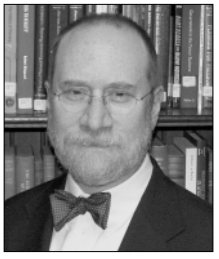
The Supreme Court and the End of Limited Government



BY SHELDON RICHMAN

The Supreme Court ruling permitting governments forcibly to transfer property through eminent domain from one private party to another for the sake of economic development did not come out of the blue. Although the Takings Clause in the Fifth Amendment to the U.S. Constitution specifies "nor shall private property be taken for public use without just compensation," the "Court long ago rejected any literal requirement that condemned property be put into use for the general public" (*Hawaii Housing Authority v. Midkiff*, 1984, cited in the current case, *Kelo v. City of New London*).

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*).

In 1984 the Court upheld a Hawaii statute that sold tenants their apartments against the will of the owner (*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." Other cases could be cited.

In the current case Justice John Paul Stevens, writing for the 5–4 majority, invoked deference to the people's representatives in explaining why the taking of homes and businesses in New London, Connecticut, for economic development is something the court should countenance. "Because that [development] plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." In other words, public use includes any valid "public purpose," and legislative bodies have wide latitude in acting on behalf of the public. It is of no consequence that a private party will benefit in the process. "Quite simply," Stevens writes, "the government's pursuit of a public purpose will often benefit individual private parties."

In a concurring opinion Justice Anthony Kennedy opined against the petitioners' plea for a rule making economic-development takings *per se* or at least presumptively invalid. "A broad *per se* rule or a strong presumption of invalidity, furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause."

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That the majority followed the Court's precedent hardly makes the decision easier to swallow. Today it is clearer than ever that government can take property and transfer it to private individuals so long as it claims that its overriding purpose is the betterment of the public. The only limit set out by the Court is that the taking not be *solely* for private benefit. But that is no real limit at all. There is a word for a system in which private owners are *permitted* to retain their property *so long as they use it for the public good—as understood by the political authorities.*

This is scary. As Justice Sandra Day O'Connor writes in her dissenting opinion, "For 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, "[T]he fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political

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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."

O'Connor's words are to be savored, although she largely accepts the precedents, striving only to distinguish them from the current case. But it is to Justice Clarence Thomas we must turn for a model of proper constitutional interpretation and reasoning. His dissenting opinion goes further than O'Connor's by calling the precedents into question. It is refreshing indeed.

Thomas writes: "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 proceeds to show, first, that it is sound constitutional principle to regard every word in the Constitution as meaningful and purposeful; second, that *use* at the time of the framing meant the "act of employing"; third, that to construe *use* more broadly would make the Takings Clause duplicative of powers already expressly delegated; and fourth, that the common law and great legal authorities such as Blackstone support this narrow reading of the word.

Thus, "The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking. . . . The Takings Clause is a prohibition, not a grant of power. . . . The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public."

Since that is the case, the issue of deference to the legislature is put into perspective: "[I]t is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights."

He concludes: "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*." (Emphasis added.)

It should go without saying that even the most narrowly construed eminent-domain power would violate individual rights. Either a person owns his legitimately acquired property or he does not.

The Court Has Spoken

Dissenting opinions are, alas, just that. As things stand, the majority rules. Governments may take private property and give it to anyone they like; all they must do is proclaim that this serves a public purpose. How in principle can one show otherwise? The Court has spoken: it will not second-guess such decrees.

A final note: It should go without saying that even the most narrowly construed eminent-domain power would violate individual rights. That taken property is to be literally used by members of the public or by the government itself provides no valid justification for the taking. Either a person owns his legitimately acquired property or he does not. The requirement of "just compensation" cannot turn theft into something else. There is no just compensation possible in a forced sale. What makes a transaction legitimate is not compensation but *consent*.

That said, the framers at least sought to limit the government's eminent-domain power. On June 23 the Supreme Court erased the final traces of that limit.