

Judges Threaten Property Rights

THE FIFTH AMENDMENT to the U.S. Constitution states, “Nor shall private property be taken for public use without just compensation.” This is known as the Takings Clause. That provision, along with similar provisions in state constitutions, protects property owners against the government’s seizing their land, homes, and businesses, unless the taking is to serve a “public use” and the property owners are appropriately compensated. The government’s power to take private property is known as the power of *eminent domain*.

“Public use” has the same plain meaning today as it did when the Constitution was written. Legitimate public uses include constructing a city hall or a courthouse, or building a highway or public transportation system. In all cases, government must pay just compensation to the property owner. In practice, such payment is often far less than the economic loss and inconvenience, but the “public use” limitation should mean that takings are relatively rare.

Never did our Founders anticipate that government would take private property away from Peter to give to Paul. America is a land of limited government, and we have never—except for public use—given our elected officials the power to take away our homes and businesses and turn them over to other citizens or businesses likely to generate more taxes from the property, or who may have better political connections. As John Adams wrote: “The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If ‘Thou shalt not covet,’ and ‘Thou shalt not steal,’ were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free.”

For 165 years, our courts faithfully enforced the Takings Clause the way it was written. The U.S. Supreme Court declared in 1798 in *Calder v. Bull* that “a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.”

In 1896 in *Missouri Pacific Railway Co. v. Nebraska*, the Supreme Court held that the “taking by a State of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.”

In 1905, in *Madisonville Traction Co. v. St. Bernard Mining Co.*, the Court again held that it is “fundamental

in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments.”

As late as 1930, we could rely on the Supreme Court to uphold private property. In *Cincinnati v. Vester*, the Court again held that “the excess condemnation was in violation of the constitutional rights of the plaintiffs upon the ground that it was not a taking for a public use within the meaning of that term as it heretofore has been held to justify the taking of private property.”

THE WARREN COURT

Then came the Warren Court with its unconstitutional notions that it could reinterpret the U.S. Constitution, change its words, redefine them, and invent new law.

In its very first term, the Warren Court in 1954 rewrote the Fifth Amendment. Justice William O. Douglas changed the words “public use” to “public interest” or “public purpose.” That case, *Berman v. Parker*, considered a challenge to a federal program to take private property in the District of Columbia and hand it over to other private parties for redevelopment. Congress had passed the District of Columbia Redevelopment Act of 1945, which authorized the taking of “blighted” property.

The government tested the limits of that statute by seizing property that was not blighted as well as property

that was. One piece of property housed a department store at 712 Fourth Street, sw. The Supreme Court admitted that this parcel was “commercial, not residential property; it is not slum housing; it will be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use.”

The owner sued to protect his private property against the government’s taking. The trial court ruled that government could condemn property only to advance slum clearance, and limited the definition of a slum to conditions “injurious to the public health, safety, morals and welfare.” Not all the property in the case could be labeled a “slum.”

But the Warren Court discarded the centuries-old rule that government should take private property only for a bona fide public use. Instead, the Court declared that “once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”

The Warren Court tried to conceal its mischief by making it appear that it was deferring to the wishes of the legislative branch. In fact, the justices were rewriting the Constitution and thereby depriving property owners of their rightful protection. The *Berman* decision was based on liberal dogma that the government can fix any problem. “The experts” had concluded, Justice Douglas ruled, that “it was important to redesign the whole area” rather than allow “the piecemeal approach.”

But our Bill of Rights was written to protect piecemeal individual rights. It does not authorize government to plan

our lives and property. The *Berman* decision started a trend of aggressive takings nationwide. All over the country, social-engineering projects replaced settled neighborhoods with concrete and vacant lots.

State court judges began to think that if the Supreme Court could get by with supremacist decisions, they could, too. Relying on the Supreme Court's *Berman* decision, the Michigan Supreme Court in 1981 in *Poletown Neighborhood Council v. Detroit* upheld the shocking seizure of hundreds of businesses, more than a thousand homes, and even several churches in the Polish community in Detroit known as Poletown, for the benefit of General Motors. Steamrollers razed all those businesses, homes and churches for the alleged "public benefit" of building a new General Motors factory.

Inspired by this raw display of government power, similar takings from some persons to give to others proceeded all over the country. *Poletown* became the decision that state courts, city councils and big development corporations loved to cite.

The American Dream is to start a small business and develop it through years of hard work and investment. Millions of small businesses form the backbone of our economy, annually creating 60 to 80 percent of all new jobs.

Location is the key to most businesses, and entrepreneurs typically build their reputation at a particular spot. A lifetime of effort can be suddenly undone by the arbitrary decision of a few councilmen or unelected city planners. The business owner can claim only an appraised value for

the hollow building and land that he actually owns, and in most states he receives zero for the goodwill and revenue stream from customers he has nourished over the years. A business leasing its property usually receives no compensation, and the employees get nothing.

Sometimes, a town announces a massive plan to seize properties for development long before it can become a reality. That depresses actual and appraised property values, thereby reducing the price the property owners will receive.

Eminent domain has become a way for politically connected developers to enrich themselves at the expense of small businesses and homeowners. More and more frequently, local governments have used such concepts as “blight” and “economic development” as excuses to destroy thriving private businesses and homes in order to pave the way for wealthy developers to build new big-box shopping centers or theme parks. This makes the large developers very happy; they get a big new shopping center at a bargain-basement price. This process makes the cities happy; cities often receive increased sales- and property-tax revenue. The losers are the former homeowners and businesses.

The familiar argument that eminent domain takings for private development are necessary for slum clearance or removing blighted areas is not supported by experience. Even when areas are blighted, consensual property acquisition is the better solution and has been successful in many areas.

REWRITING THE CONSTITUTION—AGAIN

Those who believe in the U.S. Constitution as it was written and in the right of private property began to hope that the Supreme Court would remedy the long series of mistaken decisions, and the injustices they have caused, by a new decision in a case coming out of New London, Connecticut.

But the people's hopes were dashed. In 2005, the Supreme Court opted for judicial supremacy rather than the U.S. Constitution. In one of its final decisions of the term, the Court fully embraced its own rewriting of the Constitution's words "public use" into the judicially created words "public purpose." The Court then defined "public purpose" to include the alleged public benefit of increasing the tax flow to government.

In the much-anticipated case of *Kelo v. New London*, Justice Stevens wrote for the 5 to 4 majority that whenever a taking "serves a public purpose" (which can simply mean higher tax revenues for the town), "the takings . . . satisfy the public use requirement of the Fifth Amendment."

Wilhelmina Dery lost the home that she had lived in since she was born there in 1918. Susette Kelo, the lead plaintiff, lost the substantial improvements she made to her house, which will be demolished. The Court conceded in *Kelo v. New London* that compensation is often inadequate for the owner of the seized property, but declared that issue to be outside of the scope of the case.

Justice O'Connor, in perhaps the most bitter dissent of her career, wrote: "Today the Court abandons this

long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded. . . . Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall or any farm with a factory.”

The judicial supremacists had struck again. As Justice Thomas wrote in his brilliant dissent, “Something has gone seriously awry with this Court’s interpretation of the Constitution. . . . The Court has erased the Public Use Clause from our Constitution.”

Justice Thomas’s dissent emphasized the importance of the original meaning of the Constitution: “When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution’s original meaning.” But five justices rejected the Constitution’s meaning and substituted their own social views. They rewrote the Fifth Amendment to allow takings for any broadly defined “public purpose,” rather than applying the Constitution’s express limitation of “public use.”

The *Kelo* decision showed that putting more tax dollars in the hands of government ranks higher in liberal priorities than compassion for the minorities they brag about helping. Justice Thomas pointed out in his dissent that “Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite

. . . . Over 97 percent of the individuals forcibly removed from their homes by the slum-clearance project upheld by this Court in *Berman* were black.”

Public outrage at the *Kelo* decision came from all sides of the political spectrum and at all levels of government. State legislatures were spurred into action by the public outcry against the Supreme Court’s attack on property rights, and about half the states proposed statutes or state constitutional amendments to restrict local governments’ eminent-domain powers.

On November 4, 2005, the House of Representatives passed the Private Property Rights Protection Act by a vote of 376 to 38. The bill would deny federal economic development funds to any unit of government that exercises its power of eminent domain for economic development rather than for public use. The bill gives a private cause of action to anyone injured by a violation of this act. The bill moved to the Senate, which had already passed an amendment to the Treasury, Transportation, and HUD appropriations bill, stating that no funds provided in the bill may be used to support any federal, state, or local project that uses the power of eminent domain unless it is used only for a public use.

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- John Adams' quotation is from *The Works of John Adams, Second President of the United States*, Charles Francis Adams, editor (Boston: Charles C. Little and James Brown, 1851), vol. VI, 9.
- Michigan finally repudiated its own decision in the *Poletown* case. The Michigan supreme court held in *County of Wayne v. Hathcock* (2004) that the U.S. Supreme Court's *Berman* decision had no bearing on Michigan's interpretation of its state constitution to protect private property owners.

LESSON FIVE

JUDGES THREATEN PROPERTY RIGHTS

QUESTIONS FOR DISCUSSION:

- ★ What does the U.S. Constitution say about the right of government to take your private property?
- ★ Define: “public use,” “takings,” and “eminent domain.”
- ★ Do you think government should take one person’s property in order to give it to someone else?
- ★ What did John Adams say about the right of private property?
- ★ How did the Warren Court lay the foundation for abusive takings by government?
- ★ How did the Supreme Court change the words of the Constitution in the *Kelo* case?
- ★ Is the real motive of many government “takings” the desire to get more tax revenue into the hands of government?
- ★ What has been public reaction to the *Kelo* decision? Has your state legislature taken action to prevent “takings” in your state?