

IS BIG BROTHER MOVING IN? THE STATE OF PROPERTY RIGHTS IN A “TAKINGS” SOCIETY

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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 “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 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. The right to property thus serves as a kind of “early warning system” to invasions of life and liberty. 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 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 death blow 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. One enthusiastic legal scholar writes with unusual candor that “the concept behind [feudal duties] was sound. . . . The use of land is of more than private concern” (John E. Cribbet, “Changing Concepts in the Law of Land Use,” 50 *Iowa L. Rev.* 245, 247 [1965]). Thus 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 provision 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 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 built 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.”

Regulations that impose restrictions upon the use of property are known as “regulatory takings.” Regulatory takings present an entirely different problem from eminent domain. In regulatory takings governmental entities do not take possession of the property but regulate its use in ways that may diminish the use-value of the property or upset settled expectations for the use of property. The public purpose or public trust doctrine that the courts have developed is that no compensation is required unless the regulation reduces private property to no value whatsoever. Thus a regulation that reduces the value of property by only 80 or 90 percent deserves no compensation under the public trust doctrine because the property has not been reduced to zero value. As one legal scholar explained the matter in the *Cornell Law Review*: “Within the traditions of property law. . . there is nothing particularly radical in visualizing land being owned by the sovereign and being channeled out again to persons who would hold it only as long as they performed the req-

uisite duties which went with the land.” (E.F. Roberts, “The Demise of Property Law,” *57 Cornell Law Review* 1 [1971]). Could the revival of feudalism be described any more precisely?

Everyone knows about the regulations that have been established by state and local governments for property development. All kinds of “public trust” obligations have been created that require dedication of land for public purposes as a condition of securing permits or the exaction of a myriad of regulatory fees. These are all barriers or conditions to the use or development of private property. Most importantly, however, they are barriers to the liberty that is the necessary concomitant to the right to property. Property rights cannot be violated or imposed upon without also imposing upon liberty. Listen to one planner praise the virtues of totalitarianism: “China is a planners’ paradise. There is no gap between plan making and plan implementation. Nor is there any private developer to lure or browbeat into conformance. . . . What the government plans, it simply does. . . . The institutional framework for plan making is remarkably similar to what most planners say works best.” (David Callies, “Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls,” *14 Urban Law Review*. 781, 845 [1982]).

Yet there are some recent hopeful signs—and some not so hopeful. The Courts have placed some limitations on the kinds of exactions that state and local governments may impose on the development of private property. In *Dolan v. City of Tigard* (1994), the city of Tigard, Oregon, had demanded the dedication of real property as a condition for a building permit. The Supreme Court announced the general principle that would govern regulatory takings of this sort:

"the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the property sought as little or no relationship to the benefit." The Court further articulated two standards for determining the constitutionality of "permit conditions" regulating the use of property: first, there must be an "essential nexus" between the legitimate state interest and the permit condition exacted by the city;" second, there must be a "rough proportionality" between the cost borne by the property owner and the public purpose to be served. No individual owner can be made to bear a disproportionate cost in the pursuit of a public purpose. Chief Justice Rehnquist, who wrote the majority opinion, remarked that "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."

The California Supreme Court in *Ehrlich v. City of Culver City* (1996) incorporated the *Dolan* standards into the California Constitution's "Takings Clause." But the California Supreme Court extended protections for the right to property even further. The United States Supreme Court in *Dolan* had articulated standards to regulate possessory exactions of property, i.e., where the city or regulating agency takes actual possession of real property. The California Court extended the *Dolan* analysis to include the "nonpossessory exaction" of fees as well. As the Court noted, "[w]hen such exactions are imposed . . . neither generally nor ministerially, but on an individual discretionary basis, we

conclude that the heightened standard of judicial scrutiny . . . is triggered." This heightened judicial scrutiny, the Court reasoned, will help insure that "the monopoly power over development permits is not illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use." It is essential, the Court rightly noted, to address "the vice of distributive injustice in the allocation of civil costs."

The plaintiff in this case, Erlich, had operated a private recreational facility for many years in Culver City. It was never a profitable enterprise and he applied for a permit to develop condominiums. As a condition of approval, the city assessed a fee of \$280,000 to mitigate the loss of private recreational facilities in the city and to offset the increased traffic and smog that would result from citizens driving extra distances to find recreational facilities. In addition, a public art fee of \$32,000 was assessed, presumably because the development project would impact the aesthetic sensibilities of citizens. The Court upheld the public art fee as reasonable, but balked at the lack of justification for the other mitigation fees. It was incumbent on the city to demonstrate a "rough proportionality" between the amount of the fees and the harm caused by the closure of the recreational facilities: only in this way can the problem of "distributive injustice" be addressed in a constitutionally satisfactory manner. Thus, a mere invocation of public purpose on the part of the city will no longer be sufficient. A small victory for property rights perhaps, but, in my estimation, any victory that limits the reach of the administrative state is valuable.

In 1998, however, the California Supreme Court seemed to revert to its

old ways when it handed down its ruling in *Landgate v. California Coastal Commission*. This case involved a delay in the issuance of building permits occasioned by a jurisdictional dispute between two administrative agencies, the County of Los Angeles and the Coastal Commission, over who had authority of reconfigure lots. Landgate ultimately received the building permits, but only after significant delay caused by this administrative dispute. The United States Supreme Court has held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which a taking was effective." Thus temporary takings of property must be compensated under the Fifth and Fourteenth Amendments. The California Supreme Court, however, refused to concede that this was a takings. Delays, the Court argued, are merely incidents of ownership and presumably the price that individuals must pay for the benefits accorded by the administrative state. Even though the taking was categorical, the court said it was merely "a normal delay in development" which served a legitimate State interest.

Justice Janice Brown wrote a vigorous dissent in the case: her reasoning was straightforward and, in my opinion, constitutionally sound. When a dispute between two administrative agencies creates a temporary taking of property—when government "attempts to overregulate the use of private property," she argued—compensation is required.

Justice Brown wrote another dissent in a case decided earlier this year. This case, *Santa Monica Beach, Ltd. v. Superior Court* upheld Santa Monica's rent control law against the challenge

that the law was a taking of property. Justice Brown argued that the taking of property cannot be justified merely by reciting the benign purposes of the administrative state. "[A]rbitrary government actions which infringe property interests," she wrote, "cannot be saved from constitutional infirmity by the beneficial purposes of regulators." And, in language reflecting the Framers' understanding of property rights, Justice Brown concluded that "the ownership of property is itself an aspect of liberty. . . . A fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other'." Madison could not have said it better.

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 purpose "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 no means limited to—new jobs and increased tax revenue." Thus the irrefragable 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 gov-

ernment 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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