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RULE OF LAW

Supreme Folly

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Last week's regrettable 5-4 decision in *Kelo v. City of New London* marks a new low point in the Supreme Court's takings jurisprudence. The Constitution allows private property to be taken for public use only on payment of just compensation. But what counts as public use? In *Kelo*, Justice John Paul Stevens held that courts, especially federal courts, should be hugely deferential to a government decision, done after comprehensive hearings, to displace one private property owner in favor of a second private party in the name of overall economic development.

To understand why *Kelo* is truly horrible, it is necessary to look both at *Kelo* and the constitutional logic of public use requirement. On the former, the declining economic fortunes of New London spurred the city elders to embark on a general urban development plan, underwritten by \$73 million in state money devoted to general planning, physical infrastructure and environmental cleanup. The plan lacked only one ingredient -- some real live developer prepared to risk his own capital to build any office or hotel on part of the 90 or so acres the City already had.

Not content with its overheated vision, New London's plan envisioned taking down about 15 old homes overlooking Long Island Sound, to be used for some unidentified form of "park support." Fancy new private homes were not listed on the plan. None of the endless frustration and delays in implementing its grand plan were attributable to the decision of some landowners to fight New London. Quite simply, the slow rate of development made obsolete some of the original projects, such as a luxury hotel to support a new nearby Pfizer facility. Pfizer could not wait 10 years to house its visiting dignitaries. One obvious compromise position, therefore, should have appealed even to the five member majority on the Supreme Court: to force the City to postpone the condemnation of these private homes until the City revealed its hand.

No such luck with Justice Stevens, for in his view New London had made its case when it asserted, without evidence, that the new projects would both increase tax revenues and create new jobs. It hardly mattered that its projections had been pulled out of thin air and were already hopelessly out of date when the case reached the Supreme Court. All that need be shown to Justice Stevens was procedural regularity and some claim that the

proposed project served some "public benefit."

Astute readers will quickly note that the phrase "public benefit" is far broader than the constitutional words "public use." That last phrase clearly covers only two situations. The first arises when land is taken to build government facilities, such as forts, or to construct infrastructure, such as highways, open to all. The second covers those cases where property is taken by, or conveyed to, private parties who are duty bound to keep it open to all users. Private railroads and private grist mills, both of which are subject to the common carrier obligation of universal service, are two obvious examples. Note too that once a given use is properly identified as public, it does not matter for constitutional purposes whether the project is wise or is as foolish as New London's redevelopment program. The constitutional inquiry is over once it is proved that the project falls into these categories. Factually, the standard of review hardly matters, for it takes little genius to prove that a given structure is a fort or a highway.

There are, however, good reasons why the public use language has long been extended to cover some cases of takings for private purposes with indirect public benefits. One recurrent problem of social coordination arises when one party is in a position to blockade the productive ventures of another. To take a real historical example, assume that the owner of a mine (who has no choice on where to dig) can only get his ore to market by ferrying it over scrub lands owned by another individual. That second landowner can demand a huge chunk of the mining profits for his trivial contribution to the overall venture. For over 100 years, the Supreme Court has allowed the state to condemn the obstructing property for the mine owner upon payment of just compensation, here measured by the trivial losses sustained by the obstructing landowner. The net gains from blocking the holdout are huge.

The great intellectual blunder of the public use law over the past 50 or so years is that it has wrenched the public benefit language out of this narrow holdout context. In the mid-1950s, the Supreme Court held that takings were for public use when they were intended to relieve various forms of urban "blight" -- a slippery term with no clear constitutional pedigree. Thirty years later, the Court went a step further by allowing Hawaii to force landlords to sell their interests to sitting tenants, as a means to counteracting ostensible "oligopolistic" market conditions. Now any "conceivable" indirect social benefit would do, without regard to the attendant costs.

Given this past legacy, Justice Stevens found it easy to take New London at its word. Any comprehensive public project will produce some benefit for someone, so that -- as Justices O'Connor and Thomas stressed in dissent -- his test always allows the legislature to gin up some rationale for taking public property for just compensation (which alas falls far short of making the individual landowner whole: legal, appraisal and moving costs, for example, are systematically ignored). But the slightest bit of reflection should have shown just how the new public use cases have migrated from

the old mining cases, or even under the Hawaii statute, which did not displace sitting tenants.

In the present case, Susette Kelo and her fellow plaintiffs have not tried to extract some unconscionable gain out of some sensible business venture. They have no desire to sell their homes at all. At the same time their subjective losses have been enormous. It was a perfectly sensible line for the Court to say when subjective values are high, and holdout problems are nonexistent, the requisite public use is not present.

The Court could only arrive at its shameful *Kelo* ruling by refusing to look closely at past precedent and constitutional logic. Courts that refuse to see no evil and hear no evil are blind to the endemic risk of factional politics at all levels of government. And being blind, this bare Supreme Court majority has sustained a scandalous and cruel act for no public purpose at all.

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