

# Freedom Matters

A News & Opinion Paper

Dane County, Wisconsin

Preserving Property Rights

Vol. 5, No. 27

Monday, December 19, 2005

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.

## Kelo vs. New London, Conn.: the Canary in the Coal Mine

by Bob Bowman

Who makes the law? The legislature? The courts?

By our federal constitution, and state constitutions, the legislative branch is empowered to make the law. By those same constitutions, the courts are only empowered to enforce the law made by legislatures. In the early days of our republic, the courts also claimed the right to void those laws which it judged as being unconstitutional. That makes sense; it goes hand in glove with their authority to enforce the law.

However, in the early 1930s, in the crucible of a severe economic collapse (the "Great Depression"), and in keeping with the ferment of communism that was then sweeping around the world, President Franklin D. Roosevelt frightened the U.S. Supreme Court into invoking a new judicial philosophy, which changed the constitution without changing its wording. Thereby, the Supreme Court then supported changing the nation from a limited central government into a federal welfare state that has since burgeoned into obesity. That judicial philosophy declared the federal constitution to be a "living constitution" which could be amended by mere judicial reinterpretation of its language.

This revisionist judicial philosophy turned the nation away from the rule of law, and invoked a re-ascendence of the rule of men. In place of the King whom American colonists had rebelled against, the nation is now ruled by unelected judges in black robes, who make law instead of merely enforcing it. This philosophy then put the nation upon a long retreat away from freedom and liberty, as Roosevelt's embrace of the welfare state took the nation down the socialist road that Hayek warned in the early 1940s was the road to serfdom.

Of course, it was not Franklin Roosevelt who frightened the Supreme Court into such a change. Roosevelt merely mediated it. It was the **American people** who frightened the Court. The people were caught in the poverty of the Great Depression, on a world stage in which the communist movement was challenging capitalism, threatening the stability of the American form of government. *It was the temper of the people, in the temper of the times, that frightened the Supreme Court into change.*

Yet, that was nothing new. From the beginning of our government, it was **the people** who pushed the Court to go where they wanted it to go. See Chapter 5 in De Soto's book, *The Mystery of Capital*, which lays out what many regard as the most important evidence on economic systems in the past 100 years.

In that Chapter 5, De Soto traces the history of land use law in the United States from its founding to the year 2000. Repeatedly, it was the pioneers on the frontiers who created land use law, and the Courts which then adopted it and gave it legal blessing. For example, early on, the Court used English land use law, and refused to recognize squatters rights. At one point, the federal Supreme Court would have dispossessed Kentucky squatters, but the Kentucky courts refused to enforce that ruling and won. It was state law that made people secure on their own land and in their own homes. Thereafter, in the American march across the continent, local and state law created land use law, and the congress and federal courts adopted that creation.

The result was the near absolute protection of property rights by the courts, resulting in the wealthiest and most prosperous nation the world had yet seen. That economy was rivaled only by the earlier British and Roman Empires, and both of those were nations which also had practiced strong property rights.

The American people took a different direction in land use law after World War 2, with the growth of suburban America. People in the suburbs adopted zoning laws designed to **exclude** those elements the people had left the cities to escape. The Courts dutifully affirmed those laws as legal, thus giving near absolute power to the government to control all private land holdings. Again, it was what **the people** asked for!!!

Well: "Watch out what you ask for." This year, the case of Kelo v New London, Conn., came before the U.S. Supreme Court, in which a city government asserted its power to take away the property (i.e., the land and homes) of certain citizens, to give that property to other citizens who would create a more lucrative tax base. *This was merely the **culmination** of the American people's 60-year drive to make the majority vote of local citizens all that it took to control their neighbors' land.* With Kelo, **the beast we created has turned on us.** You see, when we took away our neighbor's property rights, we took away our own as well. By equal protection of the law, **we gave up our rights to our own homes.** (To be continued.)

Readers' Bulletin Board. e-mail us your comments. Include your name, for publication by *Freedom Matters*

\*\*\* Published by Freedom Matters, Inc., Cross Plains, WI. 53528, Michael Byrne, Editor \*\*\* **All Issues of Freedom Matters are on: [www.freedommatters.org](http://www.freedommatters.org)**  
To subscribe or unsubscribe, e-mail to [rebshar@chorus.net](mailto:rebshar@chorus.net), or call Bob at (608) 831-6653.  
Our e-mail subscriber list is confidential. We will not sell it or reveal it.