative judgments as to what public needs justify the use of the takings power" in its *Kelo* decision, the SCOTUS effectively handed a carte blanche for local governments to define the "public use" in the Takings Clause as they see fit, without the constraint of judicial review.[24] As Justice Stevens noted, "[i]ndeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time."[25]

The object of this essay is not to produce a formal legal analysis of *Kelo* but rather to explore the rhetorical implications that potentially stem from the case. As Stephen Browne contended in "Rhetorical Criticism and the Challenges of Bilateral Argument," a critical dimension of rhetorical studies represents "an interpretive practice in which a class of phenomena is identified as rhetorical and judgment is rendered as to the properties and moral implications of those phenomena."[26] This implies that rather than being a formal jurist, I am conducting a rhetorical criticism of the *Kelo* case. "The key term here is judgment," as Browne noted, "inasmuch as the critic seeks to make sense of the object not simply by describing its several features, but ultimately with reference to the critics own set of beliefs, values, and commitments."[27] The analysis of *Kelo v. New London* in this study departs from the main legal issue, of the case, and excavates the relevant belief structures as well as the material exigence underpinning the formal legal dispute. "Material exigence" specifically refers to the relevant facts on the ground that inform tensions in economic interests and allocation of resources. Whereas legal analysis of the case's issues focuses on interpretation of specific legal

[24] 545 U.S. 469, 472-473 (2005).
[25] 545 U.S. 469, 479 (2005)
[26] Stephen H. Browne, "Rhetorical Criticism and the Challenges of Bilateral Argument," *Philosophy & Rhetoric,* Vol. 40, No. 1 (University Park, PA: Penn State University Press, 2007): 108-118.
[27] Stephen H. Browne, "Rhetorical Criticism and the Challenges of Bilateral Argument," *Philosophy & Rhetoric,* Vol. 40, No. 1 (University Park, PA: Penn State University Press, 2007): 108-118.

definitions that are subject to debate, a rhetorical analysis should focus instead on what Lloyd Bitzer calls "objective and publicly observable facts in the world."[28] The analysis will highlight the tensions that exist between formal legal dispute and substantive material exigence in *Kelo* through both extensive excavation of tacit elements and close reading of the SCOTUS opinion for the case.

The analysis also looks into the organizing rhetorical assemblage surrounding the *Kelo* case. The focus will be on those relevant institutional establishments, their power authority, organizing principles, and actors. The goal for looking into the institutional context is to better understand the organizing rule-framework that bestows the court system with both interpretative (e.g. SCOTUS' exercise of judicial review) and *interpellative*[29] (e.g., city government's assumed eminent domain authority) authorities. The rhetorical analysis will first discuss the socially embedded belief framework that forms the discursive basis for the *Kelo* decision. The discussion seeks to highlight the ritual embeddedness of the judicial rhetoric operating in *Kelo,* and that judicial *doxa* often operate in ways parallel to the rhetoric of religion. Following the broad historical discussion, the analysis will move closely to the opinions of SCOTUS in *Kelo* and identify

[28] Lloyd F. Bitzer, "The Rhetorical Situation," *Philosophy & Rhetoric, Vol. 1, No. 1* (Jan., 1968), pp. 1-14, 11: "The exigence and the complex of persons, objects, events and relations which generate rhetorical discourse are located in reality, are objective and publicly observable historié facts in the world we expérience, are therefore available for scrutiny by an observer or critic who attends to them. say the situation is objective, publicly observable, and historical means that it is real or genuine - that our critical examination will certify its existence. Real situations are to be distinguished from sophistic ones in which, for example, a contrived exigence is asserted to be real; from spurious situations in which the existence or alleged existence of constituents is the result of error or ignorance; and from fantasy in which exigence, audience, and constraints may all be the imaginary objects of a mind at play."

[29] *See* Louis Althusser's definition of the concept of interpellation, from "Ideology and Ideological State Apparatuses (Notes towards an Investigation)". *Lenin and Philosophy and Other Essays*, translated from the French by Ben Brewster, Monthly Review Press: 1971: "…the individual *is interpellated as a* (*free) subject in order that he shall submit freely to the commandments of the Subject*, *i.e. in order that he shall* (*freely) accept his subjection*, i.e. in order that he shall make the gestures and actions of his subjection 'all by himself'. *There are no subjects except by and for their subjection.* That is why they 'work all by themselves'."

analogous rhetorical elements between the proceedings of the court and rituals of religious sacrifice. The analysis concludes by locating rhetorical implications of the ritual proceedings in the case, and examines the ways which these rituals were deploying in affirming the sanctity of neoliberal economic policies.

This study finds that the privatization of eminent domain, and the marketization of urban redevelopment policy in the *Kelo* case effectively amount to a significant expansion of neoliberal *logos* into domains traditionally resistant to economic liberalization. Private ownership and the free movement of goods and capital are two of the core *doxes* of neoliberalism justifying various privatization policies. Self-contradiction among these *doxes* would arise when, in cases like *Kelo,* the implementation of privatization policy would invariably involve the sacrifice of private home ownership, and the promotion of "free market access" would also involve denying people from accessing their neighborhood. The twin tragedies of the commons/anti-commons implied by the *Kelo* decision also represent a widely adaptable argumentative basis for affirming the sanctity of neoliberal policies, even in cases mandating the sacrifice of those very things that neoliberalism considers to be sacred.

This paper also finds that the judicial rhetoric deployed in the *Kelo* decision was grounded upon the tacit assumption that, should a citizen, being a member of the U.S. constitutional *ecclesia* in good faith, assume the legitimacy of the constitutional framework along with its rights protections, this same believer must also accept the conditions of ritual sacrifice of his or her rights mandated by the same constitutional framework. Although private domicile is both culturally and constitutionally held sacred in the U.S., and thus duly protected by the constitution, the very same constitution also prescribes situations wherein the right of quiet enjoyment of private property can be sacrificed for the higher "public good." The U.S. constitution, like most written constitutions, effectively asserts itself as an absolute and singular covenant that its followers must accept in whole. Being a citizen automatically predestines one to be subjected to this

constitutional covenant, and those organizing rules and principles within the constitutional framework, both written and assumed, must be applied in their totality, and cannot be compartmentalized or selectively followed.

Judicial Rhetoric and its Underlying Belief Structures

At the technical legal level, the *Kelo* decision concerns the interpretation of "public use" in the Taking Clause, and the scope of eminent domain within U.S. constitutional framework. However, the dispute in *Kelo* also touches on a fundamental exigence that is at the core of human political community – the sacrifice of individual and/or group interests for the good of the commons.

Even if we accept the Hobbesian premise that political communities are driven by the mutual interest of peace and security, those common needs are not always met with common adherence to the rules of the "commonwealth". In practice, various particularized interests (e.g. individual, familial, local, factional interests) often enter into conflict with the common interest[30] of the larger political community. The case of *Kelo v. New London,* like any other Supreme Court ruling, represents a slice of the "truth-making" power of the judiciary via its formally organized discursive rituals. Specifically in the *New London* case, this is the re-invention of the "truth" concerning the meaning of "fair public use" in mandating private sacrifices for the common good. The analysis herein proceeds not from the formal legal dimension of the Supreme Court ruling, but from the embedded belief structures that give SCOTUS its rhetorical capacity to radically redefine the threshold for the suspension of one of the most sacred rights under the U.S. constitutional framework.

The belief structures underpinning the judicial review process and the questions of eminent domain and economic redevelopment should not be reduced to mere "ideologies", or set abstract representations that inform and shapes who

[30] The "common interest" here may either be real or alleged.

we are. Rather, they are more appropriately understood when framed by religion and ritual.[31] This perspective may seem, at first glance, to be incongruent with the neoliberal, market-driven *topoi* of the *Kelo* decision. Indeed, the historical unfolding of a global market-driven governance system displaced the powers of many old religious orders, and in the process made new prophetic declarations for a rational conduct of life and a source of happiness that cut across all human "superstitions." This is evidenced in the *Kelo* decision, for example, where Justice Stevens noted that the SCOTUS had previously "embraced the broader and more natural interpretation of public use as 'public purpose,'"[32] where the implicit goodness of the market-driven policies is signified with the God-term "nature."

It is through its promises of material comfort and life fulfillment, and through its rationalist epistemic framework that neoliberalism justifies the global proliferation of market-driven governance. However, we must ask: how could this sweeping material promise retain its persuasive force, especially in times when the promised "good life" cannot be delivered without increasing demands for sacrificial offerings – not only in the form of redevelopment regulatory takings in *Kelo v. New London*, but also the pollution and destruction of a viable environment?

The Book of Job[33] from the Hebrew Bible illuminates two important lessons concerning the relation between our beliefs and the material conditions we live in: First that our faith, to a large extent, depends on our material conditions, and it is extremely difficult to remain faithful when facing a material reality that

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[31] On a similar vein, works by James Carey also provides a substantive and analytically helpful update to what Carey refers to as the "ritual view" of communication. Most notably, in his 1994 essay "Communications and Economics," Care first locates the "case of communication" within the context of the prevailing mode of economic production and economic relations. *See, J*ames Carey, "Communications and Economics," first published 1994, from *James Carey : A Critical Reader*, edited by Eve Stryker Munson, and Catherine A. Warren (University of Minnesota Press: 1997).

[32] 545 U.S. 469, 480 (2005)

[33] See, Mechon Mamre, "Job", *English Bible According to the Masoretic Text and the JPS 1917 Edition*, available: http://www.mechon-mamre.org/p/pt/pt2701.htm

contradicts our deeply-held beliefs. Second, it is nonetheless possible for humans to remain faithful to certain principles, even at the cost of great hardship and suffering, as long as the promised material prosperity eventually arrives. Ideals, however appealing, will eventually lose their persuasiveness when they are perceived as being in contradiction with our lived experience. Laws, however perfectly written, will lose their legitimacy without implementation on the ground.

Indeed, classical canons of Western political philosophy have long recognized this intimate relationship between the ideal and material in organizing political communities. Consider the debate between Thrasymachus and Socrates on the nature of a "just state" from Plato's Republic– while they offered disparate justifications for the state's existence, both Thrasymachus and Socrates supported their ideological position by pointing to their perceived material reality.[34] Whereas Thrasymachus claims that "the just is nothing else than the advantage of the stronger",[35] Socrates rebutted that the just state is "found in the fact that we do not severally suffice for our own needs, but each of us lacks many things",[36] and from this material necessity arises "the cause of men uniting themselves at first in civil societies."[37]

The principle of organizing a moral community around a set of rule frameworks has been succinctly reflected in the biblical text, from the formal

[34] See, Plato, *Republic*, trans. Paul Shorey, (Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1969), book 1.
[35] Ibid., at 338c
[36] Ibid., at 369b
[37] Ibid., at 369b-c: "The origin of the city...in my opinion, is to be found in the fact that we do not severally suffice for our own needs, but each of us lacks many things… Forasmuch as we are not by ourselves sufficient to furnish ourselves with a competent store of things needful for such a life as our nature doth desire . . . we are naturally inclined to seek communion and fellowship with others; this was the cause of men uniting themselves at first in civil societies. …[T]hen, one man calling in another for one service and another for another, we, being in need of many things, gather many into one place of abode as associates and helpers, and to this dwelling together we give the name city or state."

adoption of God's Ten Commandments via the stone tablets in *Exodus,* to the substantive implementation and administration of those divine Commandments in *Deuteronomy*.[38] The basic principle of the rule of law has been reflected in numerous human traditions and is inseparable from the historical development of law and polity themselves.[39] The proper functioning of both religious doctrines and laws of the state demand believers or citizens adhere to their constituting core collective ideals and norms, but the laws themselves also need to reflect the material reality and the pressing needs of their subjects. The authority of both the church and the constitutional state are bound by their laws precisely because the laws themselves reflect the set of basic principles that the authority organizes itself upon. In both cases, the authority's constituting principles or doctrines represent the expression of the singular, indivisible will of the People or God, through the exercise of the popular or divine sovereignty.

In theology, ecclesia (ἐκκλησία, "ministry") is used to describe local ministries as well as in broader sense of all members of a faith organized under a common religious institution. Here I would like to borrow the theological term ecclesia precisely because a full-fledged constitutional society functions similarly to religious institutions – both require the interdependent presence of formal doctrines and practicing believers.

Consider the following example: imagine you are trying to establish a new local Southern Baptist Church in your local community. The church building must first adopt the basic aesthetic form of a protestant institution. It must ensure its physical design, core mission statement, teachings, and ritual practices adhere to

[38] See Mechon Mamre, supra note 2. Available: http://www.mechon-mamre.org/e/et/et0.htm

[39] Similar to Moses' stone tablets, the Code of Hammurabi from circa. 1760 BCE is one of the earliest examples where stone-carved laws are presented to the public by the ruler, binding the acts of both the ruler and the people under the same set of collectively-held rules. There are also rich traditions of Islamic law and Chinese legalism that embraced governing principle of the supremacy of law. *See* "What is the rule of law" from United Nations Rule of Law Website and Document Repository, Available http://www.unrol.org/article.aspx?article_id=3.

the commonly recognized premises of Southern Baptism and the larger protestant community, for a failure to do so would result in the ministry being seen as illegitimate by its peers. Finally, even when the church building is designed and organized in ways that perfectly conform to protestant taste and Southern Baptist conventions, it is not a functional ecclesia without any visiting patrons and attending pastors. Similarly, secular institutions, however perfectly designed, cannot be considered fully functional without a corresponding community that actually believes and practices its legitimacy. The ecclesia or legal order of a polity thus represents the integration of constitutional *dóxa* (formal doctrines) with socially embedded *pistis* (tacit beliefs enabling rhetorical identification).

Indeed, organized religious communities and secular rule-of-law societies are organized around similar operating principles. Their proper functioning is dependent on two conditions: The first is the "good faith" of the commons – that personal ego and habits are restrained under a self-referencing set of collective core values and beliefs. The second condition is the ritual repetition – that those shared core values are maintained via enforcement of laws that reflect the material condition and pressing needs of the community. The authority of both the ecclesiastical body and the constitutional state are bound by their laws precisely because the laws themselves reflect the set of basic principles that the authority organizes itself upon. This interconnectedness between collective belief, collectively observed rituals, and collective legal consciousness, in fact, has been succinctly echoed in Rousseau's writings in defense of classical republicanism, where Rousseau used the metaphor of "general will" in describing the sovereignty as a belief community.

Political communities are organized around rules and procedures to help negotiate tensions arising from competing interests; these rules are often formalized into laws and/or internalized into tacit truth-framework regulating everyday communal transactions. On the most basic level, the phrase "the rule of

law" simply stands in contrast with "the rule of personal will".[40] The supremacy of the law, divine or man-made, implies that these collectively maintained legitimation frameworks, or *pistis,* cannot be inferior to the arbitrary rule of an individual or factions within the community.

Furthermore, the *pistis* of the political community would operate to consecrate, via a series of prescribed procedures and rituals, the *doxa* of the designated authority as "incontestable mandate." The *doxa* consecrated by the *pistis* of the state may manifest in diverse forms, such as papal decrees, imperial edicts, executive orders, legislative statutes, and, of course, court opinions. Formal differences aside, these laws organize the subjects of the political community by ensuring that commonly-held rules, not personal will, serve as the basis for the construction and operation of the polity.

Whereas various expressions of the rule of law framework throughout history may have grown out of similar social necessities,[41] the modern discourse on the rule of law is heavily grounded in the formal relationship between the law and the state, namely the *Rechtsstaat* ("law-state"), where the state (*Staat*) is organized within a constitutional framework that is consistent with internationally recognized governing norms, and serves the rights (*Rechte*) and prerogatives of its citizens.[42] Constitutional democracy thus has become the

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[40] See Aristotle, *Politics,* supra, book 3-16: "And the rule of the law, it is argued, is preferable to that of any individual."
[41] See supra, Aristotle, *Politics,* book 4: "So many kinds of democracies there are, and the grew out of these necessary causes."
[42] For the UN, the Secretary-General defines the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." See "Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies" (2004), available: http://www.unrol.org/doc.aspx?n=2004%20report.pdf

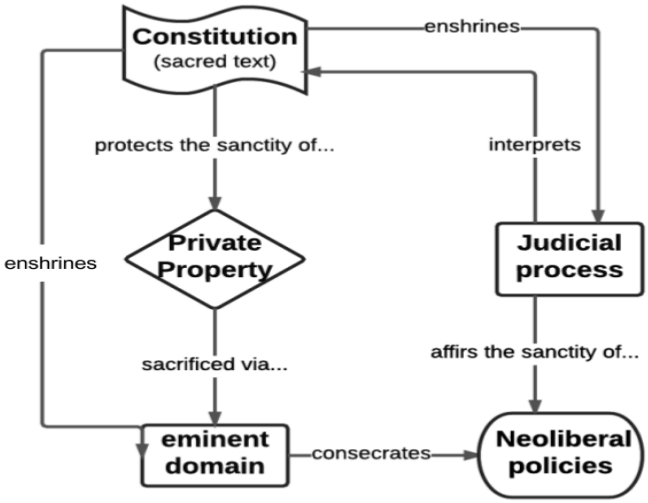
cornerstone for contemporary rule of law discourse.[43] As the judiciary constitutes a key institutional component of the law-state, state institutions cannot operate without their embedded organizing principles that recognize the absolute sanctity of the constitutional framework. The constitution invested the judicial power of the United State "in one Supreme Court."[44] The Supreme Court, in turn, assumed its authority to interpret the meaning of constitutional text as both final and incontestable.[45] In this sense, the classical notion of *pistis,* vis-a-vis communally shared legitimation frameworks, plays a key role in the maintenance of the rule of law. The need for legal invention may arise when dispute among parties cannot be automatically resolved via existing formal and informal rule frameworks. Within the formal domain, such needs may be fulfilled by introducing new legislations, or alternatively producing new interpretations of existing laws as in the case of the judicial review process.

The sacredness of the SCOTUS' opinion rests on two belief conditions. First, there is the *pistis* (legitimating framework) of the U.S. constitution that provides the SCOTUS its exclusive authority as the final interpreter of the law; the particular expressions of the constitution may be subject to interpretation (provided that such interpretation adheres to the rules prescribed by the constitution itself), and the basic premise of a constitution must to be seen as sacred and incontestable in order to maintain a legitimate constitutional order. The sanctity of the constitution therefore is imputed upon the SCOTUS, providing the incontestable organizing principle of the judicial review. When formally expressed *dóxa* of constitutional interpretation are translated into its local applications and internalized into the pre-existing *písteis* (tacit societal knowledge) affirming

[43] Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy", *Southern California Law Review* Vol. 74:1307, 1307.
[44] US Constitution Art. III, Sec.1-2.
[45] *Marbury v. Madison*, 5 U.S. 137 (1803): "It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each."

constitutional legitimacy, it is then possible to normalize even exceptionally disruptive transactions, such as the seizure of home, as constitutional inevitabilities.

This naturally brings us to the second belief condition, which has to do with the power to issue irresistible sacrifice. As the SCOTUS pronounces its opinion on the dispute brought before the court, its holding not only decides the meaning of the law, but also transforms the "petitioner" and "defendant" into "prevailing" and "losing" parties of the case. Thus, regardless of which side of the dispute the SCOTUS favors, its final judgement triggers the inevitable and inescapable sacrifice of the interest of the "losing" party against the "prevailing" claim. SCOTUS's role as the "court of last resort" implies that the losing party must unconditionally acquiesce to the court's opinion. The absolute certainty, predictability and constitutional legitimacy of court-mandated sacrifice in-turn consecrates and radicalizes the *doxa* of the course as "sacred opinion" (see diagram below).[46]



The SCOTUS, operating within its constitutionally prescribed parameters, bears the final authority to interpret the text of the constitution, and to review the

[46] Keren Wang, "Atlas of Sacrifice: Three Studies of Ritual Sacrifice in Late Capitalism," (PhD diss., Pennsylvania State University, University Park, 2018), 69-99.

constitutionality of actions by government organs. The U.S. Constitution enshrines in its Supreme Court the exclusive authority to act as the final interpreter of the law. Given the vagueness and ambiguity that is intrinsic to the text of the constitution, the SCOTUS assumes a degree of flexibility in shaping the meaning of constitutional provisions. However, the capacity of the Supreme Court to reshape constitutional meaning is ultimately constrained by the fact that the *ethos,* or perceived legitimacy of the SCOTUS, is enshrined in the constitution itself. Should the constitutional text lose its legitimacy due to frequent changes and non-implementation, the rhetorical authority of the SCOTUS would also wane. Whereas the precise reading of constitutional text is subject to debate via the judicial review process, the legitimacy of the U.S. Constitution itself is a sacred totem which cannot be challenged (without regime change). The sanctity of the constitution therefore is and the imputed upon the Supreme Court, providing the incontestable organizing principle of the judicial review. As the Supreme Court pronounced its ruling in favor of New London's redevelopment policy, its decision not only determined the outcome of that individual case, but also consecrated the privatization of redevelopment policies in general. Thus, the Supreme Court's formal role as the "court of last resort" implies that the losing party must unconditionally acquiesce to the court's decision, and the contested sacrifice becomes both irresistible for the case-at-hand and predestined for similar cases in the future. Ultimately, the sanctity of different constitutional principles became relative factors in the *Kelo* decision – certain preexisting constitutional protections of private property have been sacrificed in order to consecrate the reinvented interpretation of the public purpose clause in the Fifth Armament.

In terms of formalized argumentation style, both judicial and religious doctrine-making tend to involve the art of *apologetics* – the systematic and

formalized defense of *doxa* for the confirmation of a belief framework.[47] It is important to remember the apologetics is not critical reasoning *per se,* but appropriates rhetorical styles of evidence-based critical reasoning for affirming a certain "Good". The "Good" that apologetics argue is an abstract, transcendent *Other* that is not subject to the positive confirmation or negation via empirical reality. This transcendent "Good" that apologetics seek to affirm is not a concrete thing or idea that we attribute as "being-good", but presumed as "Good-itself", or the source of other concrete goods. In other words, a rhetor who engages in apologetics assumes the position as a defender of faith.

As discussed hereinabove, the SCOTUS already generally assumes the apologetics position as the defender of constitutional faith. All constitutional interpretations are presumed to serve the affirmation of the faith in the constitutional framework. However, in *Kelo v. New London,* the SCOTUS also embodied a peculiar second apologetics persona in addition to the general one – that it argued with the specific presumption that private redevelopment is a public Good-in-itself that cannot be falsified via material evidence. As justice Stevens declared:

> Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area.[48]

The SCOTUS formally presents itself as a neutral, disinterested interpreter of law. Its decisions are supposedly based on the facts of the case, decided with no predisposition beside the good faith in the constitution itself. Yet in *Kelo*, the majority of the court has made explicit its second apologetics persona as the

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[47] *See generally,* Joseph Torre, *Apologetics: A Justification of Christian Belief John Frame* (P&R Publishing: 2015). *See also,* Peter Smith, "Apologetics," in *A concise encyclopedia of the Bahá'í Faith* (Oxford: Oneworld Publications: 2000). pp. 39–40.
[48] 545 U.S. 469, 488-489 (2005).

defender of the faith in redevelopment. Aside from departing from its formal constitutional neutrality, the second apologetics personal in *Kelo* also divorces its legal reasoning of economic concepts away from their material basis. Economic development, public use, and eminent domain are vocabularies derivative of human economic transactions. Therefore, the goodness of these economic concepts are seldom taken as "Good-in-themselves" *per se*, but qualities subject to the confirmation or disconfirmation of lived material conditions. The separation of economic logic from its material basis in the *Kelo* opinion, in effect, hollowed out the "this-worldliness" of the benefits claimed by the city's redevelopment plan. Material promises of market-driven governance, therefore, are rhetorically transformed into salvation prophecies that are unbound by temporal and empirical constraints.

SCOTUS in *Kelo* appropriated the style of evidence-based reasoning for its *doxa* that private redevelopment serves the good of public interest. Apologetics in the *Kelo,* similar to its religious counterpart*,* deployed affirmational argumentative forms of *cataphatics*[49] and *apophatics.*[50] *Cataphatics* seeks to positively defending *doxa* by ways of providing positive evidence and

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[49] (*cata,* "to descend" + *femi,* "to speak") κατά [κα^τα^], poet. καταί acc. to *A.D.Synt.309.28*, found in Compds., as καταιβάτης: Prep. with gen. or acc.: A.*downwards. A. WITH GEN., I. denoting motion from above, down from...*
κατάφα^σις , εως, ἡ, A.affirmation, affirmative proposition, opp. ἀπόφασις, Pl.Def.413c, Arist.Int.17a25, al., EN1139a21. 2. affirmative particle, A.D.Adv.124.9, Synt.245.22. from Henry George Liddell. Robert Scott. A Greek-English Lexicon. revised and augmented throughout by. Sir Henry Stuart Jones. with the assistance of. Roderick McKenzie. Oxford. Clarendon Press. 1940.

[50] ἀπόφημι , fut. -φήσω: aor. 1A."ἀπέφησα" Pl.Tht.166a, al.:—*speak out, declare flatly* or *plainly,* "ἀντικρὺ δ' ἀπόφημι γυναῖκα μὲν οὐκ ἀποδώσω κτλ." Il.7.362:—Med., "ἀγγελίην ἀπόφασθε" 9.422.—In this sense only Ep. II. *say no,* S.OC317, etc. 2. c. acc., *deny*; *negative,* τι Id.Rh.1412b10, Po.1457b31; "μὴ γεγονέναι" Plu.Alc.23. *from* Henry George Liddell. Robert Scott. A Greek-English Lexicon. revised and augmented throughout by. Sir Henry Stuart Jones. with the assistance of. Roderick McKenzie. Oxford. Clarendon Press. 1940. See also, Plato. Platonis Opera, ed. John Burnet. Oxford University Press. 1903 at [360δ]: "καὶ ἐγὼ εἶπον: τί δή, ὦ Πρωταγόρα, οὔτε σὺ φῂς ἃ ἐρωτῶ οὔτε ἀπόφῃς; αὐτός, ἔφη, πέρανον. [Here he could no longer bring himself to nod agreement, and remained silent. Then I proceeded: Why is it, Protagoras, that you neither affirm nor deny what I ask you?]

conformational reasoning, usually *via* connecting the *doxa* with other totemic signifiers for the good (e.g. Thomas: "the law of the land … postpone[s] even public necessity to the sacred and inviolable rights of private property."), [51] or directly attribute concrete, material benefits to the doxa (e.g. Stevens: "…the City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including–but by no means limited to–new jobs and increased tax revenue").[52] *Apophatics,*[53] conversely, seeks to defend *doxa* via way of negation, typically via naming the inevitable and insurmountable ills that would stem from the rejection of *doxa*. Rather than positively define what *doxa* is, *apophatics* involves pointing to acts of taboo that violate the sanctity of the totemic belief (e.g. Stevens: "we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use.").

When the "truth of law" is at question, it is important to examine rhetorical etiology, or the "origin myths," that serve as legitimation narratives for the court to declare a more perfect and complete interpretation of the law's "original" meaning. As Justice Stevens wrote in *Kelo,* that "[w]ithout exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."

In *Kelo,* both the majority and the dissent opinions professed a coherent etiology for their own "more perfect" interpretation of the original meaning.

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[51] See Justice Thomas' dissenting opinion in 545 U.S. 469, 505 (2005).
[52] *Ibid.,* 545 U.S. 469, 474-475 (2005).
[53] ἀπόφημι , fut. -φήσω: aor. 1A."ἀπέφησα" Pl.Tht.166a, al.:—*speak out, declare flatly* or *plainly,* "ἀντικρὺ δ' ἀπόφημι γυναῖκα μὲν οὐκ ἀποδώσω κτλ." Il.7.362:—Med., "ἀγγελίην ἀπόφασθε" 9.422.—In this sense only Ep. II. *say no,* S.OC317, etc. 2. c. acc., *deny*; *negative,* τι Id.Rh.1412b10, Po.1457b31; "μὴ γεγονέναι" Plu.Alc.23. *from* Henry George Liddell. Robert Scott. A Greek-English Lexicon. revised and augmented throughout by. Sir Henry Stuart Jones. with the assistance of. Roderick McKenzie. Oxford. Clarendon Press. 1940. See also, Plato. Platonis Opera, ed. John Burnet. Oxford University Press. 1903 at [360δ]: "καὶ ἐγὼ εἶπον: τί δή, ὦ Πρωταγόρα, οὔτε σὺ φῂς ἃ ἐρωτῶ οὔτε ἀπόφῃς; αὐτός, ἔφη, πέρανον. [Here he could no longer bring himself to nod agreement, and remained silent. Then I proceeded: Why is it, Protagoras, that you neither affirm nor deny what I ask you?]

Justices Stevens (majority opinion author), Kennedy (concurrence), O'Connor (dissent), and Thomas (dissent) each and individually presented their cherry-picked collage of judicial precedence, legislative records, and original constitutional intents to tell their own "origin myth" of their version of the legal truth. The petitioner's counter-arguments in *Kelo* also heavily invoked historical originalism in its constitutional interpretation. Similarly, the common law principle of *stare decisis,* the court's decision as a binding precedent, or potential precedent for future cases, can be also seen as a formalized *pistis* (legitimation framework)[54] that provides the persuasiveness of etiology in establishing legal *doxa* (accepted doctrine).[55] It is also important to understand the dynamic relationship between those explicit symbolic expressions and tacitly embedded beliefs. Specifically, when judicial disputes arise, legal *doxa* often finds itself to be rhetorically dissonant with its socially-embedded *pistes*. The former operates within the formal domain of political-legal rhetoric, whereas the latter is tacitly internalized in communal/societal legal-consciousness (or lack thereof). Yet only majority's etiology prevails as the unambiguous, singularly legitimate "origin myth" of the legal truth in question -- that the U.S. Constitution, conveniently, is by design a "living document", and thereby requires constant re-interpretation to meet new policy needs.[56] Similarly, the all four justices offered their own apologetics in arguing their "more perfect" reading of the Takings Clause, but only the majority's argument will be affirmed as the new constitutional truth.

The 5-to-4 split vote among Supreme Court justices, along with the unusual

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[54] The definition of *pistis* (Πίστις) here draws from the general meaning of the term, as "the state of mind produced in the audience." (*See* William M. Grimaldi, "A Note on the Pisteis in Aristotle's Rhetoric, 1354-1356," *The American Journal of Philology,* Vol. 78, No. 2 (1957), pp. 188-192, at 190.) It is not to be confused with the technical use of *pistic* in rhetoric as modes of persuasion.

[55] Pierre Bourdieu, *Outline of a Theory of Practice. R. Nice, transl. Volume 16.*(Cambridge: Cambridge University Press: 1977), p.164: "when there is a quasi-perfect correspondence between the objective order and subjective principles or organization, the natural and social world appears as self-evident. This experience we shall call *doxa."*

[56] 545 U.S. 469, 482-483 (2005).

presence of multiple dissenting and concurring opinions in *Kelo* reflects the intrinsic politically divisive nature of the case. Yet despite the appearance of heated debate disagreement among justices, those dissenting opinions are more appropriately understood as ritual performances rather than substantive contestations. The final outcome of the *Kelo* decision, like all other instances of judicial reviews by the Supreme Court, is not a sum-aggregate of the justices' written opinions. Formally, dissenting opinions and justices' voting pattern do not assume any binding legal effect. They and do not dilute the strength or the "truthfulness" of the majority opinion. The majority opinion, is taken singularly and in totality as the final and incontestable interpretation of the constitutional text, only subjected to be overruled by the Supreme Court itself. Through its constitutional review authority, the *Kelo* decision not only affirmed the legality of the singular act of regulatory takings by the City of New London, but also at the same time significantly broadened the scope of Takings Clause of the Fifth Amendment.[57] By affirming the constitutionality of purely private commercial redevelopment policy, the *Kelo* decision effectively consecrated the legitimacy for the further privatization of eminent domain power.

The Ritual Situation in *Kelo v. New London*

"[T]he law of the land … postpone[s] even public necessity to the sacred and inviolable rights of private property."
– *Justice Thomas, in his dissenting opinion in* Kelo v. New London[58]

The preceding discussion highlighted the fact that legal *doxa* often operate in ways that are analogous to the rhetoric of religion. This section will move the analysis closely to the text of the court decision, and identify parallel rhetorical devices between *Kelo v. New London* and rituals of religious sacrifice.

[57] Gideon Kanner, "The Public Use Clause: Constitutional Mandate or 'Hortatory Fluff'?," 33 Pepp. L. Rev. Iss. 2 (2006), 335-384.
[58] 545 U.S. 469, 505 (2004)

The U.S. Supreme Court's ruling under the American common law system can be understood as a specific mode of rhetorical response to the exigence of resolving customarily non-resolvable societal tensions. For *Kelo v. New London,* its particular rhetorical tension revolves around the indeterminateness of the "public-private" distinction. To study the rhetorical dimension of this case is to critically examine the ways in which legal re-interpretation fluidly changes the legitimation framework, or what Foucault referred to as "regime of truth," in regulating the sacrifice of the private for "fair public use". [59]

Whereas the exigence underpinning *Kelo v. New London* is grounded in material interest, its rhetorical implication concerns the "truth" of private residences in relation to the predetermined conditions regulating the surrendering of one's private material interest as sacrificial offerings for the common. The Supreme Court, operating within its embedded and publicly recognized rule-of-law *pistis,* would interpret the law and produce a "sacred doxa (or incontestable opinion)" settling the "truth" concerning the relation of private and common interests.

The Supreme Court's opinion, in terms of its rhetorical objective in the *Kelo* case, is to establish the legal truth that (1) it is permissible to invoke eminent domain for what the state considers the exigence of economic redevelopment, and (2) that economic redevelopment in itself is considered a "fair public use" of the land. The facticity of these two explicitly stated declarations rests upon existing good faith on the ritual-ness of eminent domain itself, and on the sanctity of "public use". Eminent domain as a ritual practice implies that the state's status as the sole legitimate authority to declare eminent domain is sacred and not subject to questioning, and through this sacred authority that the state may perform a prescribed sequence of unconditional taking and surrendering. The sanctity of

[59] Michel Foucault, *Il faut défendre la société Cours au Collège de France. 1975-1976*, ed. M. Bertani and A. Fontana, Paris, Seuil/Gallimard, 1997; trans. D. Macey, "Society Must Be Defended". Lectures at the Collège de France. 1975-1976, New York, Picador, 2003.: p.145, 164

"public use" implies, among many things, that the declaration of its "fairness" by the court effectively consecrates the term, and it also closes the legitimate rhetorical space of debating its meaning, thereby automatically triggering the ritual surrender of private interests as unconditional offerings for sacrifice.

The first ritual device I would like to highlight is *Pharmakos*, or the ritual construction of a human scapegoat. The term "scapegoat" is sometimes used in legal scholarship as a metaphor describing those economically disadvantaged groups facing the burden of regulatory taking as seen in the *Kelo* case.[60] A scapegoat is a person or animal sacrificed to cleanse sins of the community, and to avoid the curse of a higher force. The concept of "scapegoat" can be traced back to ritual texts of ancient Mesopotamia, where an actual goat was used as a vehicle of evil to be ritually eliminated (via killing or banishment) from the community.[61] The term *Pharmakos* in the context of Ancient Hellenistic religion refers to those rituals of sacrifice that use human as the scapegoat.[62] One famous example of *Pharmakos,* found in the writing fragments of Petronius, describes an indigent man from the city of Massilia (present-day Marseille in France), whom offered himself to be sacrificed in order to expiate the town from the curse of plague. Citizens of Massilia donned the man in sacred robe and a leaf crown, paraded him through a cursing crowd and then murdered him.[63]

Scapegoating is a common form of expiation sacrifice – sacrifices made for warding off evil and avoiding retribution from a higher force. Expiation sacrifice is typically performed with a declaration that sacred covenant, or a sacred vow being broken. Furthermore, there are two types of exigencies commonly

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[60] Kelianne Chamberlain, "Unjust Compensation: allowing revenue-based compensation in regulatory takings," *Wyoming Law Review Volume 14 | Issue 1 Article 8* (2014).
[61] David P. Wright, *The Disposal of the Impurity: Elimination Rites in the Bible and in Hittite and Mesopotamian Literature* (Atlanta: Scholars Press, 1987), 15-74.
[62] Todd M. Compton, *Victim of the Muses: Poet as Scapegoat, Warrior and Hero in Greco-Roman and Indo-European Myth and History,* Hellenic Studies Series 11, Chapter 1. (Washington, DC: Center for Hellenic Studies, 2006)
[63] *Ibid.*

associated with expiation sacrifices: [1] The belief that there is an inherently angry higher power that needs constant appeasing; and [2] the belief that human subjects are inherently sinful in the eyes of the higher power, and therefore need constant atonement for their sins.

Upon closely examining the text of *Kelo v. New London* decision*,* it is important to note that these ritual elements of expiation sacrifice also play a key role in the rhetoric of the court. The concept of "economy" was discussed in the *Kelo* decision in similar terms as an "angry God". The SCOTUS framed economy as an abstract, all-encompassing force that is a source of absolute public good, and therefore is a sacred thing that demands constant honoring. The court explains that "promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized."[64] The court borrows previous cases involving the taking of low-income inner city real properties by eminent domain, for reasons of safety and health code violations, as valid precedents for the *Kelo* case. Even in Justice O'Connor's dissent opinion, the implicit presumption that economic sins of a neglected property would propagate to the larger neighborhood and to the whole city, remains. Like wrath from an angry God, if the neglected houses are left alone, they would inevitably bring an unbearable collective burden for all: "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air."[65] Thus, both majority and dissenting opinions agreed that *economy* is a sacred object that the government was created to serve, "by employing all means necessary and appropriate for the purpose, including eminent domain."[66]

Resting upon the unquestionable sanctity and wrathfulness of *economy*, the court reinvents the core tenet of the "public purpose" clause for eminent

[64] 545 U.S. 469,484 (2004).
[65] 545 U.S. 469,498 (2004).
[66] *Ibid.*

domain as a sacred covenant – that "[s]tates may take account of their special exigencies" to mandate private sacrifices for honoring the constant, all-encompassing need of economic development. "The city's determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."[67]

The rhetoric of *economy* in the *Kelo* opinion was deployed in ways which depart from the material domain of tangible prosperity and well-being. In her dissenting opinion, Justice O'Connor wrote that:

> New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.[68]

Justice O'Connor pointed out that there is no material evidence suggesting that "eliminating the existing property use was necessary to remedy the harm targeted properties"[69] Furthermore, no fact from the case would suggest that any of the condemned properties "inflicted affirmative harm on society".[70] She noted that the "economic logic" presented in the majority's opinion was not grounded in material realities, but rather in the abstract ideal that "goodness" will arrive.

Writing for the majority's opinion, Justice Stevens was not troubled by the lack of material exigence in the *Kelo* case. Justice Stevens acknowledged that "[t]here is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area." However, the majority opinion did not see the seemingly arbitrary regulatory taking of private homes in *Kelo* as unjust. Justice

[67] 545 U.S. 469,483 (2004).
[68] 545 U.S. 469, 500-501 (2004).
[69] 545 U.S. 469, 500 (2004).
[70] *Ibid.*

Stevens cited the U.S. Constitution as a justificatory framework for the regulatory takings. As the sanctity of the judicial review process derives from the Constitution, SCOTUS must in turn treat the Constitution as a self-contained, self-referencing body of sacred text

On the one hand, the majority's opinion acknowledges that the notion of private property itself is protected by Constitution and therefore is considered a sacred thing in U.S. legal system. On the other hand, the majority referred to earlier SCOTUS decision in *Strickley* v. *Highland Boy Gold Mining* (1906) to highlight that "[t]he Constitution of the United States does not require us to say that they are wrong" when taking private properties for public purposes.[71] In the rhetoric of the SCOTUS, the Constitution, just like the logic of abstracted *economy* or the will of the Abrahamic God, implies a certain sacred covenant that is abundant in both mercy and potential *wrath*. Just as articles of religious faiths sometimes bind the believer into a sacred vow or covenant that mandates calendrical or exigential sacrifices to a higher power, the Constitution also organizes its political subjects under a similar covenant. The majority's opinion in *Kelo* cited the public takings clause of the Fifth Amendment as the implied "social contract" covenant that places citizens' private properties at the mercy of the state and is constantly subjected to the possibility of being taken for "public purposes" as determined by the court.

The sacred treatment of the constitution holds true regardless of individual justices' opinion of the case – that both majority and dissenting opinion are being argued as "the most faithful" reading of the constitution. Just O'Connor prefaced her dissenting opinion by stating that "[w]hen interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, that no word was unnecessarily used, or needlessly

[71] 545 U.S. 469, note 11 (2005).

added."[72] Under the sacred constitutional covenant, the legitimacy and justness of eminent domain itself is not subject to debate. What can be debated in court are disputes on the meaning and scope of "fair public use"[73], and on the amount of "just compensation".

Justice Stevens noted that "just compensation" in the *Kelo* case is not an issue for the court as the petitioners only dispute the "public purpose" of the regulatory taking and are not asking for better compensation from the city government. "The question in the case is whether a city's taking of private property for the purpose of economic development satisfies the public use requirement of the Fifth Amendment."[74] Wrote Justice Stevens, and more specifically:

> In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." …In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.[75]

Note that in its elaboration of the legal issue brought before the court, the SCOTUS separated the ends of "eliminate slums or blight" from the means of "economic development" and "improve the local economy." This de-signification process implies that should the court rule in favor of the regulatory taking by the city government, the ruling would also reject the notion that improving living conditions and material well-being are not necessary conditions for justifying the

[72] Ibid.
[73] 545 U.S. 469, 472 (2005).
[74] 545 U.S. 469, 477 (2005).
[75] 545 U.S. 469, 472 (2005).

"public purpose" of privatization policies. And given that the SCOTUS had determined that the city's private redevelopment plan is within the "true meaning" already contained in the public use clause, the condemnation of petitioner's properties is therefore "just" and can no longer be subjected to legitimate debate.

Not only does the Fifth Amendment enshrine eminent domain as a "divine right of the state" entirely above the private right of citizens, but it is also arbitrary in the sense that the victims of public seizures are not selected due to any wrongdoing on their part. In this regard, the rhetorical structure regulatory taking resembles the biblical *Jephthah's vow* from the *Book of Judges.* In the biblical account, Jephthah made a ritual sacrifice by declaring:

"Whatsoever cometh forth of the doors of my house to meet me, when I return in peace from the children of Ammon, shall surely be the LORD's, and I will offer it up for a burnt offering."

—*Judges 11:31* (KJV)

The seemingly arbitrary nature of *Jephthah's oath* provides a sense of supra-human mandate in selecting the sacrificial victims – that sacrificial victims are selected not because they have committed any personal wrongdoing, but simply because they are "in the wrong place at the wrong time." Likewise, as the election of Jephthah's victim was framed as predestined by God, it also implied that the sacrifice itself is irresistible via human agency. Similarly, the petitioners in *Kelo* had their properties taken not due to any of their own wrongdoing, but simply being "in the wrong place at the wrong time." Jephthah's oath provides the rhetoric for justifying the selection of "sacrificial properties" for eminent domain.[76]

Notwithstanding the seemingly arbitrary character of regulatory takings, the court in no way considered the apparent "non-wrongdoing" of the petitioners a valid ground to expatiate them from condemnation. Just as ritual expiation

[76] Keren Wang, "Atlas of Sacrifice: Three Studies of Ritual Sacrifice in Late Capitalism," (PhD diss., Pennsylvania State University, University Park, 2018), 95-96.

sacrifices are often performed with an assumption of inherently sinful human subject (e.g. the concept of original sin) in the hands of an angry God, the *Kelo* decision was also argued upon the tacit assumptions of a two-fold original sins, encoded as "economic inevitabilities" that are beyond any individual's wrongdoing, yet would predestine the whole city towards economic oblivion. The first is the tragedy of the commons. That is, the assumption that collective ownership of land would inevitably leads to a condition of common neglect, as no individual would have enough incentive to manage the land and fully utilize its economic potential. The second "original sin" would be tragedy of the anti-commons: when too much private ownership becomes too restrictive for the advancement of the common good, mandating the regulatory taking of private residences. As Justice Stevens maintained in his majority opinion: "The public end may be as well or better served through an agency of private enterprise than through a department of government.

Conclusion

To be sure, the analysis in this paper does not seek to establish "alternative" legal facts of the case itself. Instead, those claims intend to highlight an economically accursed condition which the petitioners found themselves in. That is, certain general conditions (i.e. blighted inner-city neighborhoods) were already bound by presumptions by the city government that these conditions would always, and without exception, totally deprave the collective economic outlook of the community. The analysis highlights that the judicial process in this case constitutes a ceremonial (or epideictic) framework which organizes material contestations and political debates into a series of prescribed of procedures and ritual repetitions. This process would procedurally seal off the legitimate space for legal contestation, and consecrate both the settled legal doxa as well as legal "truth" of underlying material exigence. The ritual performance of judicial review in this case pre-emptively places citizen subjects into binding association with an

updated sacred mandate of sacrifice, a vow that promises certain sacrifice should the sacred association be broken. Whereas purely religious (narrow sense) offerings are often entirely symbolic, political ritual often involves offering of real significance (economic or bodily, personal and collective).

The rhetorical analysis of the *Kelo* decision finds a number of key justification frames which the SCOTUS deployed for its substantive expansion of the law of eminent domain sacrifice. These framing devices may be explicitly stated or tacitly assumed, but they tend to broadly reflect the hegemonic market-driven governmentality, and together respond to the economic exigencies of market-based regulatory takings. They define the "appropriate and proper" occasions for suspending pre-existing legal of protections of private residences, to allow otherwise transgressive use of eminent domain that depart from preexisting norms.

The first framing device is the total depravity of an economically accursed condition**.** This frame rests upon a two-fold anathema, formally delivered by the city authority against the accursed parties to be sacrificed. First is the identification of a certain pre-existing condition, blighted inner-city neighborhoods, which is presumed to be a pre-existing accursed condition depriving the city of future economic growth. The second anathema is the explicit naming of the party the accursed condition is being inflicted upon by the city (i.e. condemning the blighted city neighborhoods for regulatory seizure). In the case where the economically accursed condition is declared as "totally depraved" by the city authority, such a declaration often triggers the mandatory seizure of valuable resources as necessary means to deliver the commons from economic doom. The formal role of the SCOTUS is not to deliver the anathema for condemnation and seizure (for the court deferred such power to the city), but rather to render the anathema permanent and generally applicable.

The second framing device can be described as the "unconditional election" of sacrificial victims. It provides the *modus operandi* of their election. In all three

case studies, the sacrificial victims were elected via entirely impersonal grounds (unconditional election). Furthermore, human sacrifices in these cases did not directly involve the *total oblation* (killing) of the victim. Instead, they demanded *modified* offerings in the form of economic resources and access to these resources. In the *Kelo* case, it was not individual petitioners, but the low-income neighborhoods they lived in that were presumed to be accursed. And as such collective sin was assumed will inevitably propagate to the entire city, thus deprave New London from its economic redemption. The petitioners had their otherwise well-maintained properties seized not due to any of their own wrongdoing, but simply being incidentally located in the condemned neighborhood, the "goodness" of the involved policy measures became an unfalsifiable doctrine of faith rather a materially justified fact. The universal benefit of economic growth was reframed by institutions of power as a matter of predestination and are not subject to "second-guessing."[77] The rhetorical implication of the majority's deference to the judgement of the city, in effect, is to avoid addressing counterfactual material constraints that arise from the unfulfilled promises of redevelopment policy. Recall that the New London city government justified its aggressive regulatory seizure of well-maintained private houses with the promise of bringing new jobs and businesses to the city. The actual employment data of New London reveals a very different reality. The unemployment rate of the city skyrocketed from 4.1% in 2006 to 8.9% in 2010.[78]

The third framing device can be summarized as "irresistible takings by institutions of public authority." It is spoken from the pre-established authority of SCOTUS as the court of last resort, which in effect establishes the irresistibility of the regulatory seizure. In effect, the constitutional authority of the SCOTUS

[77] 545 U.S. 469, 488 (2005).
[78] Semega, Jessica L., and Kayla R. Fontenot, and Melissa A. Kollar. "Income and Poverty in the United States: 2016." *U.S. Census Bureau,* Report Number: P60-259 (September 12, 2017).

functions to regulate the boundaries which the petitioners could legitimately contest the regulatory seizure by the city.[79] It defines the rhetorical boundaries contestability throughout the ritual taking process, and declares the infallibility of the acting authority to exercise its power of takings, via constitutionally prescribed judicial, administrative and/or legislative processes. The constitutional framework organizes the subjects under a unified political *ecclesia* (community sharing a common-faith), in which the totemic field of habitus (or consubstantiality) is provided, which automatically implies certain role expectations and power-relations.[80] Upon audience identification of the formal invocation, an otherwise violent act-of-taking is instantly transformed into a regulated public ritual. For the petitioners, the city's condemnation notice functions as a signifier of the "publicness" of the act-of-taking. The decision by SCOTUS in turn affirmed the "public" nature of the taking, thereby rendering this taking irresistible. In effect, the rhetoric of the SCOTUS seized the legitimation power of constitutional consubstantiality when they sought to expand the laws of public sacrifice. The pre-existing constitutional protections in the *Kelo* case were paradoxically displaced under the rhetoric of "upholding the constitution."

The fourth and final framing device by the court is its rhetorical power over future possibilities. Ritual is, by definition, a symbolic act of preservation. Ritual preserves common values and norms of behavior via repetition and audience identification or consubstantiality. Even violent rituals, such as war and capital punishment, are formally conducted under the justification framework of

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[79] This is a quote from Aristotle's definition of rhetoric, see Aristotle, Rhetoric, trans. Aristotle in 23 Volumes, Vol. 22, translated by J. H. Freese. (Cambridge: Harvard University Press, 1926), Perseus Digital Library. http://data.perseus.org/citations/urn:cts:greekLit:tlg0086.tlg038.perseus-eng1:1.1 (accessed March 7, 2018), at 1.1: "Rhetoric is a counterpart of Dialectic; for both have to do with matters that are in a manner within the cognizance of all men and not confined to any special science. Hence all men in a manner have a share of both; for all, up to a certain point, endeavor to criticize or uphold an argument, to defend themselves or to accuse."

[80] For additional info on the rhetorical concept of consubstantiality, *see* Kenneth Burke, *A Grammar of Motives* (University of California Press, 1969), 29-30 and 110-112.

preserving collective ideals. The normative structures of neoliberalism, too, reproduce its economic worldview via ritual inculcation of its core values and normative principles as materialized in the city's redevelopment plan. In its *Kelo* decision, the SCOTUS tacitly affirmed the economic *logos* of neoliberalism, and thereby consecrated the sacrifice of private living spaces for the sake of private development. Furthermore, the SCOTUS in its *Kelo* decision did not resort to the "state of exception" argument. The *Kelo* decision not only consecrated the particular disputed act-of-taking by the City of New London, but also preserved the expanded definition of the "public use" clause generally applicable for all future regulatory seizures in the U.S. The otherwise transgressive use of eminent domain authority by the New London city government, through the *Kelo* decision, became ritually merged into the preexisting constitutional norm of sacrifice, framed as something "always-permitted" by the constitution.

On the one hand, these rhetorical "good faith" statements are particular truth-expressions of discursive practices that are emerge from distinct historical, social, political and economic conditions of their faith-community, and produce variable societal consequences. Yet these locally-contextualized legal doctrines and beliefs invariably serve to define the particular totems and taboos concerning the rituals of sacrifice in a political community. In this regard, the court's ritual re-interpretation in *Kelo v. New London*, for better or worse, shapes the legitimation framework regulating people as *always ready to be sacrificed* for the sacred goals defined by the state.[81] The rhetorical elements of sacrifice have existed throughout history, thematic in various religious and philosophy texts. We tend to dwell in legal technicalities when looking at the text *of Kelo v. New London*, but its

[81] The corresponding tendency to this overdetermined human-as-political-subject is the tendency to reframe and reduce the political subject as "always-already-consenting" to offer oneself for the "always-already-justified" sacrifice mandated by the state. Louis Althusser's theory of *interpellation* also expresses similar process in the context of modern states.

structure is historically think and materially grounded on tensions that arise from intrinsic contradictions in economic relations.