

WHAT'S NOT PUBLIC USE? IMPLICATIONS AND RISKS FOR THE FUTURE

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ABSTRACT

This past summer, the United States Supreme Court ruled on a major eminent domain case that substantially broadened the power of the government to take private property. Prior to the case, the government was constrained to take only property the government would use for public purposes like a road or a park. With this recent decision, governments are allowed to take private property from one person and give it to another.

INTRODUCTION

The first ten amendments to the Constitution, the bill of rights, were created to save us from what John Stuart Mill called tyranny by the majority. Its purpose is to protect the individual from the power of government, and in theory from the will of the majority, by protecting individual liberty. For example, our first amendment protects the dissemination of unpopular ideas, protects the press, provides for religious freedom, and gives us the right to collectively assemble and complain to and about the government. Each one of these protections has been given specific legal meaning.

At least since more *Marberry vs Madison* our courts have been charged with determining the constitutionality of governmental action. By this process courts have protected the individual from the government and therefore from tyranny by the majority. Never has a court said that the phrase "Congress shall make no law...abridging the freedom of speech..." was not subject to judicial interpretation. Obviously, if our free speech liberty only extends as far as Congress says it extends, we have no free speech.

Since the bill of rights was established to protect the individual from the majority it would defeat its entire purpose to have the majority determine what freedom of speech meant. Therefore, courts have given specific meaning to the phrase "freedom of speech" and have continually risen to the occasion defeating the legislative will and protecting the individual.

It is hard to imagine that the drafters of the bill of rights envisioned that some of the language they were debating would simply have no meaning.

However, the supreme court of the United States recently made exactly that determination in the case of *Kelo v City of New London*, 125 S. Ct. 2655; 162 L. Ed. 2d 439 (2005) The *Fifth Amendment* to the United States Constitution states that "Nor shall private property be taken for public use, without just compensation." That Clause was made applicable to the States by the *Fourteenth Amendment*. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

KELO vs. NEW LONDON

The issue presented to our Supreme Court was to answer with specificity what is meant by the phrase "public use". In *Kelo* the court was presented with exactly the situation that the bill of rights was meant to prevent, this family was seeking the protection of law from the power of the majority. The Kelo family lived in New London, Connecticut. The economic base of New London had weakened considerably. The Naval Undersea Warfare Center had closed down in 1996 and many of New London's jobs left with it. The population in and around New London dropped to its lowest level since the nineteen twenties. The most blighted area of New London was its Fort Trumbull area. This area is located on a peninsula in the Thames River.

In the New London area there existed a private corporation called the New London Development Corporation (NDLC). This group of private citizens organized themselves with the plan of assisting the city with economic development. At about the same time as the NLDC was formed the city of New London received good news in that Pfizer Pharmaceuticals was planning to build a three hundred thousand dollar research center in the Fort Trumbull area which would revitalize the area and bring in needed employment.

The NDLC crafted a redevelopment plan which it hoped would complement the new Pfizer facility and revitalize this area of New London. In January of 2000 the city council of New London approved the plan and designated the corporation as being in charge of implementation. They further abdicated their elected duty by transferring to this private corporation their power to exercise eminent domain in the name of the people of New London.

The area for the proposed development covered 115 privately owned properties and 32 acres on the former naval facility. This land was divided up into seven parcels by the corporation and a different use was contemplated for each parcel. Nine families would end up having their property condemned by the corporation via the power granted to them from New London's City Council. Eleven of these properties were in parcel 4A and the other four were in parcel 3. All of the other land owners agreed to sell their property to the corporation.

Interestingly enough the corporation had no firm plans for the use of parcel 4A. In fact the Supreme Court of the United States would render its decision before any specific plans had been made for its use. All they could tell the court was that the subject property might be used to somehow support a local marina or it may be used as a parking lot for a nearby park. Parcel 3, which contains the other properties at issue, was to be used as office space for research and development. This area was located immediately north of the newly planned Pfizer facility.

Neither the city nor the corporation made any allegation that the subject properties were blighted in any way. Many of the properties were located on valuable beach front and were now being transferred to a private developer by the NLDC. Our Supreme Court found no problem with this and left the phrase "public use" completely to the whim of local government; in this case the delegated unelected corporate officials of the development corporation.

How has the "public use" interpretation evolved into such a broad application that has supported taking private property to give to another private individual? The United States Supreme Court in 1798 stated 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. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them...."[Calder v.](#)

[Bull, 3 U.S. 386, 388-89 \(1798\)](#). Today we find that "such powers" are an acceptable power of state government. The determination as to what is a public use or a public purpose is now wholly a local government determination, and further it matters not that the land is taken by the governmental entity and given to another private owner. *Kelo*. We arrived at this dramatic reversal of constitutional determination in a slow and incremental process beginning in the nineteenth century.

THE EVOLUTION OF A DECISION

In 1897 a case reached the Supreme Court involving the Gettysburg Battlefield. Congress had decided to preserve the battlefield and erect tablets and statues at various places on the site. The statute further authorized the government to take any necessary land by eminent domain. The Court determined that a taking could only occur if its purpose was both a public one and that it was within the powers granted to government by the Constitution. *United States v Gettysburg R.R.*, 160 U.S. 668; 16 S. Ct. 427; 40 L. Ed. 576 (1897). "It has authority to do so [take property] whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution. Is the proposed use, to which this land is to be put, a public use within this limitation?" *Gettysburg* at 679. After an exhaustive analysis of the public benefits of preserving the battlefield the Court determined that "...when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Gettysburg* at 679. Thus we had a two pronged test, first was the goal within the powers granted by the Constitution, and secondly, was there a public use or purpose to which the land was going to be used.

Cincinnati v Vestor, 281 U.S. 439 (1930) is even more telling on the issue of public use. Here the City of Cincinnati decided to take property via eminent domain for the widening of Fifth Street. No one contested that the expansion of Fifth Street was a public use. However, the City attempted to condemn an area wider than was necessary for the public use. The Court began by laying out what it viewed as the current precedent. This is a statement of the law which, unlike our most recent Supreme Court pronouncement, gives due regard to the Bill of Rights and the Courts responsibilities to use it to insure our freedom.

"It is well established that in considering the application of the Fourteenth Amendment to cases of

expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.” *Cincinnati* at 446. In the end the Supreme Court did not allow the City of Cincinnati to take the excess property because they could not delineate a public use for the property that was specific enough to pass Fifth Amendment scrutiny or Ohio statutory law.

The Courts recent decision in *Kelo* rests heavily upon two cases that were decided in the later half of the twentieth century. They discounted the earlier case of *Cincinnati v Vestor* and instead turned too *Berman v Parker* and *Hawaii v Midkiff*. We believe that the courts reliance on these cases is misplaced. Justice Stevens, writing the majority opinion in *Kelo*, relies heavily on these two cases for the proposition that the Court must “...decline to second-guess the City's considered judgments about the efficacy of its development plan.” *Kelo*

Rather than simply deferring the opinion of a locally appointed corporation the Supreme Court in *Berman* took a good hard look at the public purpose involved. *Berman* concerned a redevelopment project in Washington D.C. The Court was persuaded by the fact that the areas being condemned were slums that adversely affected the health and welfare of the inhabitants of Washington D.C:

“In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes. *Berman* at 30. It is extremely hard to argue that the eradication of such conditions does not serve a public purpose.

Rather than displacing persons the plan required the construction of low cost housing that was clean and sanitary. It is extremely easy to see the

public use here, and a unanimous court had no difficulty in finding the eradication of squalor to be a public purpose.”

In 1984 the United States Supreme Court revisited the issue of public use in deciding a case appealed from the State of Hawaii. Hawaii had been settled by Polynesian peoples from the western Pacific. When they arrived they established a feudal system whereby the land was owned by the King and the peasants worked land they did not own, and never could own. By the mid 1960s Hawaii was still owned by a few people. On Oahu 72% of the land was owned by 22 landowners. Over all, 49% of all the Hawaiian Islands were owned by state and federal government, while 47% of the state's land was owned by 72 private land owners.

The fight to kill the land concentration in England following the death of the feudal system was not complete at the time of the American Revolution. Because of this many states took steps to redistribute land. Both Pennsylvania and Virginia created detailed legislative schemes to achieve this end. It was never doubted that land ownership was a public good. “To have suffered the *Penn* family to retain those rights which they held strictly in their proprietary character, would have been inconsistent with the complete political independence of the State. The province was a fief held immediately from the crown, and the Revolution would have operated very inefficiently towards complete emancipation, if the feudal relation had been suffered to remain.” *HUBLEY v VANHORNE*, 7 Serg. & Rawle 185 (Supreme Court of Pennsylvania-Sunbury District 1821)

Hawaii decided to end the remnants of their feudal system by the government purchasing all land in excess of 5 acres that was leased to a private individual. They paid the owners just compensation.

THE VIEW FROM THE OTHER SIDE

Justice O'Conner, who would later dissent in *Kelo*, wrote the Court's opinion in *Hawaii v Midkiff*, 467 U.S. 229; 104 S. Ct. 2321; 81 L. Ed. 2d 186 (1984). She determined that the Hawaiian land system had “...created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.” *Midkiff* at 242.

In the recently decided case of *Kelo*, however, there is no such limitation concerning a public use or a public purpose. In all of these cases there was an evil that had been perceived by the state and the state acted to eradicate that evil. All of the cases pre-*Kelo* dealt with an easily recognizable public use or purpose.

In Connecticut the City of New London simply made a determination that one private citizen could provide more economic benefit to the community than another private citizen. Perhaps there is some public purpose in attempting to create a better economic climate or to collect more tax revenue; however, there is now no distinction between a public purpose and a private purpose. The logic of this case would allow a city to condemn a church to build a Walmart or to condemn modest housing because an expensive high rise would yield higher tax revenue. Justice Stevens, writing for the majority in *Kelo*, never gave us any standard by which to judge the phrase “public use”; he simply explained why one standard after another could not work. In other words, the Court declined to address the issue. The court left open the question if there is a responsibility to develop standards by which to interpret the Bill of Rights in a way that protects the citizenry from tyranny by the majority. This Court failed its fundamental task.

CONCLUSION

The *Kelo* decision raises several disturbing issues. First, in the light of the lack of standards defining public use, are there any private property rights left in this country? Ownership and future control of a property is subject to the whim of a local government to favor another owner for some possibly nebulous reason such as the desire to collect more tax revenue from the property. Even more disturbing as pointed out by Justice Thomas in his dissent is the possibility that local governments might use eminent domain to rid themselves of housing opportunities for the economically disadvantaged thus driving the poor from the community.

Another difficulty raised by this decision is the possibility that property owners will not be fairly compensated through “just compensation.” Just compensation is required to be paid by the government body taking the property through eminent domain. The amount of just compensation is usually based upon the market value of the property in most jurisdictions. The problem is that private property owners might choose to over-improve their property to the point that the costs of the

improvements exceed the market value of the property. For example, assume that a property owner in a modest neighborhood has a child with Olympic swimming aspirations. The property owner decides to install an Olympic-sized indoor swimming pool through an addition to the home in the back yard. It is likely that the property value would increase by only a fraction of the costs of the improvement. Should the local government wish to take the property, the homeowner would not be fully compensated for the improvement.

Still another disturbing difficulty with this decision is the possibility that a local government might exercise eminent domain for political purposes. For example, in a community that requires residency for its elected officials, it would be possible for an incumbent facing an election battle to engineer taking the opponent’s property so that the opponent might become ineligible for election to the office. Ironically, it has been reported that the local government where Justice Souter has a residence has threatened to take his home through eminent domain and give to another individual to make a bed-and-breakfast. While the irony of this action is humorous, it raises the possibility that local governments might choose to take properties from some of their celebrity citizens to create tourist attractions. For example, might the local government where Michael Jackson has his Neverland Ranch condemn the property and make it into a Michael Jackson museum? To further illustrate an earlier point as well, the market value of Neverland Ranch is likely to be far less than its costs of construction.

The decision also raises the possibility that a local government might take an industrial property because of a dislike or dispute with the management of the company. The government could then turn around and sell it to another company to use it for the same purpose. For the courts to question such an action, they would have to ignore Justice Steven’s reasoning that they should “...decline to second-guess the City’s considered judgments”

Another interesting paradoxical difficulty raised by this decision is the possibility that entrepreneurs might choose to avoid communities like New London. It is not uncommon for entrepreneurs to scout out a community and begin buying up property over a significant period of time in order to assemble a group of properties before undertaking a large development. Developers might avoid communities like New London out of fear that the local government might decide to take their property to give to another developer. Had the *Kelo*

decision existed and had the local governments of Kissimmee and surrounding communities been like New London, Walt Disney might have never built Disney World. For many years, Disney quietly acquired properties in the area until they had sufficient acreage to undertake the development.

Since this decision, Rivera Beach Florida has planned to condemn much of the waterfront property displacing potentially over six thousand people. This case is likely to end up again in the Supreme Court as well. Perhaps the decision will be reversed for the Kelo decision gives new life to the meaning of the “tyranny of the majority.”

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