# Property wrongs: A Supreme blunder

**By Robert J. Caldwell**
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These words, often attributed to George Washington, defined the political wisdom of America's Founding Fathers: "Government is not reason, it is not eloquence, it is force; like fire, a troublesome servant and a fearful master. Never for a moment should it be left to irresponsible action."

A divided U.S. Supreme Court has now given us a prime example of just such an irresponsible action. By a vote of 5-4, the court ruled that private property, people's homes no less, can be seized by a local government using the doctrine of eminent domain not to acquire property for a traditionally defined public purpose but to benefit a privately owned development project.

In Kelo versus City of New London, a bare majority of the court recklessly rewrote two centuries of eminent domain practice. Heretofore, private property could be taken, with payment of just compensation, only for unmistakably public purposes – typically for roads, schools, parks and the like. In the Kelo case, five members of the court upheld a 3-2 Connecticut Supreme Court ruling that the city of New London could seize homes for the benefit of a private developer, including the pharmaceutical giant Pfizer, pursuing a project defined as "economic development." Not incidentally, the private development would produce more property tax revenues to the city of New London.

A 1954 U.S. Supreme Court decision permitted local governments employing eminent domain to seize private property deemed "blighted" to facilitate slum-removal projects. But everyone agrees that the New London householders' properties were not at all blighted, just in the way.

Predictably, the Supreme Court divided roughly along liberal-conservative lines. Justices Stevens, Ginsberg, Breyer, Souter and Kennedy in the majority and Justices O'Connor, Rehnquist, Thomas and Scalia joining in the minority dissent.

And what a dissent it was. The retiring Sandra Day O'Connor, a moderate conservative considered a swing vote on the court, wrote a blistering opinion objecting to the majority's trashing of sacrosanct property rights, a bedrock of American liberties. O'Connor began by quoting Justice Chase, who wrote in 1798 immediately following ratification of the Constitution's Bill of Rights: "(A) law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers."

O'Connor then added her own scathing critique:

"Today the Court abandons this long-held, basic limitation on government power. 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 ... (this) wash(es) out any distinction between private and

public use of property – and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment."

Defenders of the court's Kelo decision argue that economic development is a proper public purpose for which some citizens should be willing to lose their property for the private benefit of others. Further, Kelo's apologists express the pious hope that local governments won't abuse the precedent now set by this usurping decision. Barely a week after the court's ruling, a cascade of events mocks that naive hope.

The Institute for Justice, a private legal firm that represented the New London home owners, compiled a partial list that included these instances among many of local governments jumping to seize property.

Hours after the Kelo decision, officials in Freeport, Texas began legal filings to seize waterfront businesses to make way for an $8 million private boat marina.

Two days after the Kelo decision, Boston City Council President Michael Flaherty called on the mayor of Boston to seize waterfront property from unwilling sellers for a private development project.

The city of Arnold, Mo. proposes razing 30 homes and 15 small businesses for a large home improvement store and a strip mall for which the developer is to receive $21 million in tax-increment financing.

The institute's hastily compiled list included reports of sudden movement on nearly a dozen other property-seizure projects around the country by local governments, in search of more property tax revenues, assisting private developers, in search of bigger profits. Each invoked the Kelo case precedent. Expect a torrent of such cases.

It should be obvious that when wealthy developers and the local government politicians they help put in office join forces in exploiting the Kelo precedent, every homeowner and property holder of ordinary means is potentially at risk. No wonder the NAACP filed a brief in support of the New London homeowners.

Despite the Supreme Court's misguided majority, all is not lost. An aroused U.S. House of Representatives is moving to deny federal funding for any local development projects that use the Kelo precedent to seize private property on behalf of private, for-profit developers. State legislatures can do likewise. In California, which restricts eminent domain takings of private property to holdings in blighted areas, bipartisan legislation is already being introduced in the state Senate to further protect private property rights.

Meanwhile, the damage inflicted on these fundamental rights was concisely summarized in Justice O'Connor's dissent.

"Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."

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■ Caldwell is editor of the Insight section and can be reached via e-mail at **robert.caldwell@uniontrib.com**

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