

## CHAPTER II

### WOMAN AND PROPERTY

#### II.1. Property Right

Libertarians believe that property right will keep the existence of human being. They emphasize that “you own your own life and you must own the product of that life (<http://en.wikipedia.org/wiki/Libertarianism>). From this notion, a woman owns her life; therefore she must own the product of her life (baby). John Locke in his writing titled *Second Treatise on Civil Government* said every human has a property in his/ her own person. Nobody—except the person himself/ herself—has right to his/ her property. One of his most popular notions was natural-rights definition of property, stating: when a person mixes his/ her labor with nature, (s)he gains ownership of that part of nature, which is subject to limitation, but there should be enough left in common for others (<http://www.constitution.org>).

The reason why people are willing to join in a society is to protect their own property ([http://en.wikipedia.org/wiki/Private\\_property](http://en.wikipedia.org/wiki/Private_property)). Individuals give up all their natural power to a society they join in, and those individuals under a society (community) will put a legislative power in the hands of their government. With a trust they shall be governed in a declared law; if not, they can choose to return to their prior status of uncertainty in a state of nature.

Property designates things commonly recognized as entities in respect of which an individual or group has exclusive rights (<http://www.constitution.org>; also, see Appendix 1 on property). Important types of property include real property (land), personal property (other physical possessions), and intellectual property (rights over artistic creations, inventions, etc.). A right of ownership is associated with property owned by an individual or group in relation to others. The owner has a full right to make the most satisfactory of the property—whether to use it or not—while excluding others from making use of it ([http://en.wikipedia.org/wiki/Private\\_property](http://en.wikipedia.org/wiki/Private_property)).

Some philosophers said that property rights arise from a social convention. Others find the origins in morality or natural law. Social convention and morality are advocated in conservatism, on one hand; and natural law is in libertarianism, on the other hand. Public property is property that is controlled by state or society whereas

private property is property that is not public. Private property may be under a control of single individual or group of collective individuals. In a modern system of property, an ownership belongs to a legal individual, even if the “individual” is not a real person. Corporation, for example, have a legal right similar to an American citizen; therefore, a corporation is legally recognized as a “person”, or artificially referring to a "corporate personhood" (see Appendix 1 on Private Property).

A property right under the current legal system is found in form of Constitution (USDFA, 2001). The fifth and the fourteenth amendments of the United States Constitution explicitly protect the rights of private property. The Fifth Amendment reads “Nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”. The Fourteenth Amendment reads “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law”.

According to Adam Smith, the expectation of profit from improving stock of capital would rest on private property rights ([http://en.wikipedia.org/wiki/Private\\_property](http://en.wikipedia.org/wiki/Private_property)). A property holder was encouraged to further develop his/ her property by generating wealth and allocating resources based on market operation. It was central to American capitalistic system.

In modern culture the property ownership is subject to custom, regulation, and law. Tribal cultures usually balance individual and collective ownerships. Under a communal property system the ownership of property collectively belongs to a community; this socialistic notion is out of American favor. If America disfavors the communal ownership, it should not have allowed property takings for the sake of the public: Banning abortion can be translated that woman right of her very private property also belongs to the public through the government. A taking of individual property by the power of eminent domain for the public use can also be translated that an individual right is subject to the public right over the property.

The concept of property right in America is different from the concept of property right in other countries. In Indonesia, the hunter-gatherers do not consider land to be their own property because there is no shortage of land for them; the concept is applied by the locals in Papua (formerly Irian Jaya), particularly in

Mimika regency. Because of that much difference of concepts between the locals and Freeport-McMoRan Copper & Gold (a U.S. corporate personhood), who has so far been endorsed by the Central Government of Indonesia in taking the tribal land, various conflicts remain protracting with never-ending solution. Private-property system is applied by the American corporation emphasizing the land ownership by particular group with specific responsibility of individual. In America property takings are legitimated for the sake of the public; contradictorily, takings of collective property i.e. tribal land in Mimika are committed by Indonesian government for the sake of private corporation i.e. Freeport McMoRan without due process and just compensation to the owners (seven tribes).

Different societies have different theories of property right. Agrarian people make land their own property based on a concept of scarcity. For something to be economically scarce must necessarily have exclusivity of property right, meaning that the property shall be used only by one owner while others are excluded (see Appendix 1): The Ten Commandments in the Protestant Canon i.e. Exodus 20:2-17 and Deuteronomy 5:6-21 reveal that the Israelites were not to steal. These texts, written in approximately 1400 B.C., were an early applicable protection of property right. From a Biblical critical interpretation, an institution of kingship was made equivalent to fatherhood. With a paternal right of family property, a father was free to distribute his property to his children. The father also was arbitrary in taking back and disposing the right of the already-distributed property. From a cultural viewpoint of religiosity, in light of the abortion ban it is the right of the kingship (fatherhood) then to take back and dispose a woman's right of freely using her body (private property).

Unfortunately, it is not the culture that has to be referred to in deciding a taking of woman's right of a free use of her very private property (body), there has to be the most reasonable ground of hindering her in exercising her very basic right over the body. Otherwise, the government has to stay away from her private matters.

In 1760s William Blackstone codified the English common law in his writing "*Commentaries on the Laws of England*". According to him, a tyranny could be prevented or resisted by preserving property rights. Protection from harm, loss, or damage should be given to a reluctant owner whose property was taken by eminent domain. An owner had to be protected from physical invasion of his/ her property by

laws of trespass and nuisance. A landowner was unquestionably free to kill any stranger who was trespassing in his private property ([http://en.wikipedia.org/wiki/Private property](http://en.wikipedia.org/wiki/Private_property); see also Appendix 1 on private property). From this legal concept, in light of property taking a land owner can fight for his/her property right against an arbitrary rule by the government. If there is no strongly reasonable basis with due process an owner can reject a property taking by a power of eminent domain.

A property taking is not something simple in America because the property right is unquestionably protected under the Constitution. Any attempt to deprive individual right of his/her private property without the most reasonable and acceptable argument will be declared unconstitutional and tyrannical.

The definition of property has so far expanded beyond land; scarce goods in general are now regarded properties (Appendix 1 on Private Property). The concept of property right is not only philosophical but also political. American capitalist system is functioning because the Constitution explicitly protects property rights. In a formal system all ownerships and transactions of property are legitimately recorded. American legal system distinguishes different types of private property such as immovable property like land and real estate, tangible property, and movable property. Further, the legal system also recognizes intangible property.

In common law, real property (immovable property) is a combination of interest and improvement. Because of more complex forms some personal property is divided into two categories i.e. the tangible (car, clothing, animal, etc) and the intangible/abstract like financial instrument (stock or bond) and intellectual property (patent, copyright, trademark) . In Western culture, things of no owner(s) are called the “commons”. The "commons" also refer to those of general collective ownership or “common ownership”. Under the American system the “commons” refer to the public properties. Law of modern society has tended to reduce the number of properties of no ownerships (see Appendix 1 on Private Property).

## **II.2. Sovereignty in Property**

American revolutionists supported a belief that government is only an instrument of the people and the sovereignty of government shall be subordinated to individual rights (Nedelsky, 1994). It can be revealed from the Constitution with its

amendments that depict a political morality of divinity viewing that individuals are the masters of their government because the government was created with the consent of the individuals. The government must defend itself and within a limit of acceptable procedure it is allowed to punish an individual who has been proved to be an offender. But the government has no right to compel the sovereignty of individual by relinquishing or impairing his/ her human rights (life, liberty and property) if there are not the most acceptable and reasonable grounds.

Such a notion can be elaborated from the Fifth Amendment, which has been so crucial to the survival of individual sovereignty. Its clause is closer to the Virginia's formula but unique. It was originally proposed by James Madison, reading:

No person shall be subject, except in cases of impeachment to more than one punishment or trial for the same offence; nor shall be compelled to be a witness against **himself**; nor be deprived of life, liberty, or property, without due process, where it may be necessary for public use, without a just compensation (Levy, 1986: 422-3).

Unfortunately in the beginning of proposing the concept of rights of life, liberty and property, female was not included as indicated by the word "himself" in Levy's remarks above. Thus, the sovereignty of individual property did not include the sovereignty of female property. This is why woman's right of her private property (body) has never been included in the Constitution. Although philosophically an abortion ban might violate woman's right of her very private property, but constitutionally the ban could be acceptable in light of property taking.

America's concept on property and individual sovereignty can be tracked down from Magna Charta, which was the symbol and source of individual sovereignty and freedom. Also, the concept cannot be separated from the conservatism and libertarianism in America (Levy, 1986; Cullen, 2003). It became part of the principles of America's Constitution that comprised liberal thoughts requiring that any legal conclusion had to be based on reasonable evidences.

According to Levy (1986), from the beginning England had intended its common law to be applied in the colonies, thus it offered Magna Charta. Afterwards, the colonists revised the Charta and called it "Body of Liberties", which provided equal protection of individual rights, compensation for property taking, and abolition of monopoly. During the colonies, the English common law was gradually becoming

American law. Most of the American constitutional rights—including the right of property—derived from the concept of the common law.

To know the root of the English common law we have to date back to the origin of rights of Israel in Biblical Times. The common law mostly refers to the Talmud, which is an encyclopedic compilation of “Traditions” and the ancient oral teachings based on the five books of Moses. Its composition was begun before the Christian era and ended in the sixth century A.D. Divided into six general subjects or “orders” consisting of 63 books or “tractates,” its English translation spreads over 50 volumes. They include canonically authoritative discussions of virtually every subject of law. Talmudic criminal procedure was strictly accusatorial in character, reflecting a humane concern for life and liberty. All Talmudic law derives from Scriptures: right against self-incrimination and rabbinical judgment of capital punishment are rooted from Deut. XVII: 6 and Ex XXII: 3. The Talmudic law cites a verse of Ex XXIII: 3, reading:

Put not thy hand with the wicked to be an unrighteous witness. Every man is considered a relative to himself, thus he is incompetent to be a witness against himself because he is “a relative to himself (Levy, 1986: 433).

Thus, the principle citing that no man is to be declared guilty on his own admittance obviously derived from a divine decree and there was no satisfactory rationale for it. From what was found by Levy, deeply rooted in the Talmud as the main source of the common law, the Fifth Amendment concerning the property right and individual sovereignty was based on religious divinity as advocated by American conservatism. Although the Constitution comprises a great number of liberal thoughts adored by the libertarians but the ultimate value will refer to an absolute truth of moral ground based on religiosity. In light of abortion ban, when libertarian’s ultimate value of no moral ground fails to provide the most acceptable argument in deciding whether or not to allow a ban, it is the ultimate value of moral ground based on absolute truth of religiosity will be the alternative.

How can an absolute truth of religiosity be acceptable in making a legal decision in light of the abortion ban? Let’s take a provision on confession of guilt under the Fifth Amendment, which refers to the most logic argument under the Talmudic law: A confession of guilt, even if voluntarily given, was untrustworthy evidence. Individual has instinct of self-preservation, therefore a normal person—

not a mentally deranged individual—would never admit a capital punishment. Confession for capital punishment was a sort of suicide (Levy, 1986). It is sinful to commit a suicide because human life does not belong to her/him but to God. In that regard any voluntary confession of guilt shall be declared of no legal effect. Since human life does not belong to her/ him, thus (s)he cannot give away what (s)he doesn't belong to. A person has no right to kill himself/ herself so (s)he has no right to confess that (s)he committed an offense for which (s)he may be liable to a death penalty. It is the most acceptable argument in rejecting a self-confession of guilt before the courts in America; it does refer to a notion of absolute truth of religiosity citing that “human life is not his/her private property because human life does not belong to her/him but to God”.

Since human life does not belong to her/him, thus in light of abortion ban the taking of woman's right of freely using her very private property (body) can be endorsed by the State. Abortion is allowed as long as it is intended to save the mother's life. After having thoughtfully considered that an abortion can jeopardize a mother's life, it is the sense of duty of the government to ban the abortion. Moreover, in pregnancy there have already been two lives that have to be saved and protected by the government. **Abortion ban** is not only a matter of **property taking** but also a matter of **life**.

To what extent is the connection between America's concept of laws and Talmudic religiosity? American concept of government and laws cannot be separated from the concept of society applied by the Puritans, who were the only possible link between the Talmud and the common law. The Puritans were religiously and intellectually attached to Hebrew. The Old Testament affected Massachusetts Bay Colony in matters of church and state and in area of criminal law. Students at Harvard College required four years to study Hebrew and the college library had a good collection of Talmud and rabbinical exegesis<sup>9</sup>. Hebrew had been prescribed for the Master of Arts degree at Cambridge since 1549. In the middle of the 17<sup>th</sup> century there were a group of English Hebraists, mainly comprising Puritans, who were experts in Talmudic sources (Levy, 1968: 440).

Although America is a secular country, but in keeping a balance between individual sovereignty in light of property right and the government's sovereignty

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<sup>9</sup> exegesis *n*: explanation or critical interpretation of a text.

for the sake of the public, explicitly or tacitly the religiosity has played crucial roles in American life.

### **II.3. Woman in Cultural Aspect**

At present American individuals are free to write their own marriage contracts and a woman is freely initiating to call for divorce. American laws have so far been more willing to give women autonomous rights of property. The relationship between husband and wife has been much reformed and the lawmakers tend to clarify the roles of husband and wife not based on a unity of person (Salmon, 1986).

Although a modern woman is no longer dependent on man almost in all aspects of life, but in cultural aspect—particularly of conservatism—a woman has never been free from a male realm when she has to get into a traditional marriage. The position of women can be revealed from the relationship between law and society.

The legal history seems to continue ignoring the woman's status of gender. Salmon (1986) said, to know the position of American women over their property rights, we have to ponder on three primary concerns: first, how the law affects women's life; second, the change of legal status of women; and third, the working of law in practice and changes of legal meaning. The control of property should be learned from the way of man and woman sharing power in family.

In the past a married woman during the colonies could not act independently without her husband's consent—written or tacit (Salmon, 1986). Without the consent from her husband, a woman could do nothing on her own before the law. This is why in light of legal and cultural aspects; a wife's request for abortion should be in consent of her husband.

In regard of the law on abortion ban, the lawmakers (Congress) may have developed a legal system by adopting the cultural values in the society. From time to time, lawmakers would have improved the legal system by adjusting to the contemporary values in the society. Colonial lawmakers deviated from English common law in order to adapt the then local customs. In the era of the colonies, the Puritans had stipulated a law on family property based on their societal values. When necessary they would freely revise the English common law (Salmon, 1986).

In that regard we can say that America's current legal system must have



adopted much of the concept of legal system that had been well-established by the Puritans, who were purely patriarchal in cultural aspect. It was logic because from the beginning it was the community of the Puritans who initially established a solid form of their own governmental administration in colonial era.

The Puritans would never give a wife a legal status equal with her husband's. For them a legal system of separate estates—as applied by England—would create a practice of informal divorces (Salmon, 1986). A good family needed a law that bound husband and wife together. A family should be maintained on a loving, considerate, and interdependent basis. A good Puritan woman should trust her husband to take care of her. By making women more dependent on husbands and children, they hoped to strengthen the unity of family. The Puritans pronounced that:

‘our Ribs were not ordained to be our Rulers: They are not made of the head to claim Superiority. ... They desert the Author of nature that inverts the order of nature. The woman was made for the man's comfort, but the man was not made for the woman's command. Those shoulders aspire too high, that content not themselves with a room below the head’ (Salmon, 1986: 9).

Salmon (1986) elaborated that women often chose not to make use of any means of protection designed for their benefits such as separate-estates<sup>10</sup> or conveyances<sup>11</sup> because being free would frighten them in colonial—and early national—periods. But, when a husband was violent or uneconomical, a woman started to seek to manage her own financial dealings. But it was much believed by the Puritans that a financial autonomy of woman would generate a threat to the happiness of family rather than becoming a safety instrument for wife.

America's contemporary legal system on marriage is more influenced by the legal practices in Northern rather than Southern colonies as further elaborated by Salmon (1986), who said that the Northern colonies emphasized on family unity, therefore their lawmakers ignored or changed the English common law, particularly the provision on separate estate or conveyances. But the Southern colonies were not based on such high ideals and tended to follow the English common law; they did so because of lacking ideological commitment to change. Most Southern colonists came to America solely for financial reasons. They felt themselves to be inferior to the English in culture, lifestyle, politics and law (later on in American Revolution,

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<sup>10</sup> separate possession of land property.

<sup>11</sup> conveyance *n*: a legal paper transferring ownership of property.

they became Tories<sup>12</sup>).

In the Northern colonies, the Puritans then liberalized a divorce law because they regarded a marriage was a mere civil contract rather than a sacred union (Salmon, 1986): A wife was allowed to seek a divorce based on adultery, desertion, continual nonappearance of no information, and cruelty of the husband. This legal breakthrough was never accepted by the Mother Country. For Puritans, an absolute divorce could benefit the society by diminishing dysfunctional marriages. This is why up to now America allows a divorce of marriage. The cultural principle of the Puritans has been much admired by the contemporary lawmakers.

The policy of allowing a divorce was actually demonstrating cultural values of paternalism (Salmon, 1986). The reason was that the law had given a man so much power over his wife, consequently there had to be a sense of obligation to protect a wife from an abusive husband, particularly when there was a risk of ignoring the right of wife over the family property. The fact revealed that a woman could never be independent from her husband because the influence of husband was excessively widespread.

According to Puritans, a family was essentially harmonized in a single interest of love and unselfishness (Salmon, 1986). An idea of separate estate was never acceptable to them because a good Puritan wife would never seek independence or control of marriage. A wife submitted lovingly to her husband's authority and decision about property and a separation should not be drawn between husband and wife. A generous wife would never allow herself to keep her own property from man she loved. Husband and wife were of one property, thus in light of abortion, the wife's right of her property (body) also was the right of her husband. The baby in her womb also belonged to her husband.

Salmon (1986) further elaborated that as basically adopted from the English common law, the legal system of America, in particular during the era of colonies, gave a widow a right of dower<sup>13</sup> i.e. one-third of the real property owned by her husband at any time during the marriage. The husband could devise the dower to more than that, or even to his whole estate. But dower could not be less than one

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<sup>12</sup> Tory *n, pl* Tories: an American supporter of the British during the American Revolution.

<sup>13</sup> dower *n* 1: the part of a deceased husband's real estate which the law gives for life to his widow 2: DOWRY.

third. The right of dower was of life interest only, meaning that a widow could not sell or devise the dower property. She could only enjoy the proceeds from the property during her life.

The dower indicates that the wife's right share in family's property was at least one-third; also, the husband could devise the dower to more than one third, or even to the whole (Salmon, 1986). If a husband sold land without the consent of his wife, the wife could sue for the return of property in dower during her widowhood. This is why a buyer of property usually sought for the consent of wife when a husband sold his property.

In New England women had enjoyed the benefits of laws on absolute divorces whereas the women in the southern colonies had not, because most southern states still followed the laws of England by declining legal divorces (Salmon, 1986). Salmon said, since the American Revolution, daughters and sons have been regarded equal in intestate<sup>14</sup> laws. Even a certain state like South Carolina has made a wife almost equal with husband in case of inheritance.

According to Salmon (1986), although the reform of property right has been in progress, but woman's right of property—particularly her right to freely use her very private property (body)—will be restrained by the legal concept of unity of persons in marriage based on the old cultural values. In legal aspect the marital value of the unity-of-persons concept has lost influence, but it forcefully reappears in cultural aspect.

As long as the old values of culture remain to exist, a woman will never be free to use her right of abortion. It seems that the old values will never extinct because Americans are proud of and will keep well those values which have long established their national identity.

#### **II.4. Property in Political Aspect**

The rule of justice requires protection of property because justice cannot generate from a majority rule, which is not resulted from a law of nature but from a pack of interests (Nedelsky, 1994). That was a notion by James Madison when fixing American Constitution.

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<sup>14</sup> intestate *adj*: not disposed of by will <~ estate>.

It would be impossible for those of no property to enjoy a full share of political liberty. The value of property is in fact residing in its protection. For the purpose of protection, people have joined together under a society. The authority of the society will make sure that every individual is free to use his/ her own property.

When submitting the draft of the Constitution, Madison actually did not ponder on the importance of democracy but worried about the emergence of tyranny by the majority (Nedelsky, 1994). Tyranny by the majority would have an ugly face. Take for instance, when 51-percent votes win an election, would it be reasonable if the remaining 49-percent votes were simply neglected (USDFA, 2004)? For Madison, a government by the majority of people would breed a tyranny. This is why such a government had to be constrained. The only tool that could work naturally to limit the power of such a tyrannical government was to protect individual private property because it was possible for every individual to own property. In that way every individual would enjoy the benefit of the protection. The rights of individuals will be in jeopardy if the power of the majority, which can definitely oppress the minority, is politically absolute (Nedelsky, 1994). The power of the majority in fact was an enduring intimidation to American natural rights of life, liberty and property whereas the protection of property would be to the lasting benefit of every individual.

In American politics the right of participation was only subordinated to property right. For Madison, in American democracy the participation of people in a great number would be something undesirable:

He thought it was safer to control the power of the 'people' at the foundation of the government, rather than try to undo undesirable outcomes after the fact. ... moved him to make sure that the participation of the people was rendered as safe—which meant as ineffective—as possible (Nedelsky, 1994: 206-7).

Property indeed is an excellent symbol of individual liberty since—as referring to Locke—every man has a property in his own person and this no body has any right to but himself and the labor of his body, and the work of his hands are properly his (<http://www.constitution.org/jl/2ndtreat.txt>). Its powerful symbol will lose its meaning if there is no protection to the right. On one hand, the basic purpose of protecting private property is to shield individual right against government's intrusion of collective rights, but on the other hand the private property will require a protection by the government which is created based on a collective deal. In this

regard a paradox emerges: the rights of private property will naturally control an authoritative government while at the same time it requires a powerful government to protect those rights. In light of property takings, a government will be sovereign (powerful) if it has a power to take individual properties for the sake of the public.

In political—as well as economic—aspect the definition of private property has expanded, thus the criteria of property takings will also expand. As aforementioned, appropriating land property and banning abortion by the government can be categorized “property takings”, thus the sovereignty of the government will be justified from its capacity of, say, taking land property and banning a woman from exercising her right of using her very private property (body) for the sake of the public following a due process of law and just compensation.

Although Americans were religious but in designing the Constitution the issue of religion was not a focal point. It is property that has so far created a problem of inequality while religion has not (Nedelsky, 1994). How come? It is because every individual has unequal amount of property. Religion has hardly been a matter of attention to the federal legislature because it does not pose a central problem of restricting governmental power. Thus, in political aspect, it is not religion that can solve the problem of abortion but it is the political concept of individual rights (life, liberty and property) that can give the best solution.

Property is a symbolic force of American freedom and is central to American value and integrated in the country’s constitutional system. Its constitutional meaning is naturally to limit the power of government that might become a tyranny. The big concern of the Founders was to guarantee individual liberty in using his/her private property (Nedelsky, 1994). Property has indeed become a basic individual right and fundamental value of American politics since hundreds of years ago. It is true that religious people are deeply concerned on the issue of abortion, but it will be absurd if finger-pointing at them that they have to be responsible for solving the case of abortion ban because religiosity does not work in a secular America. Property takings in abortion ban and *eminent-domain* power have to be solved in a political domain.

The tension between individual autonomy and collective power is inherent in human life. Collective power is found in a democratic system but the value of democracy cannot be used as a foundation to justify a good government in America.

Collective power deriving from democratic values should be balanced with the values of individual autonomy (Dean, 1983). Although individual autonomy can be threatened by a democratic outcome but a democracy still is necessary to protect individual autonomy.

As said by Dean (1983) that in a liberal country the outcome of democracy could be detrimental to individual autonomy, thus since an elect government of America is an outcome of democracy, it also is possibly *detrimental* to individual autonomy in light of property takings in the cases of abortion ban and the power of *eminent domain*.

## II.5. Property Takings

The prohibition against takings of property for public use without just compensation has been practiced and legalized by most states as shown in their respective constitutions as well as in the Fifth Amendment of the U.S. Constitution (USDFA, 2001). The provision has been a barrier to governmental power against individual right of property. The governmental power is restricted by a provision reading “nor shall private property be taken for public use, without just compensation” ([http://en.wikipedia.org/wiki/Private\\_property](http://en.wikipedia.org/wiki/Private_property)). The interpretation is that any taking of property shall be only for public use. If the purpose is not for public use, the government has no authority at all to take a private property even it provides good compensation. If the taking is indeed for public use, thus the government can employ its power of *eminent domain* and offer a just compensation. Disappointingly, a precise explanation of “public use” has never been clear-cut—let the court decides—thus, what has to be pondered on is the issue of “just compensation”.

The Court has not abandoned its traditional concept of property right: it is a barrier to governmental abusive power in its actions of takings and illicit invasions of individual rights (Nedelsky, 1994). The genuine purpose of government cited in the Constitution is to protect property in considering that property does not exist without a mechanism of protection by the government.

The complexities of modern society have to date articulated a relationship between government and private property (Sloan, 1988). In the past the use of private property by individual was wholly autonomous but today the use of private

property is highly interdependent and the role of the government has so far expanded. State intervention can be tolerated as long as it is connected with the improvement of the public life.

The interpretation of the “takings” clause of the Fifth Amendment stating that “private property shall not be taken for public use without just compensation” has been debated from time to time. Most debaters ponder on the purpose of the Constitution in protecting individual right over his/ her property and due process. Generally speaking, the federal government usually sets up minimum rather than maximum standard of protection of land property (Sloan, 1988).

In a due process the rights and duties of people and governments in ordinary relations are intensely concerned. There is a loud cry for maintaining the protection of individual right of property particularly when the government is violating or threatening to violate the right when exercising its authoritative power.

In exercising its power of *eminent domain* the government cannot ignore the Fifth Amendment stating that “No person shall ... be deprived of ... property without due process of law; nor shall private property be taken for public use, without just compensation.” The U.S. Supreme Court has extended the Fourteenth Amendment due process of clause from the federal government to the states (Sloan, 1988: 15). In fact, most state constitutions have provisions stating that private property cannot be taken for a public use without just compensation.

The power of *eminent domain* is inherent in state sovereignty because without such a power a sovereign state can hardly exist. The power of the society as represented by its government should be superior to that of a selfish individual, who might use his/ her private property in his own way against general comfort and security of the society (Sloan, 1988: 16-17). In light of abortion ban, there might be a selfish woman who might use the right of her very private property (body) in irresponsible manners by aborting her pregnancy for certain purposes which are against the societal comfort. A normal—not deranged—woman will love her unborn baby and keep trying to keep the baby alive in her womb. A deranged woman will of course have to be in the custody of her husband, parents, or the government because she cannot make a good decision.

In light of property taking by *eminent-domain* power for the public use, theoretically it is unfair to individual because s(he) suffers from a loss while the

public enjoy the benefit. This is why the government is obligated to pay compensation for the loss. Theory also cites that when a government regulation is burdensome that an owner is deprived of reasonable use of his/ her property, (s)he may claim that a taking occurs (Sloan, 1988). Thus, a taking is not always in form of appropriating property; it also is restriction of right to use property by government's regulation. An abortion ban is indeed to restrict woman from using her body, thus it also is a taking.

The U.S. Supreme Court says publicly that under the Just Compensation Clause a land owner may seek for compensation from the government if (s)he can prove that a regulation has caused a "taking" (Sloan, 1988). A governmental regulation can be so burdensome to individual that (s)he can no longer use his/ her property appropriately. In short, if a governmental regulation makes happen an impermissible taking permanently or temporarily, the government has to compensate for the "taking".

Since human body is his/her property, consequently the regulation to ban abortion should be regarded as a "taking". But the question is: is the owner barred from an appropriate use of her *property*? Is the regulation so burdensome so that the individual has to suffer from a loss of using her *property*? Does the public enjoy a benefit of such a "taking"? It will of course be subject to "due process of law".

Conservatives—particularly those of the religious groups—have a notion that human body doesn't belong to him/ her but to God (<http://en.wikipedia.org>). In that regard, although a woman's body (body and life are inseparable) is her property, but it does not belong to her but to God. She cannot claim to be free in using the body in irresponsible manners but in accordance with God's. Unfortunately, this religious notion does not work in a secular and pluralistic country. There has to be a more acceptable argument and abortion ban has to be solved in political aspect.

Abortion ban is in fact endorsed by the Supreme Court. What made the Court support the ban? It is true that the Court has to be free from political justification but it cannot be denied that the Court also is one of governmental branches deriving from political processes. Court's justification will be further elaborated in Chapter III.



## CHAPTER III

### THE PARTIAL BIRTH ABORTION BAN ACT 2003

#### III.1. Political Conservatism in Abortion Ban

American values of politics refer to a notion by Alexis de Tocqueville, a French observer of politics and society, who visited America in 1835. According to him, liberty cannot be well maintained in democracy because a democracy will generate a tyranny by the majority (<http://en.wikipedia.org/wiki/Libertarianism>; see also Appendix 3). A mass tyranny is more difficult to tackle rather than a tyranny by government. This is why an abortion ban by the government is considered more benevolent than a direct ban by the majority of people, which is perceived to be more oppressive and tyrannical.

In a democracy the power by the people in majority is both physical and moral while repression by government is only physical (Corbett, 1982:1). Tyranny by a government from a process of democracy can be prevented by certain institutional devices such as separation of power, check and balance, Bill of Rights, and other preventative measures, whereas tyranny by the majority will be unstoppable.

The conservative endorses a governmental ban but they also favor a concept of individual liberties by John Locke (see Appendices 3 and 4). John Locke developed a version of a social contract as rule with "the consent of the governed" derived from Natural Rights based on a labor theory of property citing that each individual in the state of nature "owns" himself and, by virtue of his labor, owns the fruits of his efforts (<http://en.wikipedia.org/wiki/Libertarianism>). In securing those natural rights a government is instituted among the people.

Whenever a government becomes destructive to individual natural rights, the people can alter or even abolish such a destructive government. This notion is part of American Declaration of Independence. People make a social contract by forming a government in order to protect their individual basic rights. If the government cannot protect the rights, the people can promptly replace the undeserving government. Aside from protecting individual rights the government has to conduct relations with other societies (nations).

The primary role of government is to protect individual's natural rights; other roles have to be minimal. Such roles are endorsed by both conservative and

libertarian. The conservatives consider that a government has to be strong so that it can protect those individual rights, whereas the libertarians favor a weak government since a strong government is regarded a threat to individual liberties. For libertarians, abortion ban is a threat to woman's liberty over her body.

In principle most Americans—both conservatives and libertarians—believe in a notion that people are equal (men are created equal) but in practice they accept gender inequalities (Corbett, 1982). It can be proved from a prolong debate over the ratification of the proposed Equal Rights Amendment (ERA) citing “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex”. Although the government can accept a principle on gender equality of rights under the law, but most people in majority will be reluctant to accept the gender equality of rights. Women of the conservatives are reluctant to accept gender equality in all aspects of life, whereas female libertarians are not. Most American women are of conservatism (see Appendix 5 on Map of Conservatism), thus they will likely accept the abortion ban.

According to the conservatives, freedom can be given to an individual whose opinion or lifestyle is in conformity with the prevailing societal and political norms. Conservatives condemn those who are out of accord with the country's prevailing norms. Most conservatives think that atheists, homosexuals, socialists and communists are un-American and culturally not conformed ([http://en.wikipedia.org/wiki/American\\_conservatism](http://en.wikipedia.org/wiki/American_conservatism)).

The conservatives believe that a true freedom is a freedom to hear and speak only the “truth”. What is the “truth”? Truth refers to American virtues based on Protestant Ethics practiced by the WASP (White Anglo-Saxon Protestants) since long time ago. Truth is rooted in divinity not in human rationality or reason. False political, social and economic views do not deserve hearings; therefore an undeserved individual has to be socially controlled. Abortion ban indeed is a kind of social control. A social control is allowed due to fragile nature of humans:

... the right wing of the political spectrum, which places ...greater emphasis on social controls over the individual. ... the right wing's view on human nature as basically bad (or sinful) and irrational (Corbett, 1982:16).

It seems that the extreme-right conservatives oppose any freedom of expression due to cultural nonconformity whereas the libertarians disagreed and

asserted that a freedom of expression would be beneficial for searching ultimate truths. If an opinion was silenced, someone had to be sure that (s)he was absolutely incorrect. However, it would be impossible for a person to be never wrong.

A silenced opinion can be partly true, and there has to be competition in different opinion in searching for a complete truth (Corbett, 1982). Suppose that a silenced opinion is entirely wrong and the prevailing opinion is utterly true, there will be a risk that the prevailing truth can turn into a dogma if not challenged in open discussions. A dogma is ugly when applied uniformly in a pluralistic society. This is a critique against religious conservatives, particularly the fundamental right wing. In light of the abortion ban, the argument should not be based on a dogma, there has to be the most acceptable argument based on legal and political aspects.

### **Religion in Politics**

In practice most Americans neither strongly support nor hinder religious freedom. In principle as seen from the Constitution, America supports the rights of religious—including Atheistic—freedoms. As a secular country, America endorses the wall of separation between church and state but those, particularly the Atheists who are outside the Protestant-Catholic mainstream, have a propensity to be ignored (Phillips, 1982). An analytical evidence of the ignorance can be seen from the words *In God We Trust* on coins and paper money. Some say, it is offensive to atheists. Most American atheists favor libertarianism; they hardly believe in religious conservatism. In this regard, instead of religious notion the conservatives have to provide a more logic argument in upholding their favored abortion ban.

Religious and moral issues cannot be ignored in American politics. Southern fundamentalists and Northern pro-life voters have been habitually associated with politics (Phillips, 1982). Conservatives believe in hard work with a philosophy dating back to the Puritanism on tough work, frugal living and piety. They believe some nations which lack learning and virtues will perish while those with the greatest moral powers will win. As a consequence, America with its greatest moral power has to ban a practice of abortion because in a moral view an abortion means killing infant (fetus); infanticide is a moral wrong.

Conservative theology was fanatically associated with the economic principles of capitalism during the frontiers. There was interrelationship between capitalism

and faith, which then created a familiar definition of corporate theology. During the frontiers the Calvinists believed that economic freedom were reflecting God's presence as frequently cited by historians who were experts in Protestantism that there was a strong link between religion and capitalism (Tawney, 1962). Since capitalism is much connected with the generation of properties (capitals); in light of abortion ban, hence the property taking cannot be separated from the conservative values of religiosity.

Religious conservatives were furious at a decision by the Federal Court which restricted school prayer and Christmas displays in public quarters while permitting abortion, vulgar and nude dancing, and homosexuality (<http://en.wikipedia.org>; see also Appendix 4). It can be then presumed that the endorsement of abortion ban was because of political conservatism, which was favored by the religious voters and elders in rural and suburban areas.

In light of abortion ban, of course a property taking cannot be separated from an economic concept of capitalism practiced by the conservatives, which has also been embraced by electorates from state to state. To be operational, its economic principle has to enter the political sphere as seen from a regressive property tax offered by the conservatives and favored by business players mostly comprising libertarians.

Conservatives also link faith and altruism<sup>15</sup> in capitalism and don't believe in rationality and planned supply and demand. Free market works because people's needs are well understood:

'Capitalist production entails faith ... Search and you shall find, give and you will be given unto, supply creates its own demand. ...The socialist economy proceeds from rational definition of needs or demands to a prescription of planned supplies. ... Under capitalism, the ventures of reason are launched into a world ruled by morality and Providence. The gifts will succeed only to the extent that they are altruistic and spring from an understanding of the needs of others. ...' (Phillips, 1982: 140-1).

For conservatives, economics is based on their virtues of religiosity and to make the virtues workable in the society, they have to enter the politics. Thus, although it is not directly correlated, religiosity is found in the politics. Religiosity is politically rationalized and has to be acceptable under the Constitution.

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<sup>15</sup> altruism *n*: unselfish interest in the welfare of others.

Phillips (1982) disclosed, as reported in 1977 there was growing evidence that America was in an early stage of conservative—particularly religious—awakenings as seen from the emergence of evangelical<sup>16</sup> movement. Based on a survey, he revealed that out of the 350 to 450 churches founded in New England almost all of them were evangelical and many evangelicals are conservative in culture and politics. The data of the survey disclosed that more than 90 percent of Americans still believed in God and more than 50 percent said that religion was very important in their lives (see also Appendix 5). Explicitly or tacitly it is for sure that the political conservatives were the *actors* who devised the abortion ban. It was condemned by the libertarians but they have to be able to prove that it is *property taking* that makes the ban unconstitutional.

### **III.2. Abortion and Cultural Conformity**

At present in the United States there are no great differences between Americans who observe Protestantism and Catholicism viewed from cultural aspects (Phillips, 1982). Both believe in individual achievement, which is reinforced by Protestant Ethic. Culturally Americans have to work hard to achieve their economic successes. Hard work is virtuous and economic success is indicator of virtue. American cultural values took roots in Calvinism, which was adopted by the Puritans during the frontiers. For conservatives, culture is the reflection of religiosity. Since an abortion is morally wrong based on religiosity, thus it is not-conformed with culture. The conservatives call for the government's sense of responsibility of prohibiting all conducts of cultural nonconformity, including the practice of irresponsible abortion.

Conservatism is a home of religious orthodoxy or fundamentalism of Christian dogma. Orthodox or fundamental Christians believe that miracles described in Bible can actually happen and everything in Bible is indisputably true and accurate (Ruthven, 1989). Such a tenet is supported by American evangelicals (members of Protestant churches emphasizing the authority of Scripture and the importance of preaching as contrasted with ritual). In that regard, most conservatives believe that

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<sup>16</sup> evangelical 1 : of or relating to the Christian gospel esp. as presented in the four Gospels 2 : of or relating to certain Protestant churches emphasizing the authority of Scripture and the importance of preaching as contrasted with ritual.

cultural conformity is in compliance with the Bible. Abortion is not in compliance with the Bible; hence it is conclusively cultural nonconformity.

Abortion has so far become religious and moral controversy over the status of fetus and woman's right to terminate pregnancy. It is alleged that in America the politics of abortion is dictated by men, particularly the religious conservatives. For this reason, it is then assumed that the ban is merely a tug of war between men and women or between genders. It is absurd to make such an assumption because many conservative women disagree at abortion and libertarian men condemn the abortion ban. Thus, definitely it is not a matter of gender but it must be a matter of cultural conformity.

Due to cultural conformity, a woman has to be restricted to have an access to terminate her undesirable pregnancy. It indeed is oppressive to woman whose right of her body is restricted. Restricting the right of body (property) is no less than a "property taking". So, what is the compensation for woman? What is the government's moral responsibility in this regard?

American law prohibits federal assistance for abortion even in case of rape and incest, but allows abortion in case of threat to maternal life (Jacobson, 1990). Opponents try to restrict abortion by highlighting religious and moral grounds of American culture. Culture refers to a shared pattern of behaviors and attitudes in the society—although there are also subcultures of the minorities. The shared pattern includes politic, economic, social, religious, and moral values. Subcultures habitually refer to the cultural mainstream of America. If culture is the standard of banning the abortion, thus American culture is oppressive to minorities. In light of abortion ban, isn't it a kind of cultural tyranny? The concept of cultural conformity in banning abortion seems to be unacceptable in a liberal and pluralistic country like America, which also has to accommodate minorities.

Although abortion in second trimester has been allowed, but the U.S. Supreme Court still gives support to states that strictly regulate the procedure of abortion. Many states don't favor abortion. In years 1989-90 some states made restrictions of abortion rights: Pennsylvania required spousal notification and counseling based on opponent standpoint, New Hampshire and Connecticut allowed abortion on request and others even banned any *virtual* abortion ([http://en.wikipedia.org/wiki/Partial-Birth\\_Abortion\\_Ban\\_Act](http://en.wikipedia.org/wiki/Partial-Birth_Abortion_Ban_Act)). Abortion is really a social discomfort to American

public.

Abortion is much connected with cultural and economic pressures. From medical standpoint, abortion is the most effective method of birth control that supports national family planning but American conservatives despise it. Certain countries make use of abortion for family planning, but definitely it is not for America. Women with low incomes in America are of the highest rate of unwanted pregnancies due to unaffordable purchase of contraceptives (Jacobson, 1990). Abortion is a really a *headache* to the U.S.

Also, it is possible that the libertarians (or liberals—Ed) feel uncomfortable with abortion, but they oppose the government's intervention in woman's right to terminate her unwanted pregnancy. It can be proved that in the House, the final legislation was supported in 2003 by 218 Republicans and 63 Democrats; in the Senate the bill was supported by 47 Republicans and 17 Democrats ([http://en.wikipedia.org/wiki/Partial-Birth\\_Abortion\\_Ban\\_Act](http://en.wikipedia.org/wiki/Partial-Birth_Abortion_Ban_Act)). Unfortunately, the libertarians cannot offer the government a solution to solve the social problem. Will the government leave it as is? The religious conservatives become uneasy and call on the government to show its sense of responsibility. Then, they play the politics of abortion based on religiosity.

Based on traditional values, women were taught to accept their specific role; they even felt good about their “inferior” status in family. Women had no wish to be liberated as proved from a historical reluctance against feminist liberation. Only few, particularly those of the libertarians, wanted liberation while others preferred to adopt conservative values. Conservative women were comfortable with their homemaking roles and would be upset with a substantial change in their circumstances (Corbett, 1982). The traditional culture adopted by female conservatives has so far made them agree with abortion ban although the ban means a restriction of their own rights.

Conservative women share intolerance against other women because they favor nothing from full liberation. They ponder on cultural conformity and don't want to be fully equal with men in term of culture. Statistics revealed:

From 1958 to 1969, men more willing to vote for a woman for President than women were... women were more opposed to a woman being President than men were ... women have also been more opposed to ratification of the Equal Right Amendment (ERA) than men have (Corbett, 1982: 93).

Culturally or naturally women and men are different, but for conservatives the difference is regarded a source of strength—not otherwise and this notion of difference is upheld and defended (Corbett, 1982). Women have different values, temperament, and concerns and cannot be identical with men. If women sacrifice their distinctiveness, they will simply imitate men and lose their own unique identity.

### **Cultural Equality and Myth**

The ultimate purpose of feminism should be assimilated or integrated with the existing concept of society. A cultural revolution campaigned by radical feminists that men and women are equal in all aspects of life will very unlikely be workable. Most conservative women in the middle and upper classes are committed to an idea of different roles between men and women (Corbett, 1982). In light of abortion, a conservative woman agrees that her husband is involved in deciding to terminate her pregnancy. But a radical feminist will push a man to stay away from the right of her very private property (body). A radical feminist will likely say, “Every individual is fully responsible for his/ her own body, so stay away from my very private matter.”

No consensus on equality between man and woman has so far been reached because it is impossible to abolish all distinctions of sexes. Corbett (1982) said, an idea that women can chase a cultural agenda different from men’s is bizarre. It remains unclear on what it means to be a woman and what it means to be equal with man. What a woman has to ponder on is that she has to secure her right to vote in politics, meaning that man and woman are equal in political votes. In light of abortion ban it indeed is not about gender inequality or male domination over females.

A concept of equality between men and women is a mere myth: If the ERA were ratified, it would function pointlessly (Chafe, 1991). If revolution of gender equality could happen, who would be the common foes—men? If men and women are sexually equal, what would the rest rooms be posted with—unisex?

As proved from the structures of their respective bodies, the function, the physical strength, and the capacity of endurance, we can say that man and woman are different. It will be hardly possible for a woman to be fully similar or equal with



man. Inequality between the two sexes will exist for good. To root out the factors of inequality means to wipe out the cultural values of America.

Woman with a job will always have a dual role as worker and homemaker. Based on polling by George Gallup in 1943, many mothers resisted an idea of placing their children in the care of strangers and when asked whether they would take jobs if their children were cared in a nursery provided by the government with free of charge, only 29 percent said yes, while 56 percent said no (Chafe, 1991). Chafe (pp.146-7) said, many mothers whose children need a day nursery doubted about an idea of institutionalizing the supervision of children with child-care charity and relief. A national movement to set up a day-care center had been much opposed by working women, it means that women will never want to lose their unique identity as nurturer. Differences or inequalities are part of their culture and being in cultural conformity means being in difference or inequality with men.

Women who work are alleged of causing juvenile delinquency and their perpetual absence at home for the sake of career can directly threaten the stability of families. A family is the nation's primary social institution and home is the basic institution in America (Chafe, 1991). The majority of American conservatives—both men and women—oppose to wives who work for their careers if their husbands can support the families.

Chafe (1991) added, the conservative definition of sexual role has not been challenged: husband's role is a provider while mother is responsible for raising children. For economic reason the employment of woman is acceptable but for the reason of cultural equality it is strongly opposed. The primary role of woman is to be a mother, other roles are secondary. Most American conservatives prefer to retain a traditional definition between husband and wife.

Conservatives hardly believe that woman's right of career was more important than her duty as a mother. It could be proved from the displacement of women from skilled jobs during wartime, which did not create confrontational protests, and at the time it was commonplace for women to accept lower pays on a sex-stereotyped basis (Chafe, 1991).

Women could neither reject cultural stereotypes nor develop lives of their own. They are trapped in a cult of true womanhood in society. Feminism that embraces multiple concerns of issues from abortion rights, equal pay (except for equal pay for

equal service) to the ERA will very unlikely be endorsed by the conservatives.

The Supreme Court's decision in *Roe v. Wade* in 1973 stated that women should be able to decide, in consultation with their physician, on whether to terminate their pregnancy during the first and second trimesters and no state was allowed to constraint that abortion freedom. In a 7-to-2 decision the Court affirmed that a woman's freedom to control her own body is regarded as fundamental right, which is guaranteed in the Constitution ([http://womenshistory.about.com/library/etext/gov/bl\\_roe\\_a.htm](http://womenshistory.about.com/library/etext/gov/bl_roe_a.htm)). The decision had caused a wrath among the conservatives

A powerful counterforce against the Court's decision was growing amidst the society. Conservatives accused, it was an assault against American precious morality. They accused an anti-religious force—secular humanism—of having placed human beings ahead of God. The whole society would be destroyed: there was a war against traditional values that have so far made America great ([http://en.wikipedia.org/wiki/Partial-Birth\\_Abortion\\_Ban\\_Act](http://en.wikipedia.org/wiki/Partial-Birth_Abortion_Ban_Act)). For conservatives, women are to transmit the values of their culture to the next generation. A mother who kills her unwanted child will destroy the very foundation of American family (Phillips, 1982). Such a mother is selfish.

In 1980s the administration of Ronald Reagan was filled with the majority of conservatives and as the consequence of his appointees at the judicial, the Court moved to restore various limitations on abortion and threaten to remove the *Roe v. Wade* decision ([http://womenshistory.about.com/library/etext/gov/bl\\_roe\\_a.htm](http://womenshistory.about.com/library/etext/gov/bl_roe_a.htm)). It was obvious that the politics of abortion was played by the conservatives.

Despite of no fundamental change in cultural principle of gender equality, at present women and men have become approximately equal; men are willing to be more nurturing and loving in family (Chafe, 1991) and it is believed that today men are doing half of household work and childcare. From time to time female and male jobs have become almost equal.

Women remain different from men because it is unnecessary for a woman to seek for behavior or value similar to man's. It can be proved that similar employment for man and woman has no correlation with gender liberation and equality (Chafe, 1991). Being different should not make a woman overthrow a man from his patriarchic position. Also, abortion ban is not a matter of patriarchic culture

and not a matter of equal rights between man and woman. It is cultural conformity, which is crucial in deciding to ban abortion, but the argument whether or not to accept the ban shall be based on the most crucial and acceptable justification under the Constitution.

Chafe (1991) elaborated, in cultural conformity there are two taboos of making changes: The first is *societal separatism*. A conservative woman is taught to think herself as part of her society; whatever her background she cannot be separated from her society. A separate sphere of woman can be accepted as long as she is submissive to the concept of society. The second taboo is communalism. America is a land of individual liberties in social inequalities. The country provides every individual an equal opportunity to pursue happiness. Equality of condition in different background is bizarre to Americans.

Abortion ban indeed is not a tug of war between men and women. For conservatives, it is cultural conformity that inspired them to ban abortion. However, a justification of property taking based on cultural (religious) argument does not work in a pluralistic America, which comprises individuals of different faiths including atheism.

### **III.3. Rights of Life and Property**

Abortion remains a forceful issue in a number of states due to religious polities<sup>17</sup> that show their competencies in political arena (Phillips, 1982). Millions of religious activists merge into a political army that is ready to be mobilized when necessary.

In light of abortion ban, most religious conservatives have a deeper concern on the life of the baby (fetus) than the woman's right of freely using her very private property (body). Moreover, they believe that woman's body doesn't belong to her but to God.

In 1980s two foremost religious groups i.e. the Moral Majority led by Rev. Jerry Falwell and the Religious Roundtable led by Ed McAteer emerged in political arena (Phillips, 1982). A political partnership of Protestant and Catholic was emerging to tackle the abortion issue with their religious and moral agenda. Phillips (pp.190-1) said, cultural conservatives comprising Evangelicals, Catholic, Mormons,

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<sup>17</sup> **polity:** a politically organized unit.

and other denominations<sup>18</sup> worked together to battle their common foe i.e. the secular progressivism, which tends to remove the country's culture based on the Judeo-Christian values.

To know what concerns are highlighted in the cultural politics, two focal points i.e. (1) life v. property and (2) woman's position are worth attentions:

### **III. 3. 1. Life v. Property**

The "rights and wrongs" in American politics of abortion have been dominated by the conservatives rather than the libertarians. Those who oppose abortion argue that a fetus or a just-born child has equal right in the society and such an imposition was attacked by those who ponder on the reproductive right of woman:

...That a pregnant woman has within her body an organism with the potential of achieving personhood, barring miscarriage, is not disputable. That a single-celled blastocyst, a 2-week-old embryo, a 10-week-old fetus, or a 20-week-old fetus all have 'rights' equal to a child already born, and that these 'rights' are preeminent over the reproductive decisions of woman who carries that potential person, is very much in dispute. There is neither cultural nor theological unity on the issue of these rights (Jacobson 1990: 53).

Libertarians accused the religious conservatives of using the issue of abortion as a political tool. Jacobson (1990) said that in California the anti-abortion groups pressured the state to slash funding from 500 family planning clinics, excusing for preventing a great number of abortions taking place in the clinics. He revealed from a study that a funding slash had impacted about 86,000 pregnancies in California, at least half of which would have been aborted. A \$24 million budget had been slashed to zero and then restored to \$20 million.

Jacobson (1990) further said, the pro-abortion condemned that the abortion itself was not the only target of attack by the conservatives. Whether it is right or wrong, the conservative camp remained persisting to view that from cultural and religious notions abortion is not in conformity with American society. Moreover, for the sake of free economics, the slash of abortion fund means a reduction of government's intervention in public sphere.

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<sup>18</sup> denomination *n*: a religious organization uniting local congregations in a single body.

How can a ban of abortion be acceptable in America? Let's see the Culture of Life of U.S. President George W. Bush when delivering his remarks on stem-cell research on August 9, 2001:

'I worry about a culture that devalues life, and believe as your President I have an important obligation to foster and encourage respect for life in America throughout the world' (Singer, 2004: 34).

What Bush wants to say is that America has to value life and it is the obligation of his government to protect any life in America—even throughout the world. For him it is an absolute duty of his government to protect life. He is not groundless that America has to protect life because the Fifth Amendment explicitly states, "Nor be deprived of life, liberty, or property..." and the Fourteenth Amendment states, "...; nor shall any State deprive any person of life, liberty, or property,..." Since it is the duty of the government to protect human life, the question is: what does 'human life' mean?

Science reveals that embryo is "human life". Embryos are certainly human, no matter how early in the development they may be. Embryos are of the species of *homo sapiens*. Scientists can tell when embryos are alive and when they are dead, thus as long as they are alive they are human life (Singer, 2004: 36-7). Hence, an abortion can be categorized an act of depriving human life and the government has an obligation to protect the life since abortion undeniably violates the Constitution. In this regard Bush's argument to ban partial-birth abortion—even to ban abortion from the early development of embryo—can be acceptable based on both scientific and constitutional evidences. One may accuse Bush of using his religious belief in endorsing his agenda to ban abortion as he frequently said, "I also believe human life is a sacred gift from our Creator". But in making a decision a U.S. President who uses his religious concerns will be accepted as long as his argument is logic and acceptable on a constitutional basis.

Singer (2004) argued there should be no religious ground in respecting human life. He disagrees at Bush, who sets up a boundary of life by encouraging a respect to human life. According to him, Bush's culture of life hinders a research that can save more lives. He said, "If you are on one side of the boundary, your life must be respected and protected from destruction, even

if that means hindering research that could save more lives.” Singer’s opinion is not in line with an absolute truth based on religiosity. For an absolutist a human life cannot be deprived just for the sake of saving many other lives. In religiosity human life is special and most American conservatives believe that human life (including embryo) is precious.

Singer (p.41) makes a misleading notion by saying, “One possible ground for drawing the line between the human being and the chimpanzee is that *we* are human and so we should protect all members of *our* own species, but we have no duty to protect members of *other* species.” American Constitution explicitly protects life, liberty and property but no part of the Constitution cites that there is no duty to protect other species. He further persisted on his *fallacy* saying, “If we rely on the bare claim that we are human and so should protect our own kind, we have no comeback against racists who maintain that they ought to protect their own kind—by which they mean members of their own race, but not members of other races.” Singer makes his own interpretation by referring to nowhere under the American Constitution. In light of abortion ban, Bush’s culture of life has been in accordance with the Constitutional provision on rights of life, liberty and property. Singer should give evidence that the Constitution cites that America has to protect its own kind of race.

From the beginning of fixing the Constitution the Founding Fathers had no problem with religiosity as proved from the wording “In God We Trust”. Singer seems to be uneasy with religiosity in America. What the Founders concerned on was the protection of individual rights (life, liberty and property). As a U.S. President Bush is not groundless in using his culture of life in making a decision to ban abortion by referring to his country’s Constitution, which protects the rights of life, liberty and property. Since fetus is proved to be human life, thus it shall be protected.

Bush asserted that if embryo is human life, it is precious and must be protected. Singer (2004) argued:

If human life is more precious than non-human life, it is because human possesses higher mental capacities than nonhuman ... Embryos, however, are utterly lacking in such higher mental capacities. Hence if it is the possession of higher mental capacities that marks the line between beings

whose lives need to be protected and beings whose lives do not need to be protected, then human embryos—and fetuses, for that matter—fall on the wrong side of the line.

Singer justifies by himself that human is precious because of higher mental capacity. Does he ever consult Bush whether or not his justification is endorsable? Does Bush really refer to higher mental capacity in deciding the preciousness of human life?

I am recollecting a movie titled *Mercury Rising* about a boy who suffers from autism<sup>19</sup> but is capable of cracking a complicated puzzle. The autistic boy managed to make an access to a very top-secret phone line of the FBI. His capability of accessing the FBI phone line will definitely jeopardize the national security of America and, according to an FBI top agent (played by Alex Baldwin), the existence of the autistic boy will risk millions of lives of Americans. He, as mastermind, killed the boy's parents but the boy could be saved by a cop (played by Bruce Willis). The moral of the story is that the FBI as the representative of the U.S. Government shall have no right to deprive the boy's life just simply because of saving millions of lives. The life of the autistic boy who suffers from mental disorder is precious and has to be protected; it is not simply a matter of higher mental capacity. I hope Singer will not say that it is only a movie story!

### **Life in Religiosity**

Religious conservatives believe that a person's life doesn't belong to him/ her but to God. Life is a precious gift from God. Such a precious life shall be protected by the American Constitution.

Ninety four percent of Americans believe in God, 89 percent in heaven, and 72 percent in hell and the devil and such a belief is reflected in politics (Singer, 2004: 92-3). Singer said the role of religion has kept the issue of abortion at the center of American politics and religion has a more serious prospect of changing the nature of society in America than it has in other Western countries.

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<sup>19</sup>autism: a mental disorder originating in infancy that is characterized esp. by inability to interact socially, repetitive behavior, and language disorder.

Experts on Islam said, in the 9/11 attack the problem was not Islam, let alone religious faith itself and the terrorists had misinterpreted their own religion. It is very true and acceptable by almost all. But when Singer said (p99) that “an Islamic militant who believes he is doing the will of God when he flies a plane full of passengers into the World Trade Center is just as much as a person of faith as the Christian who believes she is doing the will of God when she spends her day picketing clinic that offers abortions”, it will be unbelievable and hardly acceptable to most Americans—both conservatives and libertarians. Singer emphasizes that faith cannot tell us who is right and who is wrong, because each will simply assert that his or her faith is the true one.

If that so, all the laws of America cannot tell who is right and who is wrong: It is incontestable that most American legislations derive from the common laws, which took roots in the Talmud based on faiths (Levy, 1986).

A libertarian like former vice president Al Gore refers to reason in finding truth but conservative like Bush refers to divinity<sup>20</sup>. The large majority of the religious conservatives share Bush’s belief that humans are guided by a power larger than themselves who created them in His image (see Appendices 3,4,5). In signing the Partial Birth Abortion Ban Act, Bush stated that the right to life can be neither granted nor denied by the government because it does not come from the government but from the Creator of life (Singer, 2004: 100-1). For a conservative a moral judgment derives from religion while a libertarian ponders on moral nihilism<sup>21</sup> or moral relativism.

As always emphasized by the conservatives, life is a gift from the Creator, thus the life is given by God and only taken by God. With such a notion, abortion will very unlikely be allowed and it will remain in politics as long as conservatism exists in America. The issue of abortion will continue to become a cultural issue in American politics.

Today, through sonograms and other technology an unborn child or fetus can be



<sup>20</sup> divinity: the quality or state of being divine or a divine being; *esp*: GOD.

<sup>21</sup> nihilism: a viewpoint that traditional values and beliefs are unfounded and that existence is senseless and useless.



clearly seen. Almost all the conservatives believe that an unborn child is also a member of family because from the beginning of pregnancy a religious conservative believes that s(he) has got another member (human life) in the family.

In the notion of libertarianism pondering on the right of property, the body of woman indeed is her own very private property, thus intervention in abortion ban shall be regarded a violation to woman's right of her private property. The abortion ban is oppressive and burdensome to woman, who wants to terminate her pregnancy. In light of the abortion ban, the government has deprived her right of a free use of her body. A regulation that hinders an owner of using her property (body) shall be no different from a 'property taking', thus the owner shall be able to seek for compensation of the loss due to oppressive restriction.

But in the notion of conservatism which ponders on the fetus' right of life, it is the obligation of the government to protect the life of the unborn-child. Abortion means killing the fetus, thus it deprives a life of the fetus. Since life begins from embryo, consequently an abortion that kills a fetus shall be regarded a violation to the American Constitution because the Constitution explicitly protects the life.

Issue of abortion—whether to ban or allow it—will be no more than a conflict between those who ponder on the protection of life and the right of woman to use her own very property (body). It indeed is a *life-v-property* issue that should be elegantly settled by both libertarians and conservatives in a political sphere by involving three governmental branches: judicial, executive and legislative.

Whether it is political or cultural or both, the fact is that the life of fetus has to be protected. In the case of *Gonzales v. Carhart* the United States Supreme Court has eventually decided to uphold the Partial-Birth Abortion Ban Act of 2003. The Supreme Court's decision was handed down on April 18, 2007, citing that the federal ban did not impose an undue burden on the due process of woman's right to exercise abortion. Justice Anthony Kennedy wrote for the Court that the respondents had failed to show that Congress lacked power to ban this abortion procedure. Chief Justice John Roberts along with

Justices Samuel Alito, Clarence Thomas, and Antonin Scalia agreed with the Court's judgment, and they also joined Kennedy's opinion ([http://en.wikipedia.org/wiki/Gonzales\\_v.\\_Carhart](http://en.wikipedia.org/wiki/Gonzales_v._Carhart); also, see Attachment 2).

Beforehand, the Partial-Birth Abortion Ban Act signed into law by President Bush on November 5, 2003, was challenged by three different U.S. district courts i.e. the Northern District of California, the Southern District of New York, and the District of Nebraska. The courts declared the ban unconstitutional. Federal District Judge Phyllis Hamilton of California ruled it unconstitutional on June 1, 2004 in *Planned Parenthood v. Ashcroft*. New York District Judge Richard C. Casey and the U.S. District Judge Richard Kopf in Nebraska also found the Partial Birth Abortion Ban Act unconstitutional (<http://en.wikipedia.org>).

A cultural concern (religiosity) indeed is very important in making decision to ban the abortion. But, with or without cultural concern any life shall be protected under the U.S. Constitution citing that “...*Nor be deprived of life, liberty, or property...*” The right of woman as the holder of her own property (body) also is protected under the Constitution. Life, liberty and property are in fact blended in one packet. Property without freedom of use will be nonsense. Without life a property owner cannot use his/ her private property. Depriving any of the rights of life, liberty and property without due process and just compensation will definitely be a tyranny.

Although religiosity cannot be used as yardstick to ban abortion in America, but it cannot be denied that it is the conservative religiosity pondering on the importance of life that has defeated a libertarian argument on woman's right of using her very private property (body).

### **III. 3. 2. Woman's Position**

Storytelling can reveal the position of woman in America both from conservative and libertarian notions. Storytelling is a powerful tool to access the past and give meaning to the present. It is often a source of liberation. Storytelling is a living memory of time and people, binding community and emphasizing on collective memory:

... The storyteller binds her community together with her emphasis on the

collective memory: “My story, no doubt, is me, but it is also, no doubt, older than me. Younger than me, older than the humanized”... The story teller knows the importance of her role. Stories, once voiced, have no end; once told, they circulate; their effects endlessly linger (House, 2005-6: 95).

House (2005) said that recollecting the past and the act of storytelling—telling and retelling—can interrelate fact and fiction, construct and reconstruct tales, which may be true and untrue. Storytelling is central to a plot which depicts the position of women in the society. There is a power of transmission in storytelling about American women.

Myth and storytelling address issues of living memory and uncover meaningful moments of women’s lives where the past and the present interconnect and produce meaning (House, 2005). The past cannot be separated from the present because past and present inform and create each other. The past can shape people’s understanding in viewing the present. A story teller is never afraid of coping with and embracing the past and using it to see the future of women’s position in America.

Now let’s see the position of women viewed from conservatism and libertarianism in America. Conservatism refers to Calvinism based on divinity while libertarianism to reason or secularism that ultimately rests on Darwinism.

American culture is illustrated and defined in a persistent tension between conservatism (traditional) and libertarianism (scientific and progressive). Hollibaugh (2005/6) said there is a clash between Charles Darwin’s theory (libertarianism) and Calvinist doctrine (conservatism) in American life: Darwinian evolution attacks Calvinist absolutism, and vice versa. Below is the elaboration of the cultural tension:

Ellen Glasgow’s story titled “Barren Ground” introduces a young woman named Dorinda, who insists on her own feminine perspective. There are overlapping influences between Darwinism and Calvinism in the story (Hollibaugh, 2005/6). The story is actually a critique against social restrictions of women in patriarchal attitudes in Southern culture. The position of Dorinda can be analyzed from both scientific theory and religious dogma.

Like or dislike there is enslavement of women through biological and social constructions of marriage and maternity. In Dorinda’s story are

highlighted some scientific and theological assumptions of women's inferiority and subservience to men. In the story Dorinda managed to defy a biological expectation imposed by Darwinism and Calvinism. The novel indeed offers a feminist alternative to both predestination and scientific Darwinism.

In the novel Dorinda emphasizes her feminine perspective by universalizing the struggle of women in social environment. She can be free from both biological pressure and Calvinist dogma. Is it real or myth?

In Darwinian theory and Calvinist dogma, biologically and socially a woman is undeniably obligated to bear children. Woman's existence is determined by her maternal role (Hollibaugh, 2005/6). Both Darwinism and Calvinism ponder on female inferiority in sexual selection and marital status respectively.

Calvinism teaches that humans have no free will but must submit wholly to the will of God. By extension a wife should have no will of her own but must submit unconditionally to the will of God through her husband (Hollibaugh, 2005/6: 38):

Wives, submit yourselves unto your own husbands, as unto the Lord. ... Therefore as the church is subject unto Christ, so let the wives be to their own husbands in every thing (Ephesians 5:22, 24).

Socially the Calvinist doctrine does not support feminism and reaffirms that men normally are superior to women. In the view of the inferior nature of women, both Calvinism and Darwinism are in the same opinion. Darwin's theory of sexual selection emphasizes an idea of possessing female in order to reproduce (Hollibaugh, 2005-6: 39-40):

The responsibility for sexual selection rests on the male. ... the "law of battle" which two males compete through competitions of physical strength, or occasionally through displays of beauty or charm, in order to possess female; ... any advantages gained through sexual selection are transmitted mainly to the male offspring. ... the difference between animals and humans is one not of kind but of degree; these laws of sexual selection apply to men and women as well. Even though the form of competition seems somewhat different among "civilized" humans, men are still the agents of sexual selection—and of the more rigorous process of natural selection, as they compete with one another in the struggle for existence—while women are merely helpless dependents (Darwin, *Descent*586).

According to Darwin, in civilized nations women have free or almost

free choices, but not in a barbarous race; and the civilized men and women are less interested in physical but social advantages, such as wealth and social position (Hollibaugh, 2005-6). In American civilized society with the culture of Calvinism, a woman was much freer than a woman in a barbarous race. To be free a woman had to be submissive to the culture and the culture of Calvinism would prohibit a woman to freely use her body. Woman had no right of free use of her body because the Calvinist believed that human body belongs to God, thus a free abortion shall be prohibited on the basis of the right of free use of body as property.

Both Darwinists and Calvinists agree that woman is inferior to man in light of strength and mental capacity. Woman's mental characteristics are of tenderness and less selfishness, which are the determinant factors of mothers as nurturers. In this regard Darwinism is in support of Calvinism:

... women are not only figured as possessions, or property, but also equated with other races which are considered less developed and therefore subject to enslavement by more civilized men. ... suggesting that only "savages" treat women as slaves or as beasts of burden (Hollibaugh, 2005-6: 41).

Darwin also cited that barbarians committed infanticide to prevent natural process of sexual selection because they found it difficult to support themselves and their children and they simply killed their infants to reduce burdens (Hollibaugh, 2005-6). A trouble of female in a savage race when raising her child(ren) was the loss of her beauty; it could be a motive for a barbarian male to kill his own infant in order to maintain the beauty of his female. A savage male treated a female like a slave and killed his own offspring. Consequently the infanticide would hinder a natural process of sexual selection in the savage race. In a civilized race an infanticide is prohibited, thus in light of abortion ban, infanticide definitely is prohibited. Savage males committed infanticides for their own benefits while civilized males prohibited infanticides for the sake of the society.

From that point of view we can say the position of women in a civilized culture is much freer than that in savages. Also, in a civilized society an effort to boost up woman's inferiority will deteriorate the degree of the culture: the more inferior the women are, the more savage the culture is (Hollibaugh, 2005-

6: 40):

Darwin also implies that the amount of choice afforded a woman in the process of mating is a sort of index of the development of a culture, as he states that ‘in civilized nations women have free or almost free choice, which is not the case with barbarous races’ (*Descent* 607).

Hollibaugh (2005-6) further elaborated, the triumph of Dorinda over her environment by asserting her own will in the story can be realized if she can extract herself fully from both cultural and scientific influences. Unfortunately it—as a myth—can be possible only in a story, not in a real life. Dorinda’s celibacy will eventually cause her extinction in the process of Darwin’s sexual and natural selections:

Once Dorinda established her superiority of character, regardless of gender; she can then begin reinstating the reformed influences of Calvinism and Darwinism into her life. ... ‘She refuses to take what God wills. By choosing celibacy, she ensures a future free from any form of social-sexual predestination’ (Hollibaugh, 2005-6: 54-5).

Dorinda creates a control over her own destiny but she is unaware of Darwin’s theory that an individual must also contribute to the survival of species: a struggle for existence. She is not successful if she is alone, childless and excluded from her own community (Hollibaugh, 2005-6). Defying predestination by rejecting both scientific and religious determinisms can be realized by *Dorinda* only in a literary but not in a real life.

Conclusively, we can say that the position of woman when viewed from both America’s libertarianism (scientific) and conservatism (absolutism) is in inferiority to man’s. But it has to be made aware that the less inferior the women are, the higher the culture is; or the more civilized the society is, the less inferior the women are. The peak of culture of the society is in the nadir of women’s inferiority.

In light of abortion ban, it is not a matter of women’s inferiority and male domination over property right (body). The position of woman (viewed from the degree of inferiority) is *equal* to man’s when the *cultural* quality is in peak, or when the society is the most civilized.

In light of abortion ban, has America proved that it leads the most civilized society?

**CHAPTER IV**  
**U.S. SUPREME COURT DECISION 2005**  
**IN KELO VS NEW LONDON**

**IV.1. Political Libertarianism in Property Right**

Libertarians, who ponder on secularism and humanism, believe that human is a measure of all things and they believe that human is the center of his/ her own universe and morals are not absolute (<http://en.wikipedia.org/wiki/Libertarianism>). A radical libertarian thinks that a fundamental conservative is a threat to secularism and a secularist do not wish to ally with a religious conservative. Secularists dislike and accuse religious conservatives of having intruded the politics with religious agenda in every walk of life from state to state for decades. They despise religious conservatives, who impose morality based on divine authority from the Bible.

Adoring individual freedom so much and putting human in the center of universe, a radical libertarian will call for a full protection of individual right of property for whatever the price it will be. In politics a radical libertarian will struggle for government's zero intervention in private rights. Libertarians believe that each person owns his own life and property, and has the right to make his own choices as to how he lives his life - as long as he simply respects the same right of others to do the same (<http://www.libertarianism.com/what-it-is.htm>). Property taking by the power of *Eminent Domain* is a government's intervention in economy that has to be condemned.

In response to libertarian persistence on protecting individual rights with unlimited freedom in using private properties, particularly human body in light of abortion ban, many religious conservatives grumble and accuse that God and Bible have been chased from public schools while abortion is legalized and amorality is out of control ([http://en.wikipedia.org/wiki/Partial-Birth\\_Abortion\\_Ban\\_Act](http://en.wikipedia.org/wiki/Partial-Birth_Abortion_Ban_Act)). The conservative anxiety was then translated into the emergence of religious polity i.e. the Moral Majority during the U.S. election in 1980 (Corbett, 1982). Religious conservatives have indeed played crucial roles in property takings. They support abortion ban and tolerate the government's power of Eminent Domain in taking individual's property for the sake of the public.

In light of property takings, the American judicial, particularly the U.S.

Supreme Court, is supposed to be free from political justification in order to protect individual liberties. The court has to make politically-free decisions even they might be unpopular for the political majority. The judicial branch has to be prepared that an unpopular decision will be frowned by its counterpart branches i.e. the legislative and the executive. It is the job of the judicial to unquestionably make a decision free from political justification for the sake of individual liberties. In the case of *Kelo v. New London* the Supreme Court was accused of having sided to the government ([http://en.wikipedia.org/wiki/Eminent\\_domain](http://en.wikipedia.org/wiki/Eminent_domain)).

Most libertarians perceived that the court's current record in protecting individual rights of property has not been much admired. A study revealed that up to the year 1933 the judicial branch had made no substantial contribution in protecting individual rights in the country (Corbett, 1982: 21-2).

Undeniably, American judicial branch is hardly free from politics because it is the U.S. President who has selected nominees for the Supreme Court on the basis of his own political justification. Senates are to confirm that the nominees for the Court have been in accordance with American political outlook. Thus, from time to time there is always perpetual tendency of the Court to avoid conflicting with the political majority. It means that the Court is not free in making decision in the case of property taking.

Some libertarians point their fingers at the Supreme Court for not automatically safeguarding individual rights of property and condemn the government that minorities have been continually dictated by the mainstream willpower (Corbett, 1982). The Supreme Court is accused of siding to the political majority. In light of property taking by the power of Eminent Domain in term of economy the Court's decision has badly affected the minorities in America.

Chief Justice Earl Warren, however, made a breakthrough in protecting individual rights and promoting equality for minorities. In the case of *Brown v. Board of Education* in 1954 he ruled that "separate but equal" facilities in public schools for white and black students were unconstitutional (USDFA, 2001). Segregation in public schools was then terminated and he ruled that religious observances in public schools were unconstitutionally violating the principle of separation between church and state and hindering religious freedom. Yet, many public schools continued observing religious services.



Principally America is supposed to have no official religion but practically there is a somewhat religious legacy based on Judeo-Christian foundation, whose legacy has so far inspired the conservatives to insist that individuals should be submissive to government's policy for the sake of the public ([http://en.wikipedia.org/wiki/American\\_conservatism](http://en.wikipedia.org/wiki/American_conservatism)). Contrary to them, the libertarians demand that the government stay away from the private matters; therefore the property takings in light of abortion ban and the power of eminent domain are definitely detested.

The concept of property in America was much associated with the American Dream based on the values of conservatism and libertarianism (Cullen, 2003). Libertarianism has partly shaped the cultural, economic and political life of America. The libertarian values were echoed by John Locke, David Hume, Thomas Jefferson and Thomas Paine (see Appendix 3). Individual liberties are believed to be substantial part of American culture, which has so far been operational in politic and economic spheres. In economic sphere both conservative and libertarian agree to uphold individual economic liberties, but in light of property takings at a certain degree a conservative is submissive to governmental authority for the sake of the public. A conservative like Ronald Reagan ever said, "I believe the very heart and soul of conservatism is libertarianism". Reagan favors individual freedom which is advocated by the libertarians (see Appendix 4). But a radical libertarian will never tolerate government's takings of private property for whatever the reason.

Key leaders in liberal economics are Ludwig von Mises, F.A. Hayek, Ayn Rand, Murray Rothbard and Milton Friedman and most libertarians enjoy popular rather than traditional culture because American popular culture emphasizes more on individual freedom, which is the most precious value while other values are secondary (Appendix 3). This is why the government has to stay away from individual private and economic matters. In light of abortion ban and the power of *eminent domain*, a libertarian demands that the government be out of his/ her "bedroom" and "wallet" (Obama, 2006).

Radical libertarians fear that traditional culture in society can threaten individual liberties but some liberal rationalists don't think so. Hayek, a paramount rationalist, believed that individual liberties in America had created a society which was successful due to traditional values (The Wall Street Journal, Feb.15, 2007 at

www.opinionjournal. com). Traditional value of individual's self reliance is the main source of individual liberties in America. Self reliance is to advocate liberties by protecting individual property rights.

Libertarianism is often associated with conservatism in liberties, which were upheld by the Founding Fathers based on their traditional values of individualism (see Appendices 3, 4). However, many conservatives feel uncomfortable with radical libertarians who want to totally remove the other values of the country's cultural tradition.

Concerning land ownership a libertarian definitely disdains an intervention by the government in his/ her property right as shown in this picture of slogan (<http://en.wikipedia.org>).



Libertarians believe that an individual is sovereign over his/ her private property and define *liberty* as being completely free in making use of the private property. Any constraint by the government indeed is violation to individual liberty and without government it is believed that all individuals can naturally self-govern themselves in a social bond with their own rules, customs, codes, and contracts (<http://en.wikipedia.org/wiki/Libertarianism>). In light of property takings, it is a fear of the libertarians that the government has been too powerful and oppressive against individuals.

According to most libertarians, the Federal Government should be necessary only for protecting individual rights. Protecting individual rights means to protect people and their private properties from criminal acts while maintaining national security. For the sake of property protection, a minimal taxation is considered a necessary evil to fund the government, particularly the court, in protecting individual liberties (see Appendix 3). In the case of *Kelo v. New London*, libertarians regretted that the government had abused its power by taking individual's land property .

Life, liberty, and property are the ultimate rights of individuals, which should be enjoyed by both the majority and minority. Imposing the majority's norms against minority's is a violation to human rights. It is a libertarian notion that individual is not the representative of particular race, religion and group; every individual represents himself/ herself (see Appendix 3). Both the majority and the minority have to honor individual right. Property takings for the sake of the public

do violate individual right.

Libertarians believe that rights of life, liberty and property are of natural law. They strongly oppose any government's infringement of individual liberties such as restrictions of free expression like speech, press, or religious belief and practice and censorship of offensive speech, action, picture, etc. Radically, a porn action can be translated into manifestation of free expression by using individual right of private property (body); the right has to be protected and it is a violation if the government deprives the right (see Appendix 3). For libertarians, property takings in abortion ban and eminent domain are violations to individual rights.

Also, individual choices of products and services should not be restricted by the government through politics by imposing licenses or trade barriers, which will control individual choices in using products and services from other countries. An extreme libertarian will oppose prohibition of drug addiction, gambling, and prostitution. Individual has to be fully free to take risk, even to harm himself/ herself because human body unquestionably belongs to him/ her (<http://en.wikipedia.org/wiki/Libertarian>). In light of abortion, a woman should be free to use her own body although it may harm her life. In the case of *Kelo v. New London*, why does Kelo have to suffer from a loss while the public enjoy the benefit?

Politically a libertarian can accept inequality in economic status. The inequality is resulted from individual freedom to choose action—to be idle or to work hard for profit motif. With economic liberty and for profit motif every individual is free to work as hard as s(he) wants. Economic liberties can automatically disperse the aggregate riches—although not necessarily equal. A tremendous concentration of riches only in few hands is because of government's intervention in politics. A sharp disparity emerges because the government grants a special privilege to certain business (see Appendix 3). Taking of land property is a kind of privileges granted by the government to corporation.

Liberty means freedom to do everything which injures no one else. For this reason the exercise of individual right of private property should be of no limits as long as it does not hinder other individuals to enjoy the same rights. In light of the power of eminent domain, the government takes Kelo's land property although she has never hindered others to enjoy the same rights.

Libertarianism is not bizarre to the religious conservatives. Christian

libertarianism is a term used by people to describe a synthesis of Christian beliefs with libertarian political philosophy ([http://en.wikipedia.org/wiki/Christian\\_libertarianism](http://en.wikipedia.org/wiki/Christian_libertarianism)). Christian libertarians believe that Christians should not use government as a tool of control or force of moral behavior against other individuals. They believe a mature individual is allowed to have a maximum freedom, providing s(he) remains in divinity which refers to John 8:36 of the Bible.

Christian libertarianism in America began during the era of colonies at mid 17<sup>th</sup> century. Martin Luther, one of the advocates of protestant reformation, was called a libertarian. America's libertarian Christians are Calvinists, who hold fast a divine covenant ([http://en.wikipedia.org/wiki/Christian\\_libertarianism](http://en.wikipedia.org/wiki/Christian_libertarianism)).

### **Democracy and *Polyarchy***

How important is libertarianism (or liberalism—Ed) in American politics? Let's see a theory of *Polyarchy*. Political elements and economic organizations are unique to polyarchy under the American democracy and the fundamental characteristics of polyarchy are liberalism and popular participation that mutually work in paradox (Dean, 1983).

According to Dean (1983), the pluralistic values of liberties have long been embedded in American Constitution. Those values are crucial to American democracy, which applies a concept of polyarchy, which cannot be separated from the rights of every state government. State's rights are demonstrated by three elements i.e. state government, two senates, and special-interest groups. America's pluralism is formally reflected in the existence of various interest groups; it is more practical to manifest similar political agenda in group rather than in individual. Through political lobbies, all individuals under their respective interest groups will disallow deprivation of individual rights of life, liberty and property. Any compromise to deprive the rights will automatically be rejected by the libertarians. Juxtaposed with life and property, liberty is the crucial element in American politics of polyarchy.

The term of polyarchy was introduced by Robert Dahl to reflect a principle of pluralism that American politics is of popular participation in government through interest groups rather than representatives. Democracy of America is of the politics of various interest groups, which comprise a lot of individuals who favor public

contestation (liberalization) under the polyarchy.

Polyarchy exists between inclusiveness (or called “popular participation”) and liberalization (or called “public contestation”). A regime without both popular participation and public contestation is called a *closed hegemony*. The regime without popular participation is called *competitive oligarchy*<sup>22</sup> and without public contestation (liberalization) is called *inclusive hegemony*<sup>23</sup>. Based on the dimensions of democratization, a regime with both popular participation and public contestation is called *Polyarchy* and an ideal polyarchy is a balance of both and it can be visualized in Figure 1 (Dean, 1983: 237).

It means that the equilibrium of American politics is in the balance between the private and public interests: private and public matters are traded off.

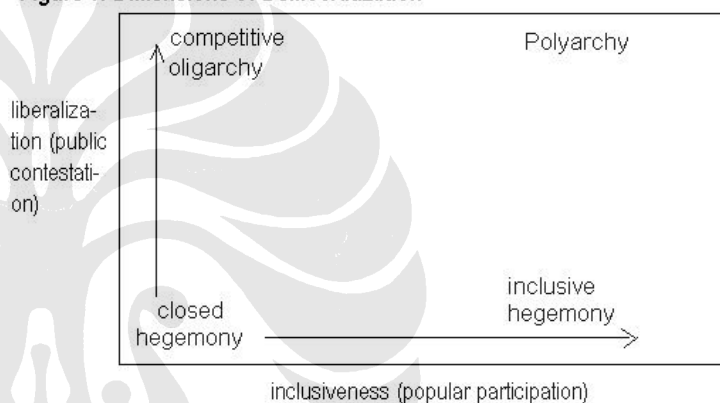
In the process of American democratization the total of votes in elections has so far hovered around 50 percent (Barber, 2003). In fact, that is the

most favorable under the polyarchy of America’s democracy. Growing liberalism means less public participation and growing public participation means declining liberalism (libertarianism). As warned by de Tocqueville, an excess of democracy would negate liberal institutions in America.

The *low* popular participation in American elections has been repeatedly misinterpreted and regarded a bankrupt democracy:

Mean voter turnout in America since World War II hovers around fifty percent for presidential elections—lower than every other noncompulsory democracy in the West. In a country where voting is the primary expression of citizenship, the refusal to vote signals the bankruptcy of democracy. ... Pure democracy suggested a form of government in which all of the people governed themselves in all public matters all of the time; such a form could hardly be expected to function efficiently in a nation of continental proportion with millions of citizens. Representative democracy therefore substituted for the

Figure 1: Dimensions of Democratization



<sup>22</sup> oligarchy: a government in which power is in the hands of a few.

<sup>23</sup> hegemony: dominant influence or authority over others : DOMINATION

pure principle...Strong democracy tries to revitalize citizenship... To be free we must self-governing; to have rights we must be citizens (Barber, 2003: 264-7).

In the political sphere under the America's democracy both libertarians and conservatives will very likely emphasize on the importance of opportunity to have economic freedom in business, trade, or job. Any regulation that hinders an economic liberty will be subject to a judicial review. It is the major purpose of the Federal judicial review to continue maintaining the economic liberties and protecting the property rights of the individuals.

American Constitution shall prohibit a state of impairing any business contract because a business contract derives from individual freedom, which is part of economic liberties. Libertarian value that emphasizes on individual freedom of using his/her private property should not be ignored by any politician because ignoring the value will simply be a political suicide. An attempt to ignore the right of private property as cited in the Fifth and Fourteenth Amendments will be harshly condemned. If it is a must for the government to take individual's property for public use it has make sure that the taking will be followed by due process of law and just compensation.

#### **IV.2. *Eminent Domain and Government's Sovereignty***

Eminent domain is the right of the government to take private property for public use because having the power of eminent domain indicates that a State is sovereign in doing its job (Sloan, 1988). In understanding this kind of government's power we should consider a theoretical root of liberal politics by John Locke. According to his theory, the function of government is to protect individual rights.

Who is the government? What sorts of people should fill in the government so that they can uphold individual liberties? How can America maintain its individual liberties?

Liberty exists in a broad scope of tolerances (Corbett, 1982) but is restricted by American Constitution. Tolerance is to support freedom of expression cited in the First Amendment and equal protection before the law in the Fourteenth Amendment.

Surveys revealed that American politicians are more tolerant than the masses and the political elites are generally committed to a wide range of democratic values compared to people in general (Corbett, 1982). American democratic values survive

because the elites—not the masses—have ruled the country.

A well-functioning government is a government with a sovereign power. The government's sovereignty<sup>24</sup> is reflected in its power of *eminent domain* but restricted by the Constitution, thus a “taking” by the government with a power of *eminent domain* has to be constitutionally acceptable and reasonable.

How can a taking by *eminent-domain* power be reasonable and acceptable? It can be illustrated in a story titled “*Eminent Domain*” by Dan O’Brien—the 1986 Iowa Short Fiction Award Winner. The story is about Willy Herbeck who is “dirty, sloppy, unsociable, old-fashioned, moody, bullheaded, and ugly” but has also “got class” and is willing to go to extremes to keep from selling his junkyard to the government. Here is the story cut down:

Shirley is young and good-looking, about thirty-five, blonde, nice while Willy must be 15 years older. Shirley married him because he's got class: When he takes a liking to something he doesn't care what other people think, he sticks by what he's said.

Shirley heard the state highway department would buy Willy's place (land property) but the offer was sternly rejected by him. Shirley said, Willy, it's a fair price. You have not sold fifty dollars worth of parts off this place since spring and here they're offering you ten thousand dollars. She emphasizes that the government will get it because the law says that he has to sell.

Willy has 113 junk cars in his place and he said they weren't for sale. The state man said Willy had to sell, that the highway was coming through and that there really wasn't much choice. The state was offering him \$10,000 for the whole place.

What are you going to do about the state, Shirley screamed. I guess I'll have to fight, Willy said. She knew he was serious.

Ray has been buying land for the state for a long time but he doesn't think he ever had one like Willy Herbeck. Willy must be a mean bastard.

Ray, the state man, together with the sheriff came to see Shirley at work. She told the sheriff, husband or not, she was staying out of it. The sheriff said, Willy took a shot at this man (Ray), Shirley, now that's against the law and you gotta do something. Ray said, when the state is forced to take over property that there are often serious adjustments to be made. This is not the time to alienate your husband. This is when Willy needs you most and the time that you need him most.

Willy was sitting in the driver's side of the Packard, peering out of the side window over his rifle barrel. Shirley looked into the backseat and could see that it was full of food and ammunition. She asked, what the hell do you think you are doing? You think you are protecting this place. Well, you're

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<sup>24</sup> sovereignty 1 : supremacy in rule or power 2 : power to govern without external control 3 : the supreme political power in a state

nuts. You aren't protecting anything. You're just making a fool out of yourself. You're a fool they'll shoot you dead as hell.

Shirley kept thinking about Willy, fighting his little war for no reason. There he was, king of the mountain. But this wasn't a game, it was for real. The sheriff wasn't kidding. The state man was serious, too.

The sheriff was there before Ray and Shirley. There were four squad cars and the deputies stood behind them, wearing helmet and checking their guns. Sheriff, she said, I want to talk to him, I think I can talk to him out of a fight. You had your chance yesterday, said the sheriff, time for talk is done. But you have to let her try, Ray said, it could save some trouble, maybe even life. The sheriff frowned and asked, how long. Ten minutes, Shirley said. Okay (p.51).

Shirley walked over to the Packard. I got a deal, she said. No, Shirley, Willy said, I've made up my mind. I'm staying with this junk for the rest of my life... That's the deal, she said.

I talked to Ray over at Ace Wrecking Service, Shirley said. Ray said he'd move them for us. There are one hundred and thirteen of them, right, she asked. Willy nodded. At twenty dollars apiece for the move, that's four thousand five hundred and twenty dollars, explained Shirley. That leaves us over five thousand dollars to buy another piece of land.

We can pick a new piece of ground, Willy asked. Sure, she said. He'll move all of them, Willy asked again. All of them, she said. And I can supervise, he asked. I don't see why not, Shirley said.

A new yard, Willy said to himself and dangled his left arm over the steering wheel. Maybe somewhere out by the dump, he said, I'd like that.

The sun was coming up bright and they could see the black smoke from the bulldozers just beginning to rise.

The moral of the story is that human doesn't belong to land but the land belongs to human. Sometimes a person thinks that (s)he has to stick to the land but in fact it is not a must for a free person to stay for good on his/ her land. A person will always have a good reason to move from the land: why should the land decide his/ her destiny?

From the story of Willy, we know that he doesn't want to move from his land because he loves his junk cars rather than the place. What he really doesn't want to leave are his junk cars—not the land.

Human is a free creature, thus why to sticks to land while outside there are many things waiting for a better future? Americans are not of Agrarian society, whose people stick to land for the rest of their lives.

Moreover, America's concept of land property is based on a homestead principle which theorizes that a resource i.e. land with no owner can become a *legitimate* property (see Appendix 1). A piece of land that has not been mixed with labor, not occupied, or abandoned, is regarded of no owner. When a person occupies



and makes use of the land, it becomes his/ her legitimate property. Any other method of converting land into private property is considered disgraceful and unlawful. This property right is *a priori* and justified from consequential basis.

Homestead principle is philosophically advocated by libertarians and the principle implies that only land of no owner can be appropriated. Land of no owner shall be appropriated with human labor and later on claimed to be a private property, providing no coercion against the right of other individual. Libertarians insist that a claim of ownership with neither laboring nor occupying of the land is wrong.

Human labor that creates property ownership under the American Homestead Act refers to John Locke's *Second Treatise on Government* published in 1690 citing that:

Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property ([http://en.wikipedia.org/wiki/John\\_Locke](http://en.wikipedia.org/wiki/John_Locke)).

Imposition of the power of eminent domain takes place not only in America, but also in other countries. Compulsory purchase, resumption, or compulsory acquisition is the term used in the United Kingdom, New Zealand, Ireland, or Australia. Expropriation is a term used in South Africa and Canada. It is the common law that provides a power of eminent domain to government in seizing private property without owner's consent (<http://en.wikipedia.org>).

The power of eminent domain is applied to not only real property but also other types of property. A government also can use its power of eminent domain against personal property like supplies of military in wartime, franchises, intangible property like contracts, patents, trade secrets, and copyrights (see Appendix 1).

English Common Law was adopted by American colonies during the era of frontiers, thus the colonists were very familiar with legal principles of the common law (Levy, 1986). The power of eminent domain was reflected in the Fifth Amendment of the Constitution but the Constitution then restricted the *eminent-domain* power with a clause on *public use* and *just compensation*.

What actually makes a power of *eminent domain* reasonable? Let's see: a person's ownership of land is actually the possession of the land title—not the land

itself. That is a general principle of owning a piece of land. A land title is granted by the State to individual, thus it is reasonable when quite necessary the land can later on be taken by the State for public use. The owner of land title who suffers from the loss of his/ her property should be *justly* compensated following a due process of law.

In the beginning, a power of *eminent domain* was assumed to arise from natural law, which was an inherent power of sovereignty. The Latin term *dominium eminens* (supreme lordship) was used in the 17th century to describe the concept of the power ([http://en.wikipedia.org/wiki/Eminent\\_domain](http://en.wikipedia.org/wiki/Eminent_domain)).

From state to state when applying the power of *eminent domain*, the government has tried to apply a broad definition of public use. As early as 1829, a state government gave *eminent-domain* power to corporation of freight and passenger railroad ([http://en.wikipedia.org/wiki/Eminent\\_domain](http://en.wikipedia.org/wiki/Eminent_domain)). In so doing the government allowed the corporation to take individual's private land for private use. The transfer of the power of *eminent domain* to corporation was indeed abusive to individual's right of private property. In the past, property taking was allowed for the sake of private use instead of public use, thus the taking did not reflect an excuse for the sovereignty of the government for the sake of the public.

Time after time the U.S. Supreme Court upheld the right of state to make its own definition on public use. For instance, in 1832 the Supreme Court ruled that the power of *eminent domain* could be given to a mill owner to take individual land for the expansion of his mill operation and dam by flooding an upstream area (<http://en.wikipedia.org>). The Court gave an opinion that a public use did not have to mean a public occupation of land but it could simply be a benefit for the public. Many people (public) would enjoy the benefit from the operation of the mill. In this regard property taking was allowed for the sake of the public benefit instead of the public use.

In light of the property taking in the case of Kelo versus New London it was the interpretation by the Supreme Court that the "public benefit" was no less than "the public use". The Court declared that the government of the city of New London was sovereign in taking Kelo's private property and others' (see Attachment 3). The government then transferred its power of *eminent domain* to a corporation, who handled the purchase and release of the land titles for the sake of development in

Port Trumbull.

As long as the government is juxtaposed with its sovereignty, it is always possible for property taking by the power of *eminent domain*. Individual liberty is subject to submission to society through sovereign government.

### IV.3. Property Right and Public Use

The Supreme Court's decision in the case of *Kelo v. New London* supported the New London's authority to take private land by its power of *eminent domain* and sell the land to private developer (<http://www.supremecourtus.gov>). The court's 5-4 decision was then poured with a heavy coverage by the press and public outcry

What made it bizarre was that the government used its power of *eminent domain* to take private property for the sake of the public, but why did the public become angry at the taking by the government? So, who was the public? Does it mean that the government knew what was good for the public although the public disagreed at what had been decided by the government? Such a conflicting situation is mundane in American life because the people adopt a culture of conflicts. From time to time there are always conflicts between conservatism and libertarianism.

The Supreme Court remained in its opinion that if an economic project could create new jobs, increase tax and revenues, and revitalize a depressed area; it would qualify a definition of public use. Transferring the power of eminent domain to Private Corporation could be accepted and considered constitutional as long as the private corporation acted as an authorized agent of the government (see Attachment 3). It means that the public interest is not always directly met by the government; a private corporation can also meet the public interest.

What actually made the government use its power of eminent domain in taking the land property? In year 2000 the city of New London in Connecticut suffered from an economic hardship: Tax revenue decreased and the city government tried hard to revitalize the local economy. It then assigned a private corporation called the New London Development Corporation to make a plan on redevelopment of Fort Trumbull. The government gave a full authority to the corporation in acquiring the land owned by the people in Fort Trumbull ([http://en.wikipedia.org/wiki/Kelo\\_v.\\_City\\_of\\_New\\_London](http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London)).

Most Americans disliked the power of *eminent domain* because it deprived

individual rights of their private properties: The people expressed their objections and accused the government of violating individual liberties; public reaction was enormous because most Americans endorsed individual liberties rather than economic development (Mark Steyn, "Eminent case of domain poisoning" in *The Washington Times*, July 4, 2005; "Alabama limits eminent domain" in *The Washington Times*, August 4, 2005; Kenneth R. Harney, "Court Ruling Leaves Poor at Greatest Risk" in *The Washington Post*, July 2, 2005; Professor Eugene Volokh, "Senator Cornyn (R-TX) Proposes Limits on Eminent Domain" in *The Volokh Conspiracy*, June 27, 2005; Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy and Bad Judgment*, 38 *The Urban Lawyer* 201, Spring 2006)

People's dislike of property taking could be identified from various reactions and political maneuvers throughout the country ([http://en.wikipedia.org/wiki/Kelo\\_v.\\_City\\_of\\_New\\_London](http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London); [http://en.wikipedia.org/wiki/Eminent\\_domain](http://en.wikipedia.org/wiki/Eminent_domain)): Senator John Cornyn proposed legislation on June 27, 2005 to confine state government's power of *eminent domain*, which would be intended only for the sake of economic development. Also, the legislation would prohibit the federal government from exercising its power of *eminent domain* for similar intention. In November 2006 Michigan passed a regulation on the power of *eminent domain*, which prohibited the government from taking private property for the purpose of economic development or tax revenue. If an individual's property were taken by government, the individual had to be paid at least 125 percent of the fair market value.

The American public was shocked by the decision of the Supreme Court, which endorsed the government's power of *eminent domain* to deprive individual rights ([http://en.wikipedia.org/wiki/Eminent\\_domain](http://en.wikipedia.org/wiki/Eminent_domain)). Although the intention of the government of the city of New London was reasonable and good for economic development but most Americans seem to prefer individual liberties over their private properties to economic benefits for the sake of the public.

However the American public was ambiguous. The public reaction was different when a government took the private property belonging to corporation. On May 23, 2006 the city council of Hercules in California decided to use its power of *eminent domain* to take 17 acres of land owned by Wal-Mart (<http://en.wikipedia.org>). Prior to the decision, people around the location

complained that Wal-Mart had made local small shops bankrupt.

Wal Mart indeed is a corporate personhood, whose right of property is protected under the Constitution. Did the public express their objections to such a taking? Did the public accuse the government of depriving the right of private property? They didn't! It is for sure that the public have used a double standard of justification. This is why the public is alleged of having no good sense in deciding what is good for the society. It is the government that will make a decision for the sake of the society (public) because a government is legitimately chosen following a process of politics in democracy. Decision by the public has never been legitimated by the politics.

Like or dislike, it is the government's job with its deep concern to develop the economy within its territory. The fruit of economic development will eventually be enjoyed by the public, which definitely comprises individuals. Moreover, following due process of law in a spirit of economic freedom a just compensation will be provided to individual whose private property is taken for the sake of the public.

Economic concern is always of the government's sphere of influence. As long as the government can prove that its decision to use the power of *eminent domain* is constitutionally acceptable, every individual in America is obliged to respect to the decision. To prove whether or not such a decision is constitutional and acceptable it is the job of the judicial to do so.

The judicial has to be free from political justification in making its decision. The judicial has to uphold individual's right of property, but as one of the governmental branches its function also is for the sake of the public.

Property taking is not a "tragedy" for America, it is a matter of mundane conflicts between property right and public use. Conflicts are not alien to American culture because since long time ago the country has managed to make a good use of the conflicts for the sake of the country's strength. Although property taking is disliked, but it is not a tyrannical measure because the Constitution states that any taking shall be subject to due process of law and just compensation.

#### **IV.3.1. Private v. Public**

The use of the power of *eminent domain* is factually meant for the economic benefit of the public and the imposition of the power is no more than

an issue of private-v-public interest. However, a taking of no public benefit is definitely outlawed.

Based on the Constitution the judicial branch has to be more concerned on individual liberties rather than the governmental power. A government that represents its society shall not penalize individual who observes the regulation and commits no misconduct. Legislation should not harm the rights of both individual and corporation in having economic liberties. When a government hinders economic liberties by intruding in market operation, the society will eventually suffer. Protecting individual liberties means protecting the society in a whole because the interest of the society (the public) has in fact been legitimized by an aggregate interest of the individuals under the country's political system (Siegan, 1980).

American society is a home of collective individual liberties. Liberties are personal and none can determine what is important for an individual. However, the government, which represents the society (public), cannot accommodate all individual liberties. It has to make priorities and impose its power for the sake of the public. In upholding a just society the government has to conduct logical, reasonable and comfortable manners. Government's priority of liberties should derive from political judgment by the public under the democracy.

In maximizing individual liberties the government should not with ease deprive the right of private property. A policy that creates no benefit to the public and restrains individual rights is definitely illegitimate. A law with excessive restrains is arbitrary and oppressive. Weighing on the benefit of the public, it is unobjectionable when a government imposes a policy to restrain an individual from committing a misconduct that might endanger his/ her fellow citizens.

In using its power of *eminent domain* the government shall take private property with due process of law and just compensation. Individual and corporation are *persons* who are subject to due process of law for economic liberties or simply called "economic due process". Treating corporation differently from individual under the economic due process is totally erroneous. Under the American legal system a corporation is no less than an

individual. If compensation for the loss of property belonging to corporation is denied, individual will also suffer from a loss:

As of 1972, only 11 percent of the nation's corporations had receipts of \$1 million or more; 93.4 percent of all corporations had assets under \$1 million. ... we cannot be certain how much power the big corporations actually possess, the risk of their failure to overcome judicial policy is borne in part by their moderate-income stockholders and pension funds of labor unions... (Siegan, 1980: 329).

Siegan (1980) said that the loss suffered by corporation is borne by stockholders and labor union which consist of individuals. There should be no discrimination in treating property rights. The point is: it is the right of private property that has to be protected—not the owner. By protecting the right of private property the economic liberties in America can be upheld and the public can eventually enjoy a great benefit from their economic liberties. For America an economic liberty is the essence of good sense, productivity, creativity and happiness. Americans believe that their economic liberties can advance tolerances and bring about immeasurable and unpredictable rewards.

For most Americans a small amount of liberty belonging to individual is much more precious than a huge benefit of economic development (Siegan, 1980). The rewards of liberty are immeasurable and unpredictable while the benefit of economic development resulted from the imposition of the power of *eminent domain* can be potentially become a sort of tyranny by the public—if not by the government! Since the era of frontiers Americans have disliked any kind of tyrannies against individuals.

From time to time the issue of *private-v-public* interests will remain to exist in political sphere under the American democracy. It is the right of the public comprising individuals to justify whether or not their government acts for the interest of the public (society). When the government does not refer to the Constitution in solving private-v-public issues, the government turns to be abusive and tyrannical.

#### **IV.3.2. Government's Position**

American Constitution is the world's oldest which is still in use and the people continue to honor and respect it as their fundamental law (USDFA,

2001). Judicial review of legislations as referring to in the Constitution has so far given a good contribution to the creation of good principle of government's position before the society.

Judicial review is to secure individual liberties from governmental infringement (Siegan, 1980). It is the obligation of the Court to safeguard individual liberties from government's abusive power because the purpose of American Constitution is to protect and preserve liberties as desired by the Founders who fixed it. American Founders believed that liberty and personal security were the ultimate purpose of the nation. They feared a tyranny by the majorities and believed that a lack of government's control in economy could benefit the society in a whole. They pondered on a notion that individuals had inalienable rights (life, liberty and property) that could not be deprived by the government.

Generally speaking from generation to generation the Americans have shared the philosophical and political values of the Founders. It is the Court that has to protect individual liberties in order to maintain the existence of non-tyrannical government.

In economic liberties the Founders favored a private-proprieted system and their genuine intention to create a federal government was to protect the *propertied*<sup>25</sup> not the *propertiless*<sup>26</sup> (Siegan, 1980). The propertied—not the propertiless—paid the necessary evil taxes to support the existence of their government, thus their representation in the government was in form of their *propertiedness*.

This is why American High Court frequently overturns legislation that violates economic liberties in considering that the economic liberties have significantly touched every individual life in America since the era of frontiers (Siegan, 1980). The primary task of the government is to preserve property rights because in private properties are found economic liberties. A free society cannot exist if its government is not barred from taking individual's property, thus property rights have to be greatly protected under the laws from state to state throughout America. But who will uphold and enforce the laws? It is the

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<sup>25</sup> those who have property.

<sup>26</sup> those who have no property



government to uphold the laws and to do so the government has to be sovereign in doing its job to protect the rights. A sovereign government has to have power when upholding and enforcing any necessary law against its citizens.

American law refers to the common law, which is dedicated to the rule of right and reason (Levy, 1986). Many Americans have equated the common law with natural law since the era of frontiers. For American Founders, the English constitution which comprises common-law rights was regarded as the measure of human freedom and they revolted not against the English constitution but on behalf of it (Siegan, 1980:96).

There is a big commitment to preserving and enhancing the rights of property and liberties in economic sphere in America (Siegan, 1980). It was intended by the Founders that the legislative should not have power to restrict individual rights of liberties. Thus, it is a high priority for the judicial branch to review any legislation that might abuse property rights.

How can the government be put in a correct position? Let's see the three separate branches of government: judicial, legislative and executive. Both the legislative and the executive are resulted from politics but the judicial is supposed to be free from political justification so that it can be in a neutral position.

Court is a mere instrument of law and the role of judges is to discover and apply custom, tradition and precedence that are good for the society. As intended by the Founders, the judicial was to function as a means of achieving liberties or objective values. The judicial was not allowed to create a new law because it is the job of the legislative to create laws. The three governmental branches have to have separable powers, if not the liberties of individuals are threatened. Overlapping powers of those three branches have to be avoided:

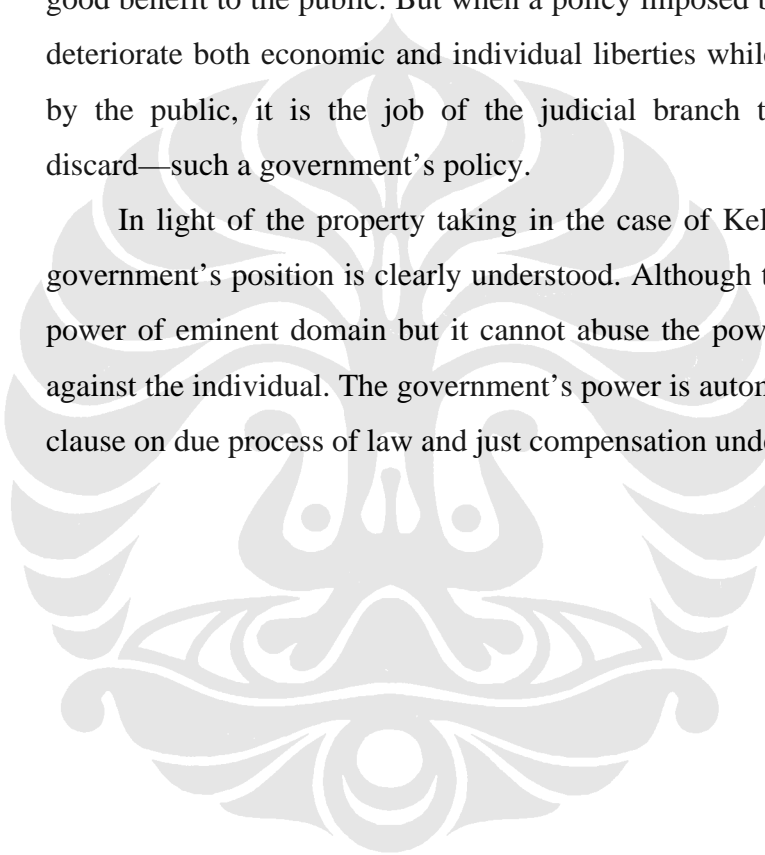
... Madison and Hamilton believed that judiciary “not separated from the legislative and executive powers” was threat to “general liberties” and its members potential “oppressors” (Siegan, 1980:107).

In effort to improve the economic quality of people, at times the government has to use its power that might unintentionally ignore certain individual right but in exercising its power the government has to show that it

does have a special interest in protecting the rights of individuals rather than the rights of the public.

The power of eminent domain is a concrete example. In using the power of eminent domain the government has to follow an economic due process as referring to the Constitution. It is reasonable if the society as represented by the government wants to enjoy a new and better economy in pursuit of their respective welfares. This is why an intervention by the government in individual right of private property can be acceptable as long as it generates a good benefit to the public. But when a policy imposed by the government may deteriorate both economic and individual liberties while no benefit is enjoyed by the public, it is the job of the judicial branch to review—or even to discard—such a government’s policy.

In light of the property taking in the case of *Kelo v. New London*, the government’s position is clearly understood. Although the government has the power of eminent domain but it cannot abuse the power and act tyrannically against the individual. The government’s power is automatically restricted by a clause on due process of law and just compensation under the Constitution.



## CHAPTER V

### SYNTHESIS AND CONFLICTS OF CONSERVATISM AND LIBERTARIANISM IN PROPERTY TAKINGS

Taking in abortion ban is much supported by the conservatives for the sake of the right of life of the fetus based on religiosity (Chapter III) whereas the libertarians attack the taking for the sake of woman's right of her very private property (body) based on individual freedom (reproductive rights). Viewed from their respective characteristic natures, the conservatives advocate the submission of individuals to the society as represented by the government whereas the libertarians advocate the full freedom of individuals and the government has to stay away from the "bedroom" of every individual.

In Chapter IV the taking by *Eminent Domain* power cannot be separated from the value of libertarianism, which is operational in politics. In philosophical viewpoint the taking is detested by those who ponder on libertarianism but in practical realities it cannot be denied that the taking is much supported by the economic libertarians who are pragmatic for the sake of economic benefits of the public based on reasons. The taking of Kelo's land property can be reasonably acceptable because it is for the sake of the public benefit that will be further enjoyed by many individuals, moreover there will be a just compensation for the taking following a due process of law. Supposedly the taking should have been supported by the conservatives who ponder on the submission of individuals to the government, but in realities they attack the taking by arguing that it is for the sake of the country's cultural value of individualism.

To further elaborate the synthesis of the conflicting values of libertarianism and conservatism in America, we have to ponder on the concept of property which is operational in politics. The concept is much associated with the *American Dream* which ponders on life, liberty and the pursuit of happiness in form of properties (Cullen, 2003). The Dream is the synthesis of libertarianism and conservatism though comprising conflicts.

Cullen (2003) said that the American Dream is a major element of American national identity and it is like an axiom that can be apparently understood by every individual (libertarian and conservative) from state to state throughout the country.

The dream is much associated with liberty, and an individual without liberty of using his/ her private property will be regarded a slave.

How important is individual liberty in connection with property right in American life? To answer the question, we need to explore and correctly comprehend the concept of property right based on both conservatism and libertarianism. In light of abortion ban and *eminent-domain* power, on one hand America adores individual liberties but on the other hand it allows property takings. Such a conflicting reality does take place in America but it seems that the country has so far managed to go through with it.

In finding out the synthesis of conservatism and libertarianism, we have to ponder on Weberian notion that provides the greatest concept of social science. Weber critically disagreed at a concept of value construction in understanding the values of America; whereas he emphasized that American values should be comprehended not based on a theory of value construction but a theory of value relevance (Schwandt, 2000). In understanding the concept of private property, the American values of conservatism and libertarianism should be comprehended philosophically rather than ideologically because it is philosophy that is much associated with individual liberties advocated in libertarianism and conservatism. Both libertarians and conservatives adore individual freedom and don't endorse ideology which does not suit their individualism.

Philosophy is the most appropriate means of elucidating the values of libertarianism and conservatism because it is generally viewed as a system of thoughts that seeks to hypothesize a definitive order of America's societal world and it is a system that tries to unify human experiences by determining the liberal principles of humankind and knowledge (Liebowitz, 1985). In contrast, an ideology is to promote a specific image of nation based on a planned ultimate goal and tends to centralize all the values throughout the country. Centralizing is disliked by both libertarian and conservative who favor individualism.

Max Weber's concept of value relevance is much accepted by most Americans and according to his concept, the ultimate values of American culture are not discovered from an objective inquiry but value relevance (Schwandt, 2000). The ultimate values will be the basis of higher objectivity in finding the characteristics of America's identity. In fact, the most acceptable values of America are those of

conservatism and libertarianism, which are based on individual freedom. On one hand libertarian can ally with conservative but on the other hand they contradict each other. What actually makes them ally and what makes them contradict each other?

American conservatives believe the religiosity of Protestant ethics and the Puritan temper as their regulative codes emphasizing hard work, sobriety, frugality and sexual restraints while forbidding bad attitudes toward life (Parson, 1985). Those traditional values remain embedded in most American conservatives. To take out those values of religiosity i.e. the belief in God, hard work and individual achievement will be almost impossible.

American businesses, which mostly comprise economic libertarians, have so far been the dynamic agencies of making America become the world's economic power because of pondering on capitalistic free market whereas disfavoring socialistic or centralizing economics (Siegan, 1980). Capitalism is favored by both libertarians and conservatives who adore economic liberties based on individual freedom.

In economic sphere, libertarians refer to individual freedom: an individual is free to do whatever s(he) thinks good—not by collective decision. It is a fallacy to say that a sum of individual decisions is equivalent to a social decision (Liebowitz, 1985). In socialism the economic function is to provide daily necessities (subsistence) while the function of capitalistic economics is to let individual freely maximize his/ her capacity of generating capital from capital by any means of resources (including human body).

In economics the libertarians favors meritocracy rather than affirmative action (Liebowitz, 1985; see also Appendix 3) and as believed an individual should be granted with an equality of opportunities instead of an equality of results:

... in the present system minorities need to be empowered through affirmative action... The criticism ... is that they cause injustices to individuals from the majority group, ... that affirmative action also creates a victim mentality or feeling of inherent inferiority among individuals and groups, ... (Watson, 2000: 50).

American libertarians will never support a communal system of society because they prefer capitalistic market operation to public mechanism (Liebowitz, 1985). Capitalism legitimates the rights of private property and an economic success

is indicated by an achievement of generating capital (property) rather than performance. Both conservatives and libertarians are the defenders of property rights. They favor capitalistic concept within a framework of traditional values on private property and economic liberty. American corporation is a pure entity of private properties and its function is to pursue profits (capital).

Current phenomena to impose economic price of externalities that have to be burdened by corporation are ridiculous for American capitalists and a widespread call on corporations to fulfill worker satisfaction, minority employment, and social morality is like 'barking the wrong trees' (Liebowitz, 1985). For Americans, particularly the economic libertarians, economics has to be efficient and effective and the most effective and efficient system of economics is capitalism, which cannot be separated from the concept of private property. This is why the economic libertarians can reasonably accept the taking of Kelo's land property for the sake of economic benefits.

Although conservatives and libertarians are in the same boat but they have different philosophical concepts of values: libertarians are pragmatists (based on reason) whereas conservatives are absolutists (based on religiosity).

A pragmatist will judge a value from consequence and practice and an ultimate value emerges from a consensus of no moral ground but reasons. According to absolutists a value from consequence and practice is based on an *a priori* justification, thus it has to be justified from another value and when acceptable, an *a priori* value has to be conditionally absolute: the justification of the value has to refer to another value which is to some extent absolute (Riley, 1959). Most conservatives believe that an absolute value has to refer to a religious ground of morality, whereas the libertarians don't agree with them and persist to refer to reasons that can be freely decided by individuals—this is the source of conflicts between the two camps. Some Americans are in-between but they will remain standing on a line stretching from one end of absolutism (religiosity) to another end of pragmatism (reasons).

A thinker who is liberal in politics, conservative in culture, but socialist in economics will be alien to America's worldview (Liebowitz, 1985). America will be reluctant to endorse both socialistic economics and welfare state since socialistic values are not in accordance with America's worldview of both conservatism and

libertarianism. The reluctance of adopting the socialistic values was demonstrated in the election of Ronald Reagan with his success of Reaganomics in dismantling a New Deal on Welfare State (see appendices 3 and 4).

Americans love liberties and have to protect those liberties but unfortunately in securing the protection of individual liberties, willy-nilly they have to surrender a certain degree of their privacies or civil liberties for the sake of the public. In a pluralistic society, an individual liberty can become a source of frustration and hope. Individual is free but in his/ her freedom there has to be a moderately receptivity to government's role in public life. Private property is the reflection of individual liberty in American life but the right of individual liberty is subject to the submission to the rights of the society:

“Private Property is held in subordination to the rights of society. Although one owns property, they may not do with it as they please, any more than they may act according to their personal desires. As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted” (Sate vs. Harper of the year 1923).

American values of conservatism and libertarianism will continue conflicting one with another, but the conflicts, particularly of property rights, are regarded invaluable for the country's advancement. The synthesis of those conflicting values will be very useful in keeping America dynamic and rigorous in finding every best solution. The conflicting values have so far made America potent instead of impotent.

### **V.1. Synthesis and Conflicts in Abortion Ban**

Conservatives support the taking for the sake of the right of the fetus based on religiosity whereas the libertarians attack the taking for the sake of woman's right of her property (body) based on individual freedom. By imposing on the reproductive rights of women, the libertarians argue that a woman has to be free in using her body (property) as long as she does not infringe the rights of others. Unfortunately in the case of abortion, the woman infringes the right of the life of her own baby (fetus). No body can deny that there is another life in her womb in addition to her own life.

Although the conservative religiosity cannot be used as a yardstick in deciding the case of abortion ban, but like or dislike the libertarians have to reasonably accept that there have been more than one life in pregnancy and each of the lives shall be

protected by the Constitution.

American conservatives are deeply inspired by the Puritan values. Superficially Puritanism was only a belief that the Church of England should be purged of its hierarchy, traditions and ceremonies inherited by Rome (Morgan, 1999). Although Puritans devoted themselves wholly to God, but they must live in a world and they did not want to live like monks or hermits.

Puritans were extraordinarily reasonable men and the zeal with which they studied the Bible sprang from a supreme confidence in their ability of reason in finding the truth (Cullen, 2003; Morgan, 1999). Therefore they listened with respect to every man who could give reasons for a better opinion. They rested their religious principles, like their social, political, legal, and moral ones, on the Bible, which was regarded a perfect guide-book for establishing a kingdom of God on earth.

The relationship between church and state must get right and in Massachusetts the Puritans drew a firmer dividing line between church and state (Cullen, 2003) and it was the source of secularism, which is the fertile ground of libertarianism. Although church stood aloof, the state should remain responsible for supporting and protecting the church and the church had no authority in the government and the government had to be particularly careful not to allow any action by the church to affect civil and political rights. Someone's right to vote and hold office was not revoked although he lost his church membership and though the clergy had no political authority, but they still enjoyed an indirect influence in the government (Cullen, 2003; Ruthven, 1989).

Congregationalists opposed to both centralization and control by the government as exercised by Winthrop in Massachusetts. Many of the Congregationalists quickly showed an explosive force of separatism and Winthrop had contained the separatism and sifted out those separatists into Rhode Island (Morgan, 1999).

Puritanism was the cornerstone of the American Dream, which referred to the central legacy of American Protestantism with faith reform. The reform started from the first generation of American pilgrims who wanted to build a new society of believers in the *New Canaan* (Cullen, 2003).

American Pilgrims were not immigrants with nothing to lose as they were relatively educated and had substantial financial resources. They used their



individual freedom to decide to leave everything behind and threw away their security for the sake of an idea. They were astonishingly committed people and as people with freedom they became masters of their own destiny:

... some people with a strong sense of religious mission founded a new world they hoped would become a model for the old one. ...—impelled them with ruthless zeal to gamble everything for the sake of a vision. ... in the achievement of any American Dream: they became masters of their own destiny (Cullen, 2003:18).

It is hard to believe that the president candidate of the Democratic Party (Obama, 2006:199) said “The Pilgrims came to our shores to escape religious persecution and practice without impediment to their brand of strict Calvinism.” Obama should be aware that the Pilgrims (Calvinists) came to America not to escape religious persecution. They gambled everything for the sake of their vision. Obama should not neglect the historical facts of the Puritans by simply making such a remark in his book.

### **Submission and Freedom**

In the case of abortion ban the conservatives call on the women to be submissive to the government whereas the libertarians call on the government to respect to women’s rights of freedom over the bodies (property). Being submissive and free had been well understood by the Puritans during the frontiers.

John Calvin’s theory of predestination had much influenced the Puritans. The Puritans, who observed the Calvinist’s Protestantism, were called “predestinarians” and they believed that fate was sealed at birth and could do nothing to change an ultimate salvation or damnation and had to find signs of their own fates (Riley, 1959; Morgan, 1999; Cullen, 2003). They believed they could find them in virtues like hard work, discipline and honesty. The virtues have remained alive and adored by Americans from generation to generation.

Puritans understood freedom as what contemporary Americans understand it, but for them such a freedom was ugly:

‘There is twofold liberty—natural ... and civil... The first is common to man with beasts and other creatures. ... This kind of freedom ‘makes men grow more evil, and in time to be worse than brute beasts.’ True freedom, on the other hand, ‘is maintained and exercised in a way of subjection to authority. ‘Freedom involved a willing surrender to the will of the Lord, a choice to defer to Godly clerical and civil authorities that ruled in His name (Cullen, 2003:21).

Puritans also believed in inequality of mankind: some are rich, some poor and some high and leading in power; others are mean and in subjection (Morgan, 1999; Cullen, 2003). The structure of their community was compared to a body with different organs that work in complementary effort to sustain it.

The inequality of mankind also is believed by most American conservatives, who accept the precious value of differences. They don't believe that all people have to be equal—woman and man are of inequality. Every body has his/ her own role and position. Also, inequality of wealth in form of private properties has been acceptable since a long time ago.

Many American conservatives are religious; thus, substantially more Americans believe in angels than those in Darwinian evolution. Such a religiosity is not something new but has long been established since the first generation of the Puritans who came to America with a strong sense of religious mission (Cullen, 2001; Morgan, 1999).

Religious conservatism ponders on an ultimate value of absolute truths. Most American Founders disliked an absolute authority but it did not reject the absolute truths of religiosity. The Founders fixed the Constitution by deeply weighing on a defense against tyranny (absolute authority—not absolute truths). It is a fallacy to say:

It's not just absolute power that the Founders sought to prevent. Implicit in its structure, in the very idea of ordered liberty, was a rejection of absolute truth, the infallibility of any idea or ideology or theology or 'ism,'... The Founders may have trusted in God, but true to the Enlightenment spirit, they also trusted in the minds and senses that God had given them. ... The rejection of absolutism implicit in our constitutional structure may sometimes make our politics seem unprincipled (Obama, 2006: 93-4).

Even implicitly one cannot find the rejection of absolute truths under the Constitution. It was an absolute power or tyranny—not absolute truths—that was hated by the Founders. None of the Constitution states explicitly or tacitly that it rejects absolute truths. The Constitution was fixed by the Founders by showing a deep consideration on absolute truths of religiosity. Even those who advocated the Enlightenment—the source of American libertarianism—remained within a scope of religiosity and never rejected the absolute truths.

In the case of a taking in abortion ban, the conservatives support the ban for the sake of the life based on religiosity that life comes from the God. For

conservatives the right of life is absolute and it cannot be deprived by anyone except by the God. Unfortunately the word “God” does not appear or include in the Fifth and Fourteenth Amendments of the Constitution, thus this religious notion is not valid to decide the case. But the libertarians can reasonably accept the ban (including the taking) since it can be scientifically proved that there is life (the fetus) that shall be protected by the Constitution.

## **V.2. Synthesis and Conflicts in *Eminent Domain***

Principally in general the libertarians do not agree at a property taking. But in realities the economic libertarians support the taking of Kelo’s land property for the sake of economic benefits of the public based on reasonable ground of pragmatism. According to the economic libertarians, the taking of Kelo’s property would create economic benefits to the public in New London, thus the economic benefits would eventually be enjoyed by all individuals. Economic growth would be the fertile ground of economic liberties.

Viewed from the notion of being submissive to the government, the conservatives should support the taking. But in fact the conservatives attack the taking of Kelo’s property arguing that it is for the sake of cultural value of individualism. From various mass media we found that a great number of conservatives had furiously criticized the taking of Kelo’s property.

Libertarians are pragmatists and reasonable in economic viewpoints. Thus, they consider that the taking of Kelo’s property is practically reasonable because it is for the economic benefits of the public which can eventually be enjoyed by all individuals in New London.

### **Pragmatic Taking**

Libertarianism does not endorse any property taking but in the case of taking by *Eminent Domain* the economic libertarians become pragmatic, thus they reasonably support the taking of Kelo’s property.

Pragmatic libertarianism in America is much associated with religiosity. The country’s economic system of capitalism is also associated with religiosity i.e. Protestant Ethics (Parsons, 1985). Pragmatism (libertarianism) and religiosity (conservatism) are synthesized in America but they conflict each other and one side has to win over the other.

Let's track down the pragmatism in America. In the 18<sup>th</sup> Century Benjamin Franklin articulated a pragmatic spiritualism and for him, virtue and happiness were correlated, distinguishable and attainable (Cullen, 2003). Hard work would engender wealth and it was a sign of God's favor. Franklin then set up a new form of common sense and made a use of Puritan values for secular gain. Because of his notion on hard work that could generate wealth (property) he was often considered the prophet of American capitalism. For him, merit was reasonably clear by involving education, experience and virtue and he believed that a ploughman and a professor were equal in morality but not in abilities. Franklin was a foremost secular pragmatist (libertarian) but he did not reject religiosity, which ultimately refers to absolute truths.

The core of the American Dream consists of life, liberty and property (Cullen, 2003). Capitalism is a means of generating capital from capital; property indeed is capital. American capitalism can work well in a market with free competition and free competition requires individual liberties. How can we relate free competition and individual liberties with slavery in regard of capitalism which generates capitals (properties)? What was the impact of slavery to the American Dream?

Abraham Lincoln could be considered an adorer of individual liberties. He could relate the rampant slavery throughout America to the spirit of competition in gaining property as part of the American Dream (Cullen, 2003). Lincoln wanted to completely remove slavery throughout the country but at the time such a call was impossible and politically impracticable. Truly speaking, he had no deep concern on the fate of the slaves but pragmatically thought that slavery could eventually destroy the American Dream, particularly the American spirit of fair competition in gaining wealth (property) for the sake of the whites.

In a pragmatic libertarian view, a slave-basis economy could deteriorate the prospect of men in gaining capital for further investment. Slavery hurt both entrepreneurship and competition in gaining fair wages for workers who wanted to work hard. A factory owner who hired workers and paid wages would be unable to compete in a fair way with other competitors who had slaves and paid no wages. Lincoln insisted to wipe out slavery throughout the country for the sake of the American Dream:

A young man finds himself of an age to be dismissed from parental control; he

has for his capital nothing but his two strong hands that God has given him, a heart willing to labor, and a freedom to choose the mode of his work and the manner of his employer; he has got no soil nor shop, and he avails himself of the opportunity of hiring himself to some man who has capital to pay him fair day's wages for fair day's work. He is benefited by availing himself of that privilege. He works industriously, he behaves soberly, and the result of a year or two's labor is a surplus of capital. Now he buys land on his own hook; he settles, marries, begets sons and daughters, and in course of time he too has enough capital to hire some new beginner (Cullen, 2003:84-5).

Lincoln called on the whites to respect to individual liberties which God has planted in all people. The whites had to preserve the spirit of liberties, which are inherited to mankind. To destroy the spirit of liberties it means that the whites planted the seeds of tyranny that could eventually destroy the American Dream i.e. life, liberty and property (the pursuit of happiness in material wellbeing).

Though Lincoln pondered on libertarian values but saw himself as a patriotic conservative (Cullen, 2003). Concerning his call for eradication of slavery he repeatedly asserted that freedom was not the same thing as equality. He told the crowd in Springfield at the beginning of his Senate campaign in 1858:

'Certainly the negro is not our equal in color—perhaps not in many other respects; still, in the right to put into his mouth the bread his own hands have earned, he is the equal of every other man, white or black' (Cullen, 2003: 88).

Lincoln believed that it was impossible for whites and blacks to live as equals; he favored superior position assigned to the white race but remained thinking that slavery was definitely wrong (Cullen, 2003). The slavery was not a major factor in his thinking of life, only a vocal minority in Illinois at the time considered it a big issue. But for Lincoln, slavery was in fact not in accordance with the values of libertarianism. Planting the seed of slavery could engender a sort of tyranny, which would eventually jeopardize the American Dream.

In economic sphere the notion of individual freedom of entrepreneurship was much endorsed by the conservatives whereas the economic libertarianism was growing with the application of the Darwinian theory of "the survival of the fittest" in humankind, which accelerated the industrial capitalism in the late 19<sup>th</sup> century (Cullen, 2003).

For libertarians, in the case of *Kelo vs. New London* when an individual freedom is not in support to the country's capitalistic system, there has to be a pragmatic decision to trigger the economic growth of region. In this regard the

economic libertarians give a support to the taking of Kelo's property by the power of *Eminent Domain* although it is not in accordance with the country's spirit of individual freedom.

### **V.3. Cultural Freedom against Abortion Ban vs. Individual Freedom against *Eminent Domain***

Taking of Kelo's property by the power of *Eminent Domain* endorsed by the economic libertarians for the sake of the economic development is opposed by the cultural conservatives who call for individual freedom in economy. Meantime, the taking in abortion ban due to cultural conservatism of religiosity is opposed by the libertarians who call for freedom from traditional values of culture and religiosity.

The battle over the case of taking by the power of *Eminent Domain* is won by the pragmatic libertarians who ponder on the economic benefit of the public. The taking is reasonably accepted and legitimated because it is subject to just compensation following a due process of law. It is not a tragedy for Kelo because she will be justly compensated and she can own other property of land with the money of compensation. Moreover, as a free creature it is not a must for her to stick to her land while somewhere else she may find a better life rather than staying for good in her old land property. In this regard, individual freedom of economy as imposed by the conservatives seems to be subject to the economic benefit of the public because under the capitalistic system of economy whenever there is a chance of generating a greater benefit (capital) it should be pragmatically decided.

In the other case, the battle over the taking in the abortion ban is won by the cultural conservatives who ponder on the right of life of the fetus based on religiosity. Although religion is not valid in making the decision by the court, but both scientifically and religiously it is proved that there is another life in a pregnant woman, thus the life has to be protected under the Constitution. Libertarians who ponder on the woman right of her own very private property (body) in fact do not lose the battle because property right is also protected by the Constitution, but when her right of freely using her property (body) is juxtaposed with the right of life of the baby (fetus) there is no other choice except allowing a taking of her right of body. If not, the right of life of the fetus will be deprived and it means the killing of the baby (infanticide). Depriving the right of her body is not the end of the world for her, but

depriving the right of life of the baby it means terminating the life of the baby.

### **The Culture of Conflicts**

In the two cases of takings we can see that the conflicts emerge because of the differences of the ultimate values of conservatism and libertarianism. Conservatism refers to moral ground and absolute truths of religiosity whereas the libertarianism refers to pragmatism of no moral ground.

Conservatism and libertarianism are the precious values of America. They are like two poles that have to exist together but remain in different ends. They can work together but they are also the source of conflicts. When the conflicts are well maintained in balance (equilibrium) the result will be outstanding.

However, if conservatism and libertarianism turn into radicalism the result will be ugly. When conservatives turn radical they will become dogmatic and authoritative and their absolute power will be tyrannical. When libertarians turn radical they become disgusting by turning themselves into radical secularists, who push rigorously progressivism—being too progressive means taking out from their own skins. Radical libertarians are eager to leave behind everything of the past in order to find their new identity. They might become new creatures that can eventually turn into *aliens* among the society.

Many conservatives complained about radical libertarians who become too secular and progressive; they can eventually become socialists in secular humanism with their global communitarian agenda. They may become new leftists, who are really *aliens* to American politics. Conservatives keep reminding the people to keep faith with the basic tenet of Judeo-Christian philosophy and competitive capitalism based on equal opportunity to pursue happiness without government interference.

A media study released in December 2005 concluded that almost all major media outlets tilted to the left and only Fox News, the Washington Times and the Wall Street were found to tilt to the right (O'Reilly, 2006). O'Reilly revealed that a survey by the American Society of Newspaper Editors shows that the rate of atheism among journalists is about 20 percent while it stands 9 percent of the general population. According to him, most Americans are traditionally conservative and the mass media are not “most Americans”. He said that in finding out the core values of American culture, one cannot simply refer to what is highlighted by the mass media.

The radical secularists frequently misinterpreted the provision on the wall of separation between Church and State under the First Amendment reading: “the Congress shall make no law of respecting an establishment of religion nor interfering with the free exercise thereof.” By referring to the provision, they push the government to expel religious expressions and forbid religious celebrations from the public places. They accuse people who express their religiosity in the public places of offending those who don’t believe in God. Radical secularists are not aware that religious expression is part of the freedom of expression which is protected under the Constitution.

O’Reilly (2006) said that in December 2005, House Resolution 579 was introduced on the floor of the 109<sup>th</sup> Congress, expressing that religious symbols of the people should be protected. The Resolution recognizes and supports the importance of religious symbols and traditions, and disapproves any attempt to ban religious expressions. The Resolution vote was 401 to 22 with 5 abstain. All dissenters were of the Democratic Party.

A libertarian—or a liberal—might insist that a woman can terminate her pregnancy for the reason of “reproductive” rights (Obama, 2006). The fact reveals that reproductive rights are neither mentioned nor included in the Constitution. According to a radical libertarian, it is legal to kill a fetus as long as it has not been detached from the umbilical cord (Jacobson, 1990). Religious conservatives condemn such a radical stance, saying that only God can decide the life and death of the unborn baby; the unborn baby is definitely human, thus it has the right of life.

American tradition can serve as a stimulus rather than stumbling block to individual advancement but when the traditional culture becomes hegemonic some problems will emerge. The tradition has so far shaped the identity of America. Some pragmatists tried to devalue the traditional values of culture from the past while many other pragmatists remain adoring the values because the tradition has so far promoted innovation, enhanced individuality and expanded democracy. They believe that pragmatism is compatible to America’s traditional outlook based on religiosity. A political effort to remove religiosity from American life will be a suicide:

The severing of ties to churches, synagogues, temples, and mosques by the left intelligentsia is tantamount to political suicide; it turns the pessimism of many self-deprecating and self-pitying secular progressive intellectuals into a self-



fulfilling prophecy (Hess, 2003: 225).

For religious conservatives there is no 'objective truth' about what the human self is really like. If there is no other value to refer to, the ultimate value has to be justified only on the basis of a metaphysical and epistemological view of American tradition (Riley, 1959). Conservatives do not assume that aesthetics is always an opponent to morality.

The values of individual liberties have so far generated various conflicts but when those conflicts are well-maintained and accommodated in such a good way the benefit will be tremendous. Communitarian values are weird to a liberal country like America. Liberal people are willing to pay any price just for the sake of their individual liberties:

For Dewey, communal and public disenchantment is the price we pay for individual and private spiritual liberation, the kind of liberation that Emerson thought characteristically American. Dewey was as well aware as Weber that there is a price to be paid, but he thought it well worth paying (Hess, 2003: 231).

America is like a world's *laboratory* of experiment of liberties and there is always the price to pay for the result. Freedom cannot be separated from the conflicts. It is always possible that an individual liberty will conflict with other individuals' liberties. The culture of conflicts due to individual liberties can be explored from the historical facts of the Fourteenth Amendment—as well as the Fifth Amendment—that prohibits the states from depriving any person's right of life, liberty or property.

### **Divine v. Secular**

In the case of taking in abortion ban the conflicts between libertarianism and conservatism should be comprehended from the concept of divinity and secularism in America. People should not misinterpret that the disappearance of libertarianism will be the victory of conservatism, or otherwise. To make America great the two camps have to grow strong together while competing each other. Here is the elaboration on American divinity and secularism:

Libertarians adore secularism i.e. the wall of separation between Church (religiosity) and the State. Actually the spirit of secularism has occurred since long time ago during the era of the Puritans; it was the spirit of the Antinomians, who

insisted that since no one knew who was saved, no one could have authority over individual consciences (Cullen, 2003; Morgan, 1999). Antinomians felt disgusted with the authority's formula on religious practices since it was contradictive with their Calvinist principle and they then called for personal approach in religious practices under the Covenant of Grace, thus the governmental authority under the Covenant of Works should not intrude individual religiosity, which would reject all outside authority. Antinomianism was endorsed by John Cotton, John Wheelright, and Anne Hutchinson<sup>27</sup>.

Puritans truly took root in America. Many found that ideals and realities were irreconcilable, thus they had to compromise. In 1662 there was an approach to a sort of Halfway Covenant that seemed to be an axis of the Covenant of Grace and the Covenant of Works and to be more practical the Puritans moved away from the Covenant of Grace towards the Covenant of Works (Cullen, 2003; Morgan, 1999). There was a tendency to rationalize the behaviors, and many people at the time increasingly became secular.

American Constitution erects a wall of separation between Church and State. Article Six prohibits religious tests as qualification to any office or public trust under the United States. The First Amendment forbids the Congress from making any law respecting the establishment of religion or prohibiting the free exercise thereof. It means that the Government does not hold a certain religion but it should also not hinder the people of expressing their religious belief.

Being secular doesn't mean that clergy engages no politics but it is for sure that the wall of separation is actually protecting the State from religious tyranny, whereas it has also protected any group of individuals who organize themselves into a church or a sect from inspection or intervention by the State:

... in America clergy engaged in politics: 'reverends' of different denominations have set in Congress and several, including Father Charles Coughlan, Gerald L.K. Smith, Martin Luther King Jr and Jesse Jackson, have been leaders of popular movements. ..., they have spoken as citizens rather than as men of the cloth (Ruthven, 1989: 305-6).

The Constitution has an implicit commitment to religious pluralism and the State has refrained from a major clampdown on cults and new religion. Ruthven (1989) said that anti-cultism has been left in the hands of the private sector while

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<sup>27</sup> She and her followers fled to Rhode Island, finally to New York, where she was killed by Indians.

religious groups or denominations are operating in a free religious market and America makes religious competition to create a condition of secular government. America's denominationalism has so far increased religious competition, diversity, and innovation. It is like a capitalistic system that tends to enlarge the divine market. Being more mobile and heterogeneous, the religious society of America has become a divine supermarket where a church has to be adapted and innovated to suit people's tastes if it does not want to extinct.

According to Ruthven (1989), the First Amendment is like a two-edged sword: The disestablishment of Church is the condition of free religious exercises. Freedom of worship means freedom from state's coercion and public scrutiny. In America the individual spiritual freedom is like a means of quality control of religiosity.

Religion is quite essential in American democracy because it functions to purify and regulate restrains from exclusiveness by the affluent and from excessive individual liberties. It will be a big mistake to eradicate religion from the country. American Protestantism has inspired the spirits of private philanthropy, anti slavery, Social Gospel and civil-rights movement.

Protestantism is like a culture for America. Being free from governmental restrictions, the Protestants including Methodists and Baptists (evangelists) have expanded westwards along with the shifting frontiers. Protestant evangelism has so far become a process of acculturation which is operationally free from governmental powers (Cullen, 2003; Ruthven, 1989).

Secularists (including the atheists) are wrong when they push believers not to express their religiosity from the public places (Obama, 2006). The majority of reformers in America, who were motivated in faith, has repeatedly used religious languages to argue on various causes. To force individuals not to use their religious morality in the public places is really absurd because American laws are mostly defined in codification based on religious morality.

America is a secular country but it does not mean that the country refers to no morality ground; in fact it is based on a Judeo-Christian tradition (O'Reilly, 2006). Both libertarians and conservatives have to refer to an ultimate religious value when they have to come to a compromise on a common ground. As referring to the Constitution, America does not refer to a certain universal value but to its own cultural value. Being universal will make America lose its own national identity.

A universal value will never give solution to abortion issue. For America the cultural value based on absolute truth of religiosity will definitely solve the issue of abortion, which refers to the Constitution pondering on the rights of life, liberty and property. In American perspective an abortion definitely violates the principle of the Constitution because abortion means depriving life. It is a good saying in America “Think outside the box but act within the Constitution”. Being universal will makes someone hold a cosmopolitan ideal. However, a cosmopolitan ideal (universal value) will very unlikely be endorsed by America:

What our deliberative, pluralistic democracy does demand is that the religious motivated translate their concerns into universal, ..., values. ... If I am opposed to abortion ..., I cannot simply point to the teaching of my church or invoke God’s will ... I have to explain why abortion violates some principle that is accessible to people of all faiths, including those with no faith at all (Obama, 2006: 219).

In what value does Obama really want to refer to? By referring to a universal value in deciding the case of abortion, does he mean that the Supreme Court’s decision was flawed? He may oppose the partial-birth abortion ban, but he—as an American and even a presidential candidate—has to have understood that the court’s decision was not simply based on religious principle. Abortion indeed violates the Constitution, which highlights on the protection of life; it is the duty of the government to protect the life of the unborn baby (fetus).

Obama might apply a universal or cosmopolitan ethics to become his moral ideal, of which was offered by the Enlightenment philosopher, Montesquieu:

‘If I knew something useful to me, but prejudicial to my family, I would reject it from my soul. If I knew something useful to my family but not to my country, I would try to forget it. If I knew something useful to my country, but prejudicial to Europe, or useful to Europe but prejudicial to human kind, I would regard it as a crime ...’ (Hess, 2003: 407).

It would be hardly possible to create a universal human world. It is true that being devoted to humanity is noble but most Americans have to live their lives in smaller solidarities. They learn to love humanity not in universal but through particular expressions i.e. American uniqueness.

Well, it is wrong to presume that the government has no moral responsibility to women who cannot afford abortions. But those who criticize the government also fail to give a correct argument that having a right of abortion means that the

government has to fund the exercise of abortion.

Most Americans still agree with the conservatives who endorse the concept of traditional marriage between man and woman as the best foundation of personal intimacy, economic stability of family, and good child rearing. Obama (2006) himself admitted that based on a research averagely married couples live healthier, wealthier, and happier whereas children living with single mothers are 5 times more likely to be poor than children with two parents.

In that regard, it is not relevant to see America from a universal viewpoint. The traditional values of the colonists have long been embedded in most individuals throughout the country and from time to time the Americans have been favoring the precious values of individualism and self reliance that supports life, liberty and property. Instead of using unknown universal values, America endeavors to universalize its unique values of culture based on conservatism and libertarianism:

... belief in the universality of their values, and only the United States “has tried to develop foreign policies that reflect such exceptionalism. ... the desire to protect uniquely American (and also universal) values; ...(Furuya, 2007: 59-60)

Instead of replacing the American values with alien universal values, America has so far tried to universalize and introduced its cultural values to the world. America’s conservatism and libertarianism cannot be separated from the facts that the people are the advocates of both divinity and secularism.

The idea of liberalism (libertarianism) that ponders on secularism does not mean that the people have to stay away from divinity. In exercising secularism it does not mean that the secular America has to get rid of the divinity. America proves that secularism can maintain divinity: America is a secular country but most—more than 85 percent—of the people are religious (Ruthven, 1989).

## CHAPTER VI

### CONCLUSION

In America the purpose of government is simply to protect the individual rights of life, liberty and property from violations by others. In America the wealthy derives their status from private effort—not from public status—and the purpose of the government is not to do good for all but merely to protect every individual in enjoying his/her rights of life, liberty, property and everybody has to be equal before the law in defending his/her rights.

For Americans, free market is about *moral* values of respecting private property. Curtailing capitalism in free market which generates greater property means moral evils and curtailing individual from making effort to generate greater property is morally wrong. Also, taking individual property without his/ her consent will be simply called a theft.

The important concept of the 5<sup>th</sup> Amendment reading “... nor shall private property be taken for public use, without just compensation” can be interpreted as follows: (1) there has to be recognition of individual’s right of private property, (2) the private property can be taken by government with its power of *eminent domain*, providing (3) the property must be taken for public use, or benefit and (4) the owner must be provided with just compensation.

The Fifth Amendment is part of the Bill of Rights. It restricts government’s power of *eminent domain* by requiring “just compensation” for any private property which is taken for the public use. It is not a must that the property is taken only for the public use; rather, it must be used or disposed in such a manner as to create benefits to the public.

Property taking by the power of eminent domain can be acceptable as long as it does not violate the Constitution which highlights the protection of private property. In light of partial-birth abortion ban, the regulation imposed by the government to restrict woman’s right over her body—her very own property—is definitely a property taking. The government has deprived the woman’s right of her body and the government has no right at all to intervene the woman’s right of her very own private property (body). However, the decision to support the abortion ban is not simply based on woman’s right of her body but it is the life of the fetus (unborn

baby) that has to be protected by the government as referring to in the Constitution. A woman has a full right of her own very private property (body) but she has no right at all to kill the fetus by simply terminating her pregnancy; abortion means depriving the life of the unborn baby.

Viewed from conservatism (religious) and libertarianism (scientific) a pregnant woman has no longer consisted of one but more than one life. Constitutionally, the argument on protecting the life of fetus (unborn baby) can be acceptable. According to the religious conservatives, life belongs to God and no one is allowed to take the life and from the scientific viewpoint (as endorsed by libertarians) a life starts from embryo, thus the Constitution shall protect the life.

For libertarians “God” is unfavorable to scientific theory because God is omnipotent. If one asks why the sky is blue, it might be answered because God makes it blue. Conservatives—particularly the religious—argue that scientific theory i.e. evolution is only a theory that has never been fully proven. No scientific theories have so far been proved to be *absolute*. Scientific theory cannot provide final explanation on everything. Science is simply a relative truth, thus there has to be another truth that it has to refer to. For the religious conservatives an absolute truth is found in religion (God).

Based on the arguments on property takings viewed from conservatism and libertarianism, in solving the research problem i.e. “What makes property-takings in light of Abortion Ban and *Eminent Domain* take place in liberal America”, I have to answer the research questions (one grand tour question followed by two sub-questions):

- **Why are property-takings legitimated in America?**
- What makes America allow abortion ban?
- To what extent can the power of *eminent domain* be applied?

The answer is: Property takings can be legitimated in America because the Constitution—particularly the Fifth and Fourteenth Amendments highlighting on the protection of life, liberty and property—allows them for the sake of the public (society). It is the government’s power of *eminent domain* that makes the government sovereign in doing its task and duty and only a sovereign government can secure the protection of individual’s rights of life, liberty and property. Moreover, it is the legitimate power of the government that makes the property

takings happen in America.

In light of abortion ban, indeed there is a property taking by the government. Viewed from libertarianism, the government's restriction on woman's right of freely using her very private property (body) does violate the Constitution because the government has no right at all to restrict a person of using his/her body as long as (s)he does not violate the right of other individual. In deciding to ban the abortion, the government cannot simply refer to the country's culture, which is much imposed by the religious conservatives based on Judeo-Christian values. In defining a concept of private property the conservatives refer to the Calvinism (Protestant ethics) that body as property belongs to God and other properties belong to humans whereas the libertarians refer natural rights that body as property and others solely belong to humans. In light of abortion ban, the libertarian argument on property taking is constitutionally acceptable since God as the owner of human body (property) is neither tacitly nor explicitly included in the Constitution and none of the Constitution implies that "God" is the owner of individual body. But, how can the abortion ban be legitimated? Legally or philosophically an abortion ban indeed is a property taking.

What is the correct argument that allows the abortion ban? Both the Congress and the Executive ponder on the protection of life rather than woman's right of her property (body). Although it cannot be denied that the two branches of government i.e. the Executive and Legislative (Congress) have used their religious justifications in banning the abortion, but they can prove that that their argument on abortion ban was constitutionally valid since the life of unborn baby (fetus) is included in the protection of the Constitution. A woman is free to use her body as long as she does not cause a danger to the life of her own baby. Although a religious notion on life cannot be accepted in making a judicial decision, but the science has proved that a life begins from embryo, thus it is constitutionally correct for the government to ban the act of terminating the life of the baby. Obviously, the Constitution guarantees the protection of life including the life of unborn baby (fetus). No body can prove that there is no life in the womb of a pregnant woman.

In light of property taking by the power of *eminent domain*, to what extent can the power be applied? Most Americans—the conservatives and libertarians—hate the Court's decision because they prefer individual right of property to economic



development. For Americans an individual liberty is more precious than an economic benefit for the public. But both the conservatives and the libertarians are aware that the government has to be sovereign in protecting their individual rights. Moreover, they also endorse their cultural values that an individual doesn't belong to land but the land belongs to individual. As a capitalistic society, as long as there is a chance to generate capital (economic benefit), every means of resources should be rationally utilized for the sake of the public (society). The Supreme Court's decision based on governmental sovereignty for the sake of the public (society) is constitutionally legitimated as long as the government can prove that it takes the property in due process of law followed by just compensation.

From the arguments on property takings viewed from the conservatism and the libertarianism I conclude that a taking is defined by the rights of life, liberty and property. Also, the taking of property cannot be separated from the concept of government whose primary function is to protect those rights. The property ownership in America is determined by the concepts of life, liberty and property. Individual rights of liberty and property may be reasonably deprived as long as there is a due process of law and just compensation but individual right of life cannot be deprived at all. The rights of property and liberty are of conventional rights whereas the right of life is of absolute right.

Based on the respective libertarian and conservative arguments on property takings in the case of *Eminent Domain* and abortion ban, the taking of Kelo's land property is allowed due to conventional right and for the sake of public benefit but subject to due process of law and just compensation. The taking of woman's right of her private property (body) in abortion ban is allowed not because of the sake of public benefit or conventional right but it is the right of the life of the baby (fetus) that shall be protected by the Constitution. Moreover the right of life is not of the conventional right but absolute right. Takings of the rights of property and liberty can be compromised due to conventional rights but a compromise of taking of individual's right of life is definitely rejected.

Declarative Statement:

**“Takings of conventional rights are allowed but taking of absolute right is prohibited”**

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