



Is Big Brother

For the Framers of the Constitution, the right to property was the vital principle of free government—"the guardian of every other right." James Madison, who has justly been called the Father of the Constitution and the Father of the Bill of Rights, remarked that "in the larger and juster meaning," the right to property "embraces every thing to which a man may attach a value and have a right." Not only does the right to property include "land, or merchandize, or money," Madison noted, but every person has "a property in his opinions and the free communication of them." Madison said that an individual "has an equal property in the free use of his faculties and free choice of the objects on which to employ them," as well as "a property of peculiar value in his religious opinions and the free communication of them." "In a word," Madison concluded, "as a man is said to have a right to his property, he may be equally said to have a property in his rights." Madison thus viewed the right to

property as the comprehensive right which assumed priority in the political community.

The right to property serves as a kind of "early warning system" to invasions of life and liberty. The right to property is, of course, derivative from the natural right to life and liberty. Life and liberty can be maintained even if property is lost. Property lost can be regained; liberty lost can be regained only with the greatest exertions. Thus it is wise to take alarm at the slightest inroads upon the rights of property. Madison's emphasis on the right of property stems from his awareness that life and liberty are mainly jeopardized through the violation of property rights—government's demands on the citizens bear most immediately and visibly on their property, whether through direct taxation, confiscation of property, or regulation of the use of property. It is therefore prudent, Madison reasoned, to make property the test of liberty.

The backdrop of the American Founding was the feudal regime. In the feudal regime





Moving In?

By Edward J. Erlar

all property belonged to the King. The King granted the use but not the ownership of property, based on certain conditions. All use of property was prescribed and conditional. The idea of a natural right to property that belonged to the individual—that was properly the product of individual labor—was designed to deal a deathblow to the feudal regime. Individuals could claim an exclusive right to private property based, not on the gift of a sovereign, but, in the words of the Declaration of Independence, on the “laws of nature and nature’s God.” This indefeasible right was derived from nature—governments were established to secure the right to property; government did not create the right.

Today, we are sometimes told that property rights are incompatible with human rights, that human rights exist only to the extent to which the right to property can be minimized or extinguished. Social justice, we are told by the minions of the administrative state, requires the redistribution of property, not the

protection of private property.

This view of the right to property is, of course, closer to the feudal view than the view of the Founding. We might call it the “public trust” doctrine. Private property is not held as an indefeasible individual right—it is only held in “trust” for the public or the community. As simple examples, consider only wetlands regulations and endangered species regulations. Vast tracts of private land have been effectively confiscated by the operation of these two regulations. Individuals still own the land, but their use is now conditioned by a “public trust.” “Public trust” has become the new feudal sovereign that conditions and even extinguishes the right to property. The feudalism that was excluded from the Founding has made its reappearance under the aegis of the administrative state.

In America, the Framers sought to establish equality of rights as the basis of distributive justice. In the feudal regime, individual fate was determined by caste and class. Equality



of rights, however, did not mean equal distribution of wealth. Indeed liberty demands that each person be allowed to acquire as much as his natural talents will allow. We have always known this principle of justice as “equal opportunity.” It means that individual enterprise and industry could be rewarded on the basis of natural talent rather than the arbitrary basis of caste and class. Under the feudal system that disallowed private property, the poor were virtually defenseless against the nobility. In America, individuals could accumulate property and look forward to a future in which the fruits of their labor would be secure from the arbitrary depredations of government or a ruling class. As Madison wrote in *The Federalist*, “the first object of government” is the protection of “the diversity in the faculties of men, from which the rights of property originate.” The protection of the diverse faculties—both different faculties and unequal faculties—from which the rights of property originate is simultaneously the protection of the freedom to exercise those faculties. Liberty is protected by the fact that class or class status is not a condition of exercising natural faculties for the acquisition of property in the broad sense in which Madison understood it. The only preference in the regime of equal opportunity is for the “rational and the industrious,” to borrow a phrase from John Locke.

The Constitution contains several provisions designed to protect the right to property. No state can impair the obligation of contracts; both the Fifth and Fourteenth Amendments accord due process protections to the right to property. No one’s property can be taken as the result of a criminal action without due process—a trial, representation, ability to confront witnesses, and the other procedural devices we associate with due process. The

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Fifth Amendment also contains the “takings clause”: “Private property [shall not] be taken for public use, without just compensation.” This is the power of eminent domain, which belongs to every sovereign government. It is the power to take private property for public use, to build a post office, a military base and the like. As the Supreme Court noted some years ago, the “takings clause” and its requirement of “just compensation” is a device “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole” (*Armstrong v. U.S.* [1960]).

The taking of property under eminent domain for public use is a relatively uncomplicated matter. The fair market value of the property to be taken for public use is calculated and paid to the property owner as “just compensation.”

In recent years, however, courts have, in effect, amended the Fifth Amendment to read, not public *use*, but public *purpose*. Thus the scope of the government’s power to take property has been greatly expanded since “public purpose” is a much more expansive concept than “public use.”

The assault on property rights has almost reached its *terminus ad quem* in the United States Supreme Court’s decision in *Kelo v. City of New London* (June 2005). The Court (Justice Stevens writing for a 5-4 majority) was unapologetic for the fact that it had over the years literally rewritten the Constitution: The Fifth Amendment’s “public use” language had been transmogrified into “public purpose.” As Stevens noted, “we have repeatedly and consistently rejected . . . [the] narrow [public use] test.” And, Stevens admitted, “without exception, our cases have defined” the public pur-



pose “concept “broadly.” To say that the *Kelo* Court defined the “public purpose” concept “broadly” is a vast understatement. Indeed, the Court, relying on earlier decisions, described the concept as “broad and inclusive,” and comprehends within its capacious boundaries “spiritual as well as physical, aesthetic as well as monetary” values. Indeed, the scope of governmental power to take property for public purposes is breathtaking—not to say alarming.

The seeming principle announced in *Kelo* was that individuals have a right to property only to the extent that their property cannot be used for a better public purpose by someone else. The City of New London took private property, not because the property was blighted or a risk to public health or welfare, but simply because the city believed others could make better use of the property by providing, in Stevens’ words, “appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.” Thus the irrefutable conclusion must be that if government can take property from one private party and give it to another if in its estimation a public benefit would accrue, then all private property owners merely hold their land in public trust. Ownership is merely conditional.

The Supreme Court did not even burden the city with proving the likelihood that a public benefit would in fact accrue from the taking, merely intoning that the Court would give “broad latitude” to legislatures “in determining what public needs justify the use of the takings power.” Given this license, it doesn’t take much imagination to predict the mischiefs that will be undertaken by legislatures at all levels of government. It won’t be necessary even to disguise the fact that property

can be taken from A for the private benefit of B—there is sure to be a “public purpose,” however implausible or tendentious, lurking in every exercise of eminent domain.

Justice Thomas, in a powerful dissent, lamented that the Court had construed the “Public Use Clause to a virtual nullity, without the slightest nod to its original meaning.”

The takings clause, Thomas reminded the Court, was an “express limit on the power of government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more

generally.” What was an express limit on the power of government has now become a general warrant to act against the property rights of individuals. A specific exception to government power has thus been translated by the Court into a general grant of power limited only by a vague requirement that the seizure of property must serve a “public purpose.” Individual rights should not be sacrificed so cavalierly—or with so little regard for the Constitution. No one can possibly doubt that the framers of the Constitution adamantly believed that the welfare of the community was best served by a strict attention to the rights of individuals—particularly the right to property, the right which comprehends all other rights and which cannot be violated without endangering all rights.

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