
Kelo v. City of New London: Do We Need Eminent Domain for Economic Growth?

BY GEORGE C. LEEF

The first piece I ever wrote for *The Freeman* was about the U.S. Supreme Court's indifference to political actions that deprive people of their liberty and property ("How Did We Lose Our Freedom?" June 1977). Sadly, the Court continues to give politicians free rein to trample the rights of individuals—except in cases where the justices think that the rights are "fundamental." Property rights are not regarded as fundamental, and the Court will accept almost any justification, no matter how naïve and intellectually feeble, for government encroachments on them.

In *Kelo v. City of New London*, decided on June 23, 2005, the Court continued that depressing tradition. The case centered on the decision of New London to seize the property of a number of homeowners for a planned "redevelopment" of a waterfront area. The houses were perfectly habitable, but the city wanted them for what it envisions as a glitzy area of corporate offices, a hotel, and upscale shops. Susette Kelo and others tried to fight the condemnation in the local political arena, but when they couldn't get the city to relent, they turned to the courts. The Connecticut Supreme Court ruled against them 4–3, finding no legal bar to the city's plan. Kelo, aided by attorneys for the Institute for Justice, appealed to the U.S. Supreme Court, arguing that the Fifth Amendment allows for the taking of private property only for "public use" and the New London plan would merely entail a different private use.

Advocates of freedom regarded this as an important case. Would the Supreme Court put an end to the widespread practice of seizing private property for no reason

other than that politicians calculated that higher tax revenues would be collected if a tract were owned by a large commercial enterprise instead of a homeowner or small business? Alas, no. Rather than reading the Constitution's clear language as it was intended—and simultaneously ending injustices from coast to coast—the Court decided to defer to the judgment of politicians as to which property confiscations are "for the public benefit." Justice Stevens, writing the majority opinion, said that economic development was a "traditional function"

Kelo is bad
constitutional law
as well as bad public
policy.

of government and the Court would intervene only if a taking were clearly motivated by a desire only to enrich another private party. Since politicians are clever enough to always swaddle their property seizures in a blanket of supposed "public interest," the ruling really gives politicians a free

hand with regard to the use of eminent domain.

The language of the Fifth Amendment is clear. Government may take private property for "public use," providing it pays "just compensation." (Of course, libertarian philosophy objects to any "takings" and points out the incoherence of just compensation in coerced transactions.) Given the solicitude of the Framers for private property and their insistence on strictly limiting government power, the notion that land seizures for economic development (or "revitalization" as it's often put) comport with the Constitution is patently absurd. Let us imagine that in 1805 New Lon-

George Leef (georgeleef@aol.com) is the book review editor of *The Freeman*.

don had sought to take the home of a resident in order to assemble enough land for the construction of a new hotel. Most of the signers of the Constitution were still alive then. If they had been asked whether the taking was permissible, very few, if any, would have said, “Sure—we must defer to the wisdom of politicians as to the best use of land in their jurisdiction.”

But most of the Court’s current members are not originalists. What the men who wrote the Constitution meant by their words is not, in their view, determinative. They believe instead that the Constitution must be constantly reinterpreted in light of “modern conditions,” a locution that nearly always justifies the ratcheting up of government power.

Here, the supposed need for government action to “grow the economy” (as Bill Clinton used to say) is enough reason to allow politicians to bulldoze modest houses to make way for big commercial developments. If local officials think that there will be a “public benefit” in transferring title from A to B, that’s enough to satisfy the public-use requirement. Justice O’Connor was surely correct in dissenting, “Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to another owner who will use it in a way that the legislature deems more beneficial to the public—in the process.” Another barrier between the citizen and the power of the state has been swept away, but the Court’s majority sees no problem with that. After all, we’re only talking about property rights here.

Crucial to the Court’s opinion is the notion that economic development is an important government function, one with which judges should not interfere. In pledging their deference to elected officials, the justices continued a long line of cases where the Court chose to leave citizens at the mercy of politicians so long as “only” economic liberty and property are involved. What all those cases and *Kelo* have in common is the central belief in the need for and general beneficence of government regulation of the economy. To

modern liberals, the idea of a society guided by nothing more than Adam Smith’s invisible hand of self-interest (and constrained by the general rule of law) is frightful. Government simply *must* do far more than the few “night watchman” functions that classical-liberal theory calls for. Government needs to be *active* in many ways, including providing employment opportunities for the people.

Sphere of Voluntary Action

Economic development is certainly is not a “traditional” function of government. Only within the last few decades has that idea taken root, an idea planted by politicians eager to expand their power. Traditionally, the job of government was to maintain order and provide those few services that the free market supposedly could not, such as roads. During our long period of *inactive* government, the American economy grew rapidly, owing to the work and investment of individuals. Those are endeavors that take place within the sphere of voluntary action rather than coercion, which is the only tool in government’s box.

Economic development occurs when free people wisely invest their labor and capital to increase the production of goods and services. All government needs to do is to stand ready to enforce the laws of contracts and property. Just as salt crystals form spontaneously once conditions are right, so does economic development occur spontaneously when conditions are right. Government action can (and often does) hinder or prevent development, but if it does not, the strong human propensity to improve living conditions will prevail.

But don’t modern conditions call for government to step in? Consider poor New London, which was designated a “distressed municipality” in 1990 by a Connecticut state agency following years of economic decline. After the closing of a Navy facility in 1996, the city continued to lose population and suffer from a relatively high rate of unemployment. New London is less prosperous overall than it was previously. That is assumed to be a *political problem* requiring local officials to take



Susette Kelo

Photo by Isaac Reese, 2004 © Institute for Justice

action to bring back jobs and prosperity. The Supreme Court buys that idea. It is, however, erroneous.

New London, or any political unit, is an amalgamation of the individuals who live there. Just as the circumstances of individuals can change with shifting events, so do the circumstances of cities. Cities no more have an entitlement to a particular level of prosperity than any individual does. If conditions change adversely, the individuals who are affected will adapt as best they can. Clearly, that has happened in New London. Some residents moved away, seeking better-paying work after the Navy facility closed. Others adapted in different ways. For many, life has gone on the same as always.

The decline of New London is not akin to some rampaging plague that must be cured. It's merely a change in circumstances to which free people are capable of adjusting. Government officials have no reason to seize the property of some in order to try restoring the former level of incomes—and, of course, the tax haul.

A Negative-Sum Game

Even if economic development doesn't need government assistance through eminent-domain land seizures, still isn't it better to have more of it? Aren't people going to be more prosperous than otherwise if cities can facilitate new investment by making it less expensive for companies to locate within their borders?

That seductive argument overlooks one of the fundamental concepts of economics—scarcity. There is only so much investment capital available, limited by the desire of individuals to save. Therefore if a city or other political unit uses subsidies such as low-cost real estate to lure business, at most that can only *redistribute* development. If a city uses eminent domain to attract a new hotel, shopping mall, or sports team the politicians deem desirable, other places will have less of those things. New London's apparent gain comes at the expense of other Connecticut or New England cities. Where is the "public benefit" in that?

Government-sponsored development is likely, moreover, to prove to be inferior to purely private develop-

ment under laissez-faire capitalism. That's because capital is more apt to be wasted if it is invested either by government directly or in conformity with plans conceived by officials. While it's true that private investors can make mistakes and put money into ventures that fail, they are less likely to blunder, because they have to bear the full cost of the venture and bear the risk of failure. The history of government-sponsored economic development is littered with wrecks, a recent case in point being Britain's Millennium Dome. The more economic development is dominated by government planning, the more scarce capital will be squandered on projects that looked good to politicians eager for photo opportunities and campaign issues, but proved to be money pits.

Let us suppose that some economic-development project facilitated by eminent domain actually proves to

be a commercial success. New London's waterfront plan might, of course, lead to the establishment of profitable businesses paying lots of taxes to the city. Then it would certainly be a "public benefit," wouldn't it? Justice Stevens wrote about the "carefully formulated" plan calculated to bring new jobs and increased tax revenue which "unquestionably serves a public purpose."

But is that right? One of the unexamined conceits of modern liberalism is that whatever augments the government's ability to spend is good. (Conservatives often play that game, too, contending that tax-rate cuts are beneficial because the result will actually be more revenue collected.) The idea that increased government spending is necessarily a public benefit needs some examination.

New London and virtually every city in the United States have enough revenue to perform all their core functions. Increased revenue, therefore, will be spent in ways that do little or nothing to improve, say, police protection or the condition of the streets. Instead, increased spending will inevitably benefit special-interest groups adept at feeding at the public trough—various consultants, contractors, public-school teachers and administrators, municipal employees, and so on. Politicians will always crow about the great benefits their spending brings the public, but the truth is that the average citi-



Susette Kelo's New London home

Photo by Isaac Reese, 2004 © Institute for Justice

zen doesn't detect the slightest change in the quality of his life whether government spending increases or decreases.


The Alternative

Rather than trying to directly stimulate economic development, governments need to concentrate on establishing the necessary conditions that will do the most to induce private investment. They do that by performing their essential functions as efficiently as possible and otherwise refraining from interfering with private decision-makers. The ideal economic-development plan for New London or any other city is to stop the incessant meddling with free enterprise. (True, many of those meddlesome regulations have been mandated by the states and federal government, but cities can gain a competitive advantage by not adding to the burden.)

Most American cities, especially older "rust belt" cities, have bloated budgets and a political culture hostile to free enterprise. An excellent example is Buffalo, New York, described in detail by James Ostrowski in *Political Class Dismissed* (which I reviewed in *The Freeman*, January–February 2005). Buffalo's high taxes and anti-entrepreneurial climate have made it an economic basket case. If city officials there or in other "depressed" cities are serious about economic growth, they need to break away from the deal-making frame of mind that equates

success with reeling in an occasional investor with subsidies. Instead, they need to establish a climate of liberty where profitable enterprise isn't penalized.

Freedom optimizes economic development, but it takes place in ways that are largely unnoticed by the public and, for that reason, of no political value. A mayor would probably rather have an occasional, media-saturated ribbon-cutting ceremony for some big deal he arranged than hundreds of small private investments, but the latter is the path to the greatest prosperity for the people.

Kelo is bad constitutional law as well as bad public policy. It encourages cities to continue using the coercive, rights-violating method of eminent domain to subsidize the kinds of splashy, high-visibility projects that politicians favor. Had the Court given a decision that was faithful to the intention of the framers to put a strict limit on the use of eminent domain, homeowners like Susette Kelo would not have to give up their homes just because political schemers can devise what they think are "better" uses for their land. Now, unfortunately, cities have the green light to continue with a failed policy that robs from the less affluent to give to the more affluent. That a majority of the U.S. Supreme Court is willing to turn a blind eye to the meaning of the Constitution and give its blessing to abusive political power speaks very poorly of our so-called liberal justices. 



Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.

—Justice Clarence Thomas, dissenting, *Kelo v. City of New London*

