

**TAKINGS & CORRECTIVE JUSTICE:  
A CRITIQUE OF THE PUBLIC USE MODEL**

Michele Goodwin<sup>©</sup>

***Introduction***

*[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with that they have done it.<sup>1</sup>*

*As for the victims, the government now has license to transfer property from those with fewer resources to those with more.<sup>2</sup>*

The recent Supreme Court case, *Kelo v. City of New London*<sup>3</sup>, marked the most significant challenge to eminent domain in fifty years.<sup>4</sup> Susette Kelo learned the day before Thanksgiving that her home had been compulsorily purchased by New London and she had five months to “get out.”<sup>5</sup> The eviction order pasted to Kelo’s door informed her that the property had been purchased. The property was to be sold to a private company, Pfizer, which the city of New London anticipated would generate economic benefits. It was assumed private, non-profit organization, New London Development Corporation (NLDC) that Pfizer’s relocation to New London would stimulate the local

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<sup>1</sup> See *Calder v. Bull*, 3 Dall. 386, 388 (1798)(quoted by Justice O’Connor in *Kelo v. City of New London*, 545 U.S.—(2005)

<sup>2</sup> See *Kelo v. City of New London—O’Connor dissent*.

<sup>3</sup> *Kelo v. City of New London—US—(2005)*

<sup>4</sup> *Despotism By Stealth*, *Economist*, February 17, 2005.

<sup>5</sup> *Id.*

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economy by generating tax revenue and supplying jobs. At the heart of the case are fundamental issues<sup>6</sup> involving the limits of governmental authority to seize private property for “the public good.”

The case raises a number of questions related to government authority and public use in general. For example, what is a valid public use of private property in contemporary terms? Must that property be blighted and condemned? When may the government overrule a private citizen’s refusal to “donate” property to the common good even if fair market value is provided? Under what circumstances can a government compel an individual to surrender her property, particularly for a private party’s usage? These questions, although relevant to the specific eminent domain dispute in *Kelo* can easily be extended beyond private land property to other property and property-like scenarios.

This Article scrutinizes the basic concept that governmental power, specifically, the authority to take private property, is boundless. This Article extends the common thinking about property as that being associated with land, to a newer field of tangible goods—the human body. The timing of *Kelo* coincides with unsurpassed demand for human body parts and states taking an active role in procuring human tissues from cadavers even if doing so interferes with privacy, autonomy, and due process.

In an attempt to retrieve more body parts and meet the growing transplant demand, over two dozen states have adopted legislative consent laws (also known as presumed consent) to increase the supply of human tissues for transplantation. These laws operate as a form of legislative substitute judgment. Legislative/ presumed consent

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<sup>6</sup> Id.

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basically authorizes state actors (coroners and medical examiners) to harvest heart valves, corneas, and other tissues from individuals who have not refused donation prior to death. Presumed consent operates in a compulsory fashion; it is a conscription policy, wherein the government provides consent for the dead donor. Much like the *Kelo* case, the tissues are transferred to private companies some not for profit and others for profit and “sold” to recipients.

In the past, the issues surrounding presumed consent legislation focused primarily on the ethical underpinnings of the policy. Avoided were any attempts to associate the body with property. Yet, the contemporary demand for body parts and the significant pecuniary interests attached to the human body places its status in a new category. The human body is not a common store. Yet in ways not only imaginable, but real, the body is a stockpile of valuable, tangible goods. Hearts, lungs, kidneys, tendons, heart valves, and cartilage from the spine represent publicly and privately traded goods. The demand for these objects outpaces a miserly supply. As a result, secondary systems have emerged, including modern-day grave robbing, as in the case of New York and New Jersey funeral homes selling their clients’ organs, tissues, and bones. Cases like that and the scandals that plague university cadaver procurement programs, which have suffered reputational damage as a result of employees embezzling and selling body parts, exposes the more clandestine nature of contemporary tissue, bone, and organ procurement.

This Article draws analogies from the 2005 Supreme Court decision in *Kelo v. City of New London*, which provides the most recent application of the concept that a government entity may seize private property if the acquisition qualifies as a “public use” within the meaning of the takings clause. This Article, however, scrutinizes the majority

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opinion in that case, and demonstrates through analogy to presumed consent laws how both government taking of land for the benefit of a private enterprise, and the state appropriation of body parts for implantation to private individuals violate sacred covenants, most particularly autonomy and privacy, and defy at least in the context of presumed consent laws, that as a society we abjure the duty to rescue doctrine.

The thesis of this Article is that presumed consent laws violate privacy, autonomy, and constitutional protections found in the 5<sup>th</sup> and 14<sup>th</sup> Amendments. Presumed consent appropriations violate due process and fundamentally constitute a taking of property without just compensation, recourse or ability to appeal. Indeed, even with compensation, such as a compulsory purchase, the law strips bare the fundamental ethical principles of autonomy and informed consent. The rationale for presumed consent law is not sufficiently compelling to legitimize this type of state action, which in these cases means granting agents of the state authority to nonconsensually harvest body parts. Rather, Americans demonstrate their ambivalence about altruistic (compelled or not) body part donations when they bypass the opportunity to voluntarily register to donate organs and tissues. Because presumed consent laws' opt-out provision are not institutionalized through a formal process, the measure is more compulsory than not. Finally, this Article argues that presumed consent operates in relative obscurity, making the compulsory harvesting of tissues resemble a more surreptitious than transparent process.

Part II of this Article briefly describes the significant demand for human body parts and the considerable constraints in procuring an adequate supply. It offers a

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nanced view of body part procurement, especially that of human tissues which are considerably in demand by private, for-profit cosmetic and biotechnology companies.

Next, Part III further defines presumed consent and analyzes the impact of this type of legislation. It argues that legislators likely failed to predict the pecuniary motivation of lobbyists petitioning for such laws or that the tissue banking industry would transform from one focused primarily on helping injured burn victims, to reprocessing body parts to create penis enhancements or products to make lips fuller. Part III also illuminates the potential disparate impact on bodies of color. It discusses a 1997 study of presumed consent in Los Angeles, California. In that study over 80% of individuals whose corneas were nonconsensually appropriated by the coroner were Black and Latino. Because presumed consent laws operate pursuant to mandatory autopsies, which usually involve homicides, more often, Blacks and Latinos are likely to be the surgical victims.

Part IV scrutinizes the constitutionality of presumed consent laws, debunking the notion that these types of human tissue appropriations are voluntary, consensual, and within the state's authority. It argues that the state power to appropriate property and extensions of property (or items with property-like value) is not absolute. It suggests that assertions which link human tissues to the "common good" are inconsistent with the common law tradition. Further, as Part IV explains, public use rationale associated with body parts conflicts with a strongly guarded right to privacy and the right to be free from individual and government intrusion upon our bodies.

Finally, Part V concludes that nonconsensual appropriation of human tissues by state actors amount to takings in violation of the Fifth Amendment. Pursuant to

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traditional takings, states that adopt presumed consent legislation should compensate “donor” families or their estates for the deprivation caused and the right to “use” or “reuse” the appropriated tissues. This Part acknowledges a substantial body of scholarship that decries any financial associations with the body. It argues however, that anti-commodification scholarship fails to acknowledge that the human body is commonly and regularly traded for profit post donation. In addition, a robust tissue banking industry that profits considerable from tissues nonconsensually harvested or harvested for alternative purposes already exists.