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Dane County, Wisconsin — Preserving Property Rights
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Our republic limits government to securing individual unalienable rights to life, liberty, and property. These rights are eroded by legislatures, and by courts complicit with them. To encourage wise jurists and journalists to help, Freedom Matters dedicates itself to the fight to restore that republic.

US Supreme Court Abandons Legitimacy: They Turn the Kelo vs New London case into Homeowners vs the Supreme Court

by Bob Bowman

In our last issue, we argued that saying a government is "legitimate" is similar to saying that government exists by the consent of the governed. As if on cue, the US Supreme Court gave us a negative example: they failed the test of legitimacy. By a bare majority, they ruled that any elected governing body in the USA can seize the homes of citizens for virtually any use which that elected body desires.

As the song says, "You've come a long way, baby." Sadly, in this case, the journey is in the wrong direction. The citizen, in the eyes of the Supreme Court, has at last become essentially a non-entity, not a *cogito ergo sum*, but merely the first three letters of it, a cog, no longer the master of government, but its vassal. If ever a judiciary has proven asinine, this Supreme Court in this case has.

I say this as a student of our inalienable rights, and as a citizen sitting in judgment on our constitutional rights. The same opinion has been argued, however, by an eminent legal scholar. He is Richard A. Epstein, law professor at U. Chicago, who says of the Kelo decision:

> "... this bare Supreme Court majority has sustained a scandalous and cruel act for no public purpose at all."

Epstein said this in an editorial in *The Wall Street Journal*, Monday, June 27, 2005. His legal analysis in that article is astute, and bears citing. First, he notes:

> "The Constitution allows private property to be taken for public use only on payment of just compensation."

Then he says that to see the "truly horrible" nature of the Kelo decision, one must consider both the case and the constitutional logic of public use. He points out that the City of New London merely asserted a public **"benefit"** derived from the taking of the homes at issue. Not only did they **not prove** the benefit, but their delays in the project removed the "need" cited for taking the homes. Yet, that **mere procedural facade** was all the legitimacy the Supreme Court required of the City.

Next, regarding the Constitutional logic, **public benefit** is much broader than the Constitutional term, **public use**. Epstein sees only two public **uses**. One is when a government facility is built on the taken land, or when a private facility is built on it that has an obligation to provide a universal public service (e.g., a transit system). The only other "public" use that Epstein sees as valid is when the government allows the taking of private land to provide a right-of-way to a landlocked private parcel, in which the use of the landlocked parcel is worth notably more than the value of the land needed to provide the right-of-way. The latter version of public use doctrine is actually written into Wisconsin statutes and can be exercised by town boards.

All takings require "just" compensation. Yet, such compensation often fails to make whole, since it does not typically include professional, legal or other costs associated with the person's loss of their property.

The Kelo ruling has been met by overwhelming public opposition, despite the Court's declaration that the States, if they choose, can prohibit government takings for private use. That will now likely happen. As past readers of *Freedom Matters* know, the citizens of Oregon enacted property rights protection last November. Also, several states apparently already prohibit taking public land for private use; the Kelo decision should spur all states to enact and enable such protection.

It is as if the Court is blind and deaf to the temper of the country, the era and the Constitution. Epstein says as much. Here, I add that the federal Supreme Court had, as an example, the Michigan Supreme Court, which 20 years ago made a ruling like the Kelo ruling, known as the Poletown case, which permitted government seizure of over a thousand homes to make way for a big GM plant. A few months ago, the Michigan Supreme Court **unanimously reversed** that decision.

If nothing else, in Michigan, its above Supreme Court ruling should trump the federal Supreme Court's Kelo ruling, in which latter ruling the feds opined that state's rights have precedence. We will see.

Finally, I cite Richard Epstein as a formidable legal scholar. He has published several books, including:

1. *Principles for a Free Society: Reconciling Individual Liberty with the Common Good, 1998;*
2. *Simple Rules for a Complex World (he says we have "too many lawyers, too much law"), 1995;*
3. *Takings: Private Property and the Power of Eminent Domain, 1989.*

As the latter title shows, he has researched the area of takings and eminent domain. He is a libertarian, but also pro-government, and tries to balance the two.

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