

Property Rights Condemned

The Supreme Court's decision allowing government to take private property for the purpose of economic development is the latest in a series of rulings over the past half century that have undermined property rights. In the words of dissenting Justice Thomas, "something has gone seriously awry with this Court's interpretation of the Constitution."

["Government has no other end but the preservation of property."] These are the words of John Locke, the 17th century English philosopher whose views greatly influenced the Founding Fathers. The belief that strong property rights are an essential component of liberty, and that a representative government therefore has a duty to preserve them, is embodied in the Fifth Amendment of the Constitution, which reads in part:

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, 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.
(Emphasis added.)

The last clause, known as the "Takings Clause," was at issue in the Supreme Court's recent decision concerning eminent domain. The case involved an effort by the city of New London, Connecticut, to seize the property of homeowners without their consent (but with compensation) in order to use the land for an economic development project. City planners claimed that the economic benefits, such as more jobs and increased tax revenue, would be enjoyed by the whole community, and therefore the property was being taken for a valid "public use." One of the homeowners fighting the plan is an 87-year-old woman who has lived in the house since she was born, and whose home has been in the family for over 100 years.

The Court ruled against her and the other homeowners, saying that the city's plan for economic development did indeed qualify as a "public use." The ruling has been almost universally denounced; the only people who seem pleased with it are city planners, real estate developers, and their lawyers. It has upset not only property rights advocates but Americans across the political spectrum, who were surprised and unsettled to learn that the Constitution apparently provides far less protection than they thought against Big Brother taking their homes away.

It may be an even greater surprise to learn that this lack of protection is nothing new. The Supreme Court's decision did not represent a sudden break with its past rulings. The general public may not have been aware of it, but property rights have been eroding for decades. The government has been allowed to take property for the purpose of economic development since the 1950s, and when the Supreme Court has heard a case in the past 50 years involving eminent domain, it has usually ruled in favor of giving the government more power to use it. [Rent control is another example of taking property without just compensation!!]

A Slippery Slope

The Constitution has never provided absolute protection against the power of the government to take private land. The Supreme Court long ago permitted it to use the power of eminent domain to provide public roads, bridge, buildings, and parks. The common characteristic here is that when the land is put to its new "public use," it is open to the public, it directly serves the public, and it is usually owned by the government. Governments have also been allowed to seize property from one private owner and transfer it to another private owner, but only under limited circumstances, as when land was given to railroad owners in the 19th century. The reasoning was that even though the railroads were privately owned, the entire community used and benefited from them.

The Supreme Court gradually broadened the scope of what constitutes a "public use" in the 19th and early 20th centuries. It ruled that land could be taken even if the general public would not directly use the property, as long as its new use still served the public. For example, in 1896 the Court allowed a local government to condemn private land in order to build an irrigation ditch. In another case that year, it allowed Congress to condemn private land in order to build battlefield memorials at Gettysburg. (For more on these and other historical examples, see the full text of the Court's recent ruling, especially the dissents by Justices O'Connor and Thomas. It is available online at <http://caselaw.lp.findlaw.com>, under "Kelo v. New London.")

The Court's modern reading of the Takings Clause, giving a government drastically wider latitude to use the power of eminent domain, dates to 1954, when it first ruled that "economic development" qualifies as a valid "public use." The case *Berman v. Parker*, involved a plan to redevelop a blighted area in Washington, D.C., by condemning the existing buildings and replacing them with new roads, schools, and low-cost housing. The *Berman* case involved slum housing whose terrible condition could arguably be construed as harmful to the general public. As Justice Douglas wrote in his opinion upholding that condemnation, "The misery of housing may despoil a community as an open sewer despoils a river." Removing such blighted conditions, the Court said, benefited the entire community.

That decision opened the door to thousands of similar attempts around the country to take land from private owners in order to "improve" communities. The Court left it to communities and their legislators to decide what constitutes an "improvement"—and over time the concept became ever broader. State and local governments began condemning property that was not genuinely blighted, sometimes with the only "public use" being the vague promise of future economic benefits.

Increasingly, governments take land from private owner A and transfer it to private owner B in hopes that owner B will put the land to better economic use. According to a study by the Institute for Justice, the public interest law firm that represented the homeowners in the recent Supreme Court case, from 1998 through 2002 there were over 10,000 examples of condemnations or threatened condemnations for the benefit of private parties.

(For more on the work of the Institute for Justice, see *Property Rights: The Essential Ingredient for Liberty and Progress*, AIER Economic Education Bulletin, May 2005. This book includes the proceedings of AIER's November 2004 conference on property rights, at which Bert Gall, a lawyer for the Institute for Justice, as one of the speakers. Scott Bullock, the attorney at the Institute for Justice who argued the recent Court case on behalf of the homeowners, is an alumnus of AIER's Summer Fellowship Program.)

"Economic development" is a dangerously vague concept that invites misuse and abuse. As we noted last fall, "when politicians, bureaucrats, and businessmen organize themselves in the name of 'economic development,' they receive almost universal applause however, their activities typically serve to advance special interests rather than the general well-being of the communities they purport to serve." ("Economic Development: Boon or Boondoggle?," Research Reports, October 11, 2004.)

The Supreme Court says it is up to state governments to restrict the use of eminent domain (some have already done so). It also says that state-level judicial review of eminent domain cases should help prevent abuses. But this presumes that individuals threatened with the loss of their property have the means to pursue a legal fight. As Justice Thomas noted in his dissent:

"Any property may now be taken for the benefit of another private party, but 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."

Moreover, judicial review is no protection against property seizure if the state courts agree that the public will actually benefit (however this is defined) from taking the property. As Justice O'Connor wrote in her dissent. "[W]ho among us can say she already make the

most productive or attractive possible use of her property? The specter of condemnation hangs over all property. 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.”

Thomas Jefferson once said, “The natural progress of things is for liberty to yield and for government to gain ground.” There is no better evidence of this than the steady erosion of private property rights over the past 50 years. One suspects Jefferson would not be surprised by the Supreme Court’s latest ruling; surely he would also be disappointed if citizens did not loudly protest.

Eminent Domain Abuse

A 2003 report by the Institute for Justice found widespread use by state and local governments of the power of eminent domain to benefit private parties, such as politically-connected corporations and individuals. Use varies by state:

“In terms of sheer numbers of condemnations for private parties, California, Kansas, Michigan, Maryland and Ohio lead the pack for most private use condemnations filed. Pennsylvania, Florida and New Jersey also have high numbers of threatened condemnations for the benefit of private parties. Detroit takes first place as the worst city in terms of condemning property for private parties, while Riviera Beach, Florida, San Jose, California, and Philadelphia have placed the greatest number of private owners under threat of condemnation for private parties. With the assistance of a state agency, New York City has become the site of some of the most egregious condemnations, for private use. Some states stand out. From a legal standpoint, New York, Missouri, and Kansas are the worst states to live in for owners who hope to avoid condemnation for private parties, while Idaho, Montana, New Mexico, South Dakota and Wyoming appear to be the best. Those states, as well as Alaska, Delaware, Georgia, New Hampshire and Washington, D.C. have no reported uses of eminent domain for private parties. Certain other states, like Arkansas, Illinois, Kentucky, South Carolina and Washington also appear to have a legal climate disfavoring private condemnations, but enforcement is either spotty or unknown.”

Examples cited in the report include cases where governments have:

- Destroyed a black middle-class neighborhood in Atlantic City (including the home of a woman who lived on a street named after her father) in order to build a tunnel to a casino;
- Removed a woman in her 80s from her home of 55 years for the claimed purpose of expanding a sewer plant, but Bremerton, Washington actually gave her former home to an auto dealership;
- Condemned a family’s home in Florida so that the manager of a planned new golf course could live in it;
- Condemned small businesses for The New York Times and the New York Stock Exchange;
- Threatened to condemn a Walgreens in Cincinnati to build a Nordstrom; condemned a CVS to relocate Walgreens; and condemned several small businesses to relocate CVS. The Nordstrom was never built and became a parking lot;
- Begun condemning a bus company in Edison Township, New Jersey, for a Walgreens. The Township’s consultant said the bus company was “unproductive and stagnant,” but actually it transports the local school children;
- Planned to force the relocation of 500 low-income seniors in Aurora, Colorado, over the next 10 years;
- Condemned property in Boston to help the owner get rid of its tenants and condemned property in Knoxville, Tennessee to help the tenants get rid of their landlord;
- Labeled as blighted one-tenth of the geographical area of San Jose, occupied by one-third of its citizens, making all homes and businesses within the area susceptible to condemnation.
- The report tracked only private condemnations that were reported in public sources. These are only the tip of the iceberg, because many more condemnations go unreported.

The entire report, Public Power, Private Gain, is available online at the Institute for Justice’s website, www.ij.org, and its related site, www.castlecoalition.org.

Reprinted with permission from American Institute for Economic Research.

