A Popular Insurrection on Property Rights

BY RICHARD A. EPSTEIN

The property rights issues that arise constantly in modern life are always difficult and often obscure. Most ordinary people understand the importance of zoning restrictions and environmental protection in their daily lives. They are also keenly aware that the state exercises its eminent domain power whenever it condemns land for a post office or a public highway. But in general they rightly feel a little intimidated if asked to understand the inner workings of a legal system that is dominated at every turn by an impenetrable jargon that even trained lawyers find it hard to manipulate. So they tend to express their satisfaction or disapproval with various cases in global fashion that avoids judgment of their legal merits: do the actions of governments, usually at the state and local level, tend to advance some legitimate cause? They couldn't care less about the fine points of exactions or whether imposition of a conservation easement counts as a regulatory or a possessory taking.

There are occasions, however, in which that resigned complacency is replaced by a collective gasp of indignation that sounds a clarion call for action. The two key conditions for a popular uprising are not easily satisfied. First, the government action has to be simple and direct, so that it hits people right in the gut. Second, it has to be an affront to a constitutional provision simple enough for everyone to understand. Outrageous actions that are flatly illegal do produce a firestorm of protest by ordinary citizens turned constitutional lawyers.

There are few cases in which this explosive mix seems to occur. It certainly happens with school prayer, abortion, and affirmative action. But land-use planning and condemnation has been such a fixed feature of our urban landscape for so long that is hard to believe that it could trigger that kind of social firestorm. But it did, big time, on June 23, 2005, in *Kelo v. City of New London*. That case catapulted private property rights into the top position of American problems, according to a *Wall Street Journal*/NBC poll. And why? Because a regrettable decision of the United States Supreme Court upheld an ambitious land-use planning scheme that the City of New London devised with the ostensible purpose of reviving the flagging fortunes of a small Connecticut city that had fallen on hard times. One portion of the plan, viewed in its most favorable light, authorized the condemnation and destruction of a number of family homes, with payment of compensation, which is always set below the actual loss to its owner—which is another, related, story. The land was to be transferred to private developers for use to promote general economic development, create jobs, and increase the tax base of the town. In its original inception, these were no modest aspirations: luxury hotels, fancy apartments, upscale stores, and wishful thinking.

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Fifth Amendment, which is short enough to quote in full: "nor shall private property be taken for public use, without just compensation." A five-member "liberal" majority led by a determined Justice Stevens (who like Will Rogers has never found a government spending program he did not like) upheld the project. Justices Souter, Ginsburg, and Breyer happily signed on, and Justice Kennedy waffled a bit, but went along nonetheless. Their bottom line: any project that had some indirect public benefit in the eyes of the city elders was sufficient. The project could go forward. Four conservative justices, so-called, Rehnquist, O'Connor, Scalia, and Thomas, signed on to pointed dissents that castigated the Court for making the public-use clause a dead letter.

Outrage is the only way to describe the public reaction. (See, for one account, Timothy Egan, "Ruling Sets Off Tug of War Over Private Property," *New York Times*, July 30, 2005, p. A1.) I had written on behalf of the Cato Institute (with Mark Moller) a brief that had decried the action of New London. For my pains I was besieged with phone calls from legislative aides in the United States Senate, California, Florida, Illinois, Missouri, Texas, and perhaps some others, who were determined to pass some constitutional or legislative fix that they thought would undo the massive damage that the *Kelo* decision did to their fundamental institutions. Legislation is pending just about everywhere. The U.S. House of Representatives condemned the decision by a vote of 365 to 33, with the likes of Tom DeLay and Maxine Waters at last finding common ground. Quite simply, they were all pushed by ordinary citizens who do not care one way or another whether John Locke had the right explanation for the origin of private property. But those folks went ballistic over the proposition that the state could take their lands simply to transfer them to someone who was richer and more powerful than themselves. Conservatives who believe in property and populists who dislike pushy corporations made a common cause.

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After the Supreme Court decision, moreover, the New London Development Corporation only added fuel to the fire, both by serving eviction notices on the *Kelo* defendants and demanding back rent from them for the interim period of occupation. Those steps brought howls of protest from Connecticut Governor Jodi Rell and the New London Council, which announced that at long last it had lost confidence in its Development Corporation. At last word, the eviction orders have been rescinded and the rental claims dropped. Indeed, at the eleventh hour, even the status of the ill-starred grand plan is in issue. Stay tuned.

Since the worst thing that anyone can say about a Supreme Court justice is that he or she has engaged in the sin of judicial activism, Justice Stevens and his progressive liberal crew were quickly branded with that unseemly label. The four conservative horsemen, almost by default, now became the redoubtable defenders of the common man.

This whole overheated picture requires some unpacking—but none that will restore respectability to the dreadful mishmash in the Stevens opinion. First off, the phrase "judicial activism" should not be hurled around as an uninformed epithet, but should be given some precise meaning, along with that of its sometime traveling companion, the canon of "strict construction" of the Constitution. In its original inception these two concepts were thought to be closely entwined. The judicial activist was a judge who usurped legislative functions by invoking exotic conceptions of constitutional interpretation. Thus efforts to take over school systems and to pass legislative appropriations for prisons do count as instances of judicial activism. The activist judge strikes down legislation that democratic bodies have properly passed after due deliberation.

No Judicial Activism Here

But however grievous the sins of *Kelo*, "activism" is not the word to describe them. Quite the opposite,

in *Kelo* Justice Stevens performed judicial somersaults to allow the city to go forward with its comprehensive plan to rip down the houses. He was too *soft* on government, not too hard. But strict construction raises a different flag, for how could the words "for public use" be read to allow the state to take land that was headed by design straight for private ownership and private use, whereby its new owners could exclude the entire world if they so chose. The first important lesson of this sorry exercise is that the principle of a strict construction often *requires* the invalidation of laws that violate an express constitutional prohibition.

Here it does not take a great lawyer to realize that the phrase "for public use" does not easily translate into "for private use, so long as there is any 'conceivable' indirect benefit from a planning scheme hatched by City of New London and its privately created Development Corporation." More simply, every private home generates some public benefit, so that any time property is taken from A to B, it meets the capacious test of public use. That perverse rendering just writes the words out of the Constitution.

The abuse of legal doctrine is not something new: it is an inseparable part of Supreme Court jurisprudence. But in this instance, the judicial misadventure hit home. Justice Stevens lives in the thrall of a Progressive worldview that sees only good when the bulldozer knocks down a private home. The traditional view that property is the central institution for preserving and promoting the settled expectations of ordinary people is a view that has commended itself to such outdated thinkers as Locke, Hume, Smith, and Bentham. But ironically it was just that view that resonated so powerfully with people on all sides of the political spectrum, many of whom never heard of any of these eminent thinkers to whom they owe such an enormous debt. They could not see the wisdom or justice of throwing folks out of their homes to make way for the richer folks who could take their place.

Indignation in this case is a wonderful tonic because it wakes people up to the dangers that government can pose to institutions that they take for granted—which is itself a phrase taken from general property law. Indeed, if they had stopped to look at the particulars of the *Kelo* situation they would have been still more appalled. The best that could have come out of that sorry exercise in city planning was that the land on which the homes of Ms. Kelo and her fellow landowners sit would be occupied by fancier homes with a fine view of Long Island Sound. In fact the blundering planners of New London did not contemplate that the land would be used for that purpose. Rather, it was set aside for "park support services" that no one could define.

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More generally, it turns out that this particular plan is best described as a "nonplan." The city had full control over about 90 acres of property that were already in its possession; it had spent about $73 million in state funds to build infrastructure, do environmental cleanup, and engage in long-term planning. The only problem was that it did not have any private developers who were committed to putting any particular project on the land that it already owned! As often happens, there is a competition for development between different localities in the same region. And while New London dithered over its "plan," smaller parcels of land outside of city limits had been turned into the hotels, shops, and office buildings that scooped the ones New London had hoped to put on its land. The houses were, for the most part, a sideshow, which never stopped the main plan anyhow. The plan that it had could have gone forward if those houses had just been left alone and not slated for senseless destruction on spec. Property is not taken for public use when the state has no idea *why* it is taken.

So What Do We Do Now?

Faced with so outlandish a decision, it is no mystery that people wonder when they go to sleep whether they will own their homes in the morning. The one silver lining in Justice Stevens's opinion was that he noted that state legislatures could include in their constitutions

and statutes protections that are more extensive than those (paltry) protections that he found in the public-use provision of the Takings Clause. So the rush begins. Just what should be put in place of the despised *Kelo* ruling? And it is here that the job gets a lot more complicated. One key feature of the public-use language is that it does not specify at all what kind of property is taken. Yet to most individuals, *Kelo* would be just another property-rights case if the City of New London sought to take a vacant lot, abandoned store, or even farmland for public use. Sentiment would be more divided if it were a small business, or perhaps even a large one. But it is not so clear that the Constitution embeds in the public-use clause these very sensible judgments that some forms of property are more personal than others, and thus should receive a higher level of protection. Yet at the same time, a provision that says that private homes should never be taken for public use runs into difficulties the other way: do we really think that under no circumstances a private home should ever be taken for a public road, a hospital, or even an office building? There is only so much weight that we can place on three little words.

The situation becomes more clouded when we look to the historical evolution of the public-use language. The recent decisions before *Kelo* did not speak well for the intellectual or political acumen of the Supreme Court. Its 1984 decision in *Hawaii Housing Authority v. Midkiff* involved a Hawaiian scheme whereby individual tenants would place money in the public treasury that the state government would then use to condemn (on the cheap of course) the landlord's interest in the same property. It looks to be as clean an illustration of taking from A to give to B as one could imagine. But a unanimous eight-member Supreme Court (Justice Thurgood Marshall did not participate) meekly caved in with a dreadful decision by (a then-compliant) Justice O'Connor, which found that Hawaii had "conceivable " indirect public benefit in using the eminent domain power to counteract a supposed "oligopoly" problem that confronted the worthy Hawaiian Islanders. (It was largely attributable to its restrictive zoning laws, but that is another story.) The decision rested on the same flabby rule of constitutional deference as *Kelo*, but it engendered no public outcry at all. Why? Because no sitting tenant was knocked out of his home, and the chief landlord was the powerful Bishop's Estate. The populists didn't care.

Department Store Taken

Much the same can be said of an earlier decision that proved more important in the *Kelo* decision. The 1954 decision in *Berman v. Parker* involved a comprehensive plan to clean up a blighted area in Washington, D.C., by removing all the structures in a large district. Berman's department store was located in the region, but was itself not blighted. No matter, said Justice Douglas for a unanimous court. All sorts of aesthetic benefits (which he blithely assumed that the planners could create) counted as a sufficient public benefit, so that Berman had to take the dollars and shutter his store. But again, no real outrage. Ordinary people don't identify with blighted neighborhoods or small department stores, and besides the real dangers of bad urban planning were less apparent then than they are now.

Nor did the public react in 1981, when the city of Detroit, with the blessing of the Michigan Supreme Court, took an entire unblighted old ethnic neighborhood, Poletown, so that General Motors could build a Cadillac factory. In many ways the level of disruption of ordinary life was far greater than it was in *Kelo*, so it is critical to ask why the lack of some national backlash like that which *Kelo* has spawned. Two points come to mind. First, Poletown was a local matter; the case did not reach the U.S. Supreme Court. And second, at the time, there was no organized property-rights movement and certainly no campaign against eminent-domain abuse, as there is today. In an age of raised sensitivity, *Kelo* brought together intellectual conservatives who fear state power with progressives who think that state power should be used to bring communities together, not rip them apart.

The complacent tone of Justice Stevens's opinion in *Kelo* gave no hint that he (or anyone else, for that matter) was aware of the looming public outcry. But the anguished cries of protest clearly stung him. In a rare moment of public unhappiness, Stevens stated at a Las Vegas bar association meeting that he did not like the outcome in the *Kelo* decision, and thought that the free market was the best way to redevelop land. But,

nonetheless, he concluded that he had no choice but to apply the judicial precedents that required *Kelo's* unhappy result. The Justice was half right. There's no question but that his decisions were *consistent* with earlier dreadful decisions. But there was no way to say that the results were *required* by them either. Here are three quick grounds of distinction. *Kelo* was the first case that involved the condemnation of private homes; it was the only case where the so-called comprehensive master plan specified no use for the condemned property; and it involved neither blight nor oligopoly. Stevens could have protected the *Kelo* defendants, and, ironically, defused the widespread challenge to the use of eminent domain to further development or enlarge the tax base. So what's next?

Constitutional Interpretation and Public Trust

At this point, however, the complexities start to build up. Is the removal of real (hard-core) blight—the sort we know when we see it—sufficient reason to take land? Or is it a reason to raze the building as a public nuisance, while leaving the land in private hands? These choices are a lot tougher than the issue raised in *Kelo*. The same is true of the earlier line of cases which said that certain takings for (gasp!) private uses were all right because of the great public benefit they created. No, these cases were not early trial runs of *Kelo*. Typically they involved scrublands that lay between a productive mine and the railroad tracks that had to be reached to ship the ore to market. The danger was that owner of the scrubland would hold out for a small fortune and block the use of the mine. In other nineteenth-century cases, mills could only be created by flooding private farmlands, so that the same holdout problem existed. Cautiously, early courts tended to allow these takings for just compensation when the high-holdout problem was conjoined with the low subjective value of the scrubland (or farmland) taken for what looks like a private use, with some real public benefit.

That balancing test does not sit well with the dogmatic frame of mind that takes hold when all people think of is what they can do to prevent outrages like *Kelo.* And this shows a hidden danger of really bad interpretation in easy cases as opposed to really tricky interpretation in harder cases. I see no reason why any court or legislature would want to overturn the results in the holdout cases, which have done useful work for 150 years or more.

Unfortunately, precipitate action often goes further than it ought. And that is just another cost of bad case law in *Kelo* and its forebears. No constitutional language is so crisp that it does not admit hard cases. The language of public use was introduced to signal that certain kinds of takings were just off limits. No three words in the English language are better adopted for that result. But three words are not a complete land-use code, and they cannot take into account all the factors that on reflection should decide when property is just off-limits to government action and when it can be taken with just compensation. Similar issues exist with every other word of the Takings Clause: what is private property, how is it taken (or destroyed or regulated), when is it permissible to do so?

Constitutional texts are sensible and vital starting points for complex analysis. It takes literally a volume to sort out all the difficulties that arise with any open-ended clause of our Constitution while remaining faithful to its central purposes. The great constitutional tragedy of *Kelo* is that the subtle element of trust between the justices and the public has been shattered by a decision so wrongheaded that people think that they have to take the law into their own hands. It will be a long time before that trust is restored no matter what the Court's composition. Overruling *Kelo* would be a good way for the Supreme Court to begin.