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The Supreme Court Repeals the Constitution **by Sheldon Richman**

An unidentified New York Surrogate Court judge famously said in 1866, “No man’s life, liberty, or property are safe while the legislature is in session.”

Thanks to the U.S. Supreme Court we now know (if we needed reminding) that life, liberty, and property are in peril even when the legislature is not in session. That is the only reasonable conclusion to draw from the 5-4 decision last June in *Kelo v. City of New London*, the landmark eminent-domain case. The legal principles set out in the majority opinion go well beyond the government’s taking of private property for *private* (as opposed to “public”) use.

The political philosopher and economist Murray Rothbard used to say that every principle devised to limit the power of government sooner or later becomes a way to expand it. For example, the divine right of kings was supposed to limit the sovereign’s power to execute God’s will. In time the principle came to mean that whatever the king did was by definition *consistent* with God’s will. The Supreme Court decision stretching the power of eminent domain to include redistribution of private property to assist private economic activity provides another example: the “takings clause” of the Fifth Amendment to the U.S. Constitution.

The clause holds: “nor shall private property be taken for public use without just compensation.” Since, as the Supreme Court wrote in 1926, “it cannot be presumed that any clause in the constitution is intended to be without effect,” we have to read each word closely. In his dissent in *Kelo*, Supreme Court Justice Clarence Thomas did just that. He proceeded to show that “use” at the time of the framing meant the “act of employing”; that to construe the word more broadly would make the Takings Clause duplicative of powers already expressly delegated; and that the common law and great legal authorities such as Blackstone support this narrow reading of the word. Parsing the clause with great care, Thomas shows there is no reasonable reading but this: if the government wants to take a person’s property, it may do so only for *public* use (like a road or bridge) and only if the owner is fairly paid. Thus the Takings Clause was intended to be, Thomas wrote, “an express limit on the government’s power of eminent domain.”

Before proceeding I must say that eminent domain is an assault on individual freedom. The very term should make us suspicious in that it tells us that government asserts, according to Merriam-Webster's *Dictionary of Law*, "the superior dominion of its sovereignty over all lands within its jurisdiction." In other words, we live on the land at the pleasure of the sovereign. As a matter of law, this principle is a vestige of absolute monarchy and contrary to the libertarian spirit of the American founding. My friend Ronn Neff brings to my attention the fact that the word "real" in "real estate" comes from the French word for "royal." Here's an informative paragraph from the online encyclopedia Wikipedia:

In spite of the name, real estate has no connection with the concept of reality (in other words, the law does not consider real property more "real" than personal property). It derives instead from the feudal principle that in a monarchy, all land was considered the property of the king. Thus originally the term real estate was equivalent to "royal estate," real originating from the French *royale*, as it was the French-speaking Normans who introduced feudalism to England and thus the English language....

As a matter of logic, no "just compensation" is possible in a forced sale of property, because the only just price is the one freely negotiated by seller and buyer. What makes a transaction morally legitimate is not compensation but consent. Eminent-domain cases are distinguished precisely by their lack of the seller's consent.

The roots of *Kelo*

It's an unfortunate historical fact that the American Founders did not abolish the power of eminent domain. But it is also a fact that they sought to limit it through the public-use and just-compensation provisions in the Bill of Rights. This is why the *Kelo* decision is such a blow. As Justice Sandra Day O'Connor writes in the main dissent, the Court has "effectively ... delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment."

We are all less secure in our homes than we were before the case was decided. However, it must be pointed out that this case did not come out of the blue. The majority relied on Court precedents. In 1954 the Court unanimously upheld Washington, D.C.'s, taking of a department store as part of a plan to replace a blighted neighborhood, although some of the land would be turned over to private parties (*Berman v. Parker*).

And in 1984 the Court upheld a Hawaii statute that gave tenants ownership of their apartments against the will of the owner (*Hawaii Housing Authority v. Midkiff*). The objective of the statute was to diffuse the ownership of land, and the Court deferred to the legislature's belief that this was a proper public objective. What counted, the Court wrote, is "the taking's purpose, and not its mechanics."

These and other cases planted the seeds for *Kelo*.

Winners and losers

While property owners are less secure today than they once were, some are decidedly less secure than others: the homes of low-income people are far more likely to be taken than those of the affluent. The winners in the case are big well-connected land developers — and revenue-hungry local politicians, like those in New London, Connecticut, who condemned a number of homes and stores in a decent working-class neighborhood to make way for a private luxury hotel, upscale restaurants, and other businesses. Several homeowners objected, including an elderly woman who has lived in her home all her life, and they sued all the way to the Supreme Court.

The city argued that, since the new businesses will produce increased tax revenue and jobs, the takings will benefit the public, even if it won't directly use the land. In other words, governments should be able to take property from its owners if other prospective owners will put it to better uses. How is that to be determined? Primarily by the amount of tax revenue expected from the alternative uses. (I need not point out that permitting owners to hold their land only so long as they serve the public interest as defined by the rulers is the essence of fascism.)

This is a scary principle. As O'Connor wrote, "[Who] among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property." Then she adds perceptively,

[The] fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.

Thomas's dissenting opinion, to which no other justice signed on, went further than O'Connor's. Where O'Connor strove to distinguish *Kelo* from the precedents, Thomas rejected the precedents wholesale as contrary to a plain reading of the Constitution:

Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, *without the slightest nod to its original meaning*. In my view, the Public Use Clause, *originally understood*, is a meaningful limit on the government's eminent domain power. *Our cases have strayed from the Clause's original meaning, and I would reconsider them.* [Emphasis added.]

Thomas went on to make additional important points:

So-called "urban renewal" programs provide some compensation for the properties they take, but *no compensation is possible for the subjective value of these lands* to the individuals displaced and the

indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is *bad enough*, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. [Emphasis added.]

Note the radical things Thomas said. First, he debunked the very possibility of just compensation. Value, he wrote, is subjective; values cannot be measured or compared interpersonally — there is no unit of measurement — but only ranked by the individual. (I prefer A to B and B to C.) Why does subjective value preclude just compensation? Because the only test of the justice of a given level of compensation is the owner’s voluntary acceptance, showing that he prefers the tendered compensation (or what he can buy with it) to the property. But voluntary acceptance is by definition missing from contested eminent-domain cases.

Second, Thomas implies that takings even for so-called public use are suspect (“bad enough”). When did a prominent legal authority, not to mention a Supreme Court justice, last intimate that?

Finally, Thomas invokes classical-liberal class analysis by pointing out that wealthy people won’t have to worry about their properties’ being taken for urban renewal, which, he notes, came to be known as “Negro removal” in the 1960s. This is refreshing stuff.

Unfortunately, in ruling for the city the majority held that “public use” needn’t mean *public use*. It may mean any intended public benefit the government chooses. Quoting a 1984 case, Justice John Paul Stevens declared, the “Court long ago rejected any literal requirement that condemned property be put into use for the general public.”

If the Court can liberate itself from any “literal requirement” when reading the Takings Clause, it can liberate itself from any literal requirement when reading any other part of the Constitution. But that means we can never know how the Court will claim to understand the Framers’ limits on government power. Which means: there *are* no limits on government power.

We’ve been in postconstitutional America for some time now. *Kelo* adds an ominous P.S.: There’s no turning back.

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