

Judicial Activism and Private Property Rights

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Thank you for the opportunity to be here and speak with you tonight. I want to begin my remarks by asking you to think about the following statement in the context of the recent Kelo decision and the national debate over eminent domain that it has spawned:

"Meanwhile, back in the city, under urban renewal the assault on freedom carries on. Private property rights [are] so diluted that public interest is almost anything a few government planners decide it should be. In a program that takes from the needy and gives to the greedy, we see such spectacles as in Cleveland, Ohio, a million-and-a-half-dollar building completed only three years ago must be destroyed to make way for what government officials call a 'more compatible use of the land.'"

Do you recognize this statement? It was not given after the Kelo decision. It was part of the speech by Ronald Reagan at the 1964 Republican National Convention that launched his meteoric rise to political prominence. The Kelo decision raised public awareness of eminent domain abuse and the Courts' refusal to adhere to the Constitution in 2005. **But Ronald Reagan understood the precious principles of American liberty and saw the gathering threat forty years before Kelo. Reagan also understood the threat to freedom posed by regulatory takings when, in the same speech, he said:**

"Now it doesn't require expropriation or confiscation of private property or business to impose socialism on a people. What does it mean whether you hold the deed to the -- or the title to your business or property if the government holds the power of

life and death over that business or property?"

A discussion of constitutionally protected property rights is not simply a matter of telling a group of professionals how minor developments in a specific area of the law may affect their particular business or industry. I would like to talk to you today as free men and women who cherish their liberty and dream of handing it down to future generations. When I leave this world, I want my life to be measured by something larger than the number of victories I claim in the courts. So I hope that you won't feel that I am wasting your time if I approach the subject of property rights and the Courts from a broader theoretical and historical perspective.

With that in mind, I'd like to briefly share a story that inspires me. It is one that American history has almost completely forgotten, though it profoundly affected the nation that we would become. In the mid-seventeenth century, Charles Stuart, King of England dissolved Parliament for having the audacity to discuss issues of foreign policy. With no Parliament sitting, the King abused his emergency powers to force the people to lend him money and imprisoned, without trial, any who refused to make the forced loan. It was a classic case of taxation without representation. To meet his military needs, the King further insulted the people's property rights by quartering soldiers in private homes—and those soldiers robbed, raped, murdered and plundered. As England was about to be torn to shreds by a brutal civil war fought over these abuses, Sir John Eliot, a Member of Parliament, was committed to the Tower of London for publicly challenging King Charles' oppressive conduct. In one of these stirring challenges, Eliot said this:

"Upon this dispute not alone our lands and goods are engaged, but all that we call

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ours. These rights, these privileges, which made our fathers freemen, are in question. If they not be the more carefully preserved, they will I fear render us to posterity less free, less worthy than our fathers. For this particular admits a power to antiquate the laws."

Eliot understood that if the people tolerated abuses of their property rights, it would set a dangerous precedent permitting the King to antiquate or ignore the law in favor of his own needs and his own power. Because Eliot refused to retract and apologize for his statements against the King, he was never released and eventually died from the cold and unsanitary conditions of the Tower of London. But his death was not in vain. He was considered a martyr and his death became a rallying point for the Puritan Revolution that overthrew King Charles and established a new Constitution that rejected the divine right of kings and embraced the sovereignty of the people. Before challenging the King John Eliot was a member of the upper class. He was financially comfortable and held positions of honor in his country. Had he been willing to sit quietly and let the momentous times he lived in pass by without raising his voice, he likely could have lived out his days in comfort instead of suffering the humiliation of being incarcerated as a traitor to his King. But as Eliot said, it was not simply a matter of protecting the people's lands and goods from a Tyrant. The King's attempt to take control of private wealth to meet his government's objectives threatened all of their other liberties as well. I tell his story to illustrate the fact that the protection of the right to property involves more than our own narrow self-interest, and that it is a cause that is worth sacrificing for in our own lives because of its centrality to our American concept of liberty.

While he did not live to see the results of his sacrifice, Eliot did hand down to posterity a nation more free than the one he inherited. The complaints against the King in the English Civil War--dissolving Parliaments and refusing to call new ones, taxation without representation, failure to provide due process of law before punishment is imposed, the quartering of soldiers in private homes and other abuses of property rights—are all abuses that the Ameri-

can colonies complained of in the Declaration of Independence.

If I had more time to go into it, I'd love to more fully explain how the English Civil War contributed directly to the concepts of liberty and sovereignty enshrined in America's Declaration of Independence and Constitution. But let it suffice for now that John Eliot's courage and sacrifice made a tremendous difference for all of us sitting in this room today. We have been blessed with the opportunity to grow up in a free nation, partly because of rights that were won in the Puritan Revolution four centuries ago. I don't want to be melodramatic. But today our nation is engaged in something that matters a lot more than just our precious pocketbooks—though our pocketbooks are certainly involved. I intend to talk with you today about judicial activism and the erosion of property rights. I will first discuss judicial activism, and conclude with the discussion of a few recent cases on the subject of property rights where I believe that our judiciary has been paying homage to government power at the expense of individual liberty.

We desperately need judges that know the difference between vigorously enforcing the constitution and re-writing it. I dislike the way the terms judicial activism and judicial restraint are often used— suggesting that activist courts frequently interfere with legislative judgments, while restrained courts tend to defer to the legislature and are reluctant to declare legislative acts unconstitutional. Rather, I think that a better definition of an activist Court is one that does not feel appropriately restrained by the original intention of constitutional provisions when applying them. Thus, judicial restraint is the idea of judges being restrained by the original meaning of the words of a Constitutional provision, rather than feeling free to make creative reinterpretations. These definitions are equally valid whether the Court is enforcing a legislative act or finding it unconstitutional.

America's great Justices Holmes and Brandeis said that the Courts' power of judicial review is "not an exercise of the powers of a super-legislature." *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (Brandeis & Holmes, J.J., dissenting). At stake in

the battle for control of the judiciary in our time is nothing less than the integrity of our constitutional form of government.

But simply applying the Constitution as written rather than adding to it is not as easy as it sounds when we hear about it in political stump speeches or evening talk shows. We need to be very honest about that. James Madison, known as the Father of the Constitution, wrote in Federalist 37: All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.

Here we have the architect of our federal Constitution saying that we won't know for certain the meaning of a particular provision of the Constitution until we have had the chance to apply it in deciding individual cases. In the Courts the principles embodied in constitutions and statutes are applied to individual facts and circumstances, and their meaning is refined by repeated application. As Madison said:

"[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many [words] equivocally denoting different ideas."

In simple terms, Madison knew that the words of law were often ambiguous when you get down to applying it to particular facts. For the most part, the questions that are easy to resolve just by looking at the words of the Constitution don't even make it to the Court of Appeals. But Madison was not suggesting that the Constitution had no meaning or that its words could be interpreted to mean literally anything. He was not suggesting that we should just give up being faithful to the Constitution because its language is not perfectly clear on many points. Madison hastened to remind us, and please listen to this, if "the sense in which the Constitution was accepted and ratified by the nation is not the guide to expounding it, there can be no security for a faithful exercise of its powers." Without a government that is faithful to the restrictions on its powers, there is no

security for our rights. The "sense in which the Constitution was accepted and ratified" includes an understanding of the purposes of each provision, the history of the time and the traditional common law understanding of the words.

Liberty is left shivering and unprotected when the Courts feel free to find things in our constitutions that come not from the words and history of the document, but from the policy preferences of the individual judge. George Washington said in his farewell address:

"The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all."

The decision of a small panel of appellate judges is not an authentic act of the whole people. In making his statement, President Washington warned of the danger of empowering factions:

"... by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion."

Because the language of law is susceptible to a variety of different interpretations, it is also vulnerable to hijacking by judges who would like to usurp the power of the people and impose their own wisdom on society. Alexander Hamilton wrote in Federalist No. 78, "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." As Madison taught, Hamilton also said that the courts' responsibility was to declare the sense of the law according to their legal judgment—not their private will.

Result-oriented jurisprudence insults and undermines the sovereignty of the people. Judges must resist the often-powerful temptation to conduct a continuing constitutional convention according to their own

values and policy preferences. On the other hand, a judge is negligent in his duty when he allows unconstitutional policy to survive judicial review in the name of exercising judicial restraint. As Hamilton further explained in Federalist 78, the rights of the people:

"... can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the Constitution void."

Without this, all reservations of particular rights or privileges would amount to nothing.

Our judges should guard the boundaries of the constitutional authority of the other branches and, while doing so, take earnest care that the judiciary itself does not overstep the bounds of its authority and begin to find things in the Constitution that are not really there in order to impose their own values on society. As Chief Justice Harlan Stone wrote:

"[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

The awesome power of interpreting the foundational charters of our government must be exercised with humility and fidelity to the purposes for which it was written and enacted or liberty cannot survive. The lives of a million American patriots throughout our history have not been sacrificed on the altar of liberty only to see us surrender our power to govern ourselves to a small panel of high priests in black robes with an agenda to remake society in its own image. A written Constitution is the ultimate expression of the people's will. Our courts must understand that re-writing the Constitution according to their own policy preferences deprives the people of their sovereignty and violates the fundamental principle that government derives its just powers from the consent of the governed.

The first principle of constitutional interpretation that I will apply is that words have meaning. If we tolerate the idea that creative interpretation can alter the substantive meaning of the law, or that the meaning of the words may change as the judge per-

ceives the needs and norms of society changing, we cease to be governed by law and begin to be dictated to by the arbitrary will of a few fallible human beings.

If we aspire to a government of laws and not of men, we must begin by assuming that the law has meaning independent of the judge enforcing it, and that the meaning can be successfully discovered and applied. To deny that premise is to suggest that law does not really exist outside the mind of the individual judge and that his word is, in effect, the law. King James was fond of saying that a King was "Lex loquens," meaning, "a speaking law." But we don't subscribe to the divine right of kings in this country, nor do we believe that any one person's word is the law. As imperfect as human language is, the idea that the law has a fixed and determinate meaning must always be the beginning point of legal analysis.

If the government can breach the barriers of Constitutional tradition that have protected the people's property from commandeering to further government policy, our other freedoms have no refuge. As James Madison said, "[i]n a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights." Unfortunately, we have alarming examples of disregarding property rights here in the state of Washington.

Against this background, let's talk about a few cases.

As the Kelo case has been discussed here in Washington, people have always reassured me that our state constitution is more protective of property rights and would not allow the taking of private property for private use. My friend Attorney General McKenna even issued this statement:

"The Washington State Constitution prohibits the use of the power of eminent domain to condemn private property for private use and reserves to the judiciary the role in determining what constitutes a public use. The Washington Supreme Court has defined the "public benefit" limitation more narrowly than the definition used by the U.S. Supreme Court in the recently announced Kelo decision. Accordingly, the condemnation of private property for the

type of development at issue in the Kelo case would likely be evaluated as a matter of state constitutional law under standards that are potentially more protective of private property rights than those used by the U.S. Supreme Court today."

[Full press release here.](#)

The Attorney General put that statement out shortly before our state Supreme Court issued its decision in the Seattle Monorail Authority case. In that decision, the Supreme Court decided that an entire parcel could be taken from a private party to build a monorail platform, even though the parcel was significantly larger than needed for the platform and parking area. The landowners sued the Monorail Authority arguing that the Monorail Authority should only be permitted to take the portion of the tract needed for the public use. After the platform was developed, the remainder of the property now adjacent to the train station was to be sold or ground leased by the government to private developers for a substantial profit. Notwithstanding the fact that Article 1 Section 16 of our state constitution explicitly provides that, "Private property may not be taken for private use," the Court permitted an entire parcel to be taken even though only a small fraction of it was to be put to public use with the rest to be sold to private parties.

The Court reasoned that the question of how much of the property was needed for the legitimate public use was a legislative question that the Courts could not interfere with, even in a case where the excess property was to be re-sold to private persons at a profit to the Monorail Authority. Whenever a Court starts giving deference to legislative acts implicating a constitutional right, pay close attention. It signals the Court's unwillingness to protect an individual right against the power of government. Furthermore, giving broad deference to legislative definitions of public use directly violates the plain language of the Constitution. I quote Article 1 section 16:

"Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to

any legislative assertion that the use is public."

It is crystal clear that no public use was envisioned on three-fourths of the property. But the Supreme Court didn't want to second-guess the Monorail Authority's decision. So the Court let the Monorail Authority take an entire tract when only a small fraction was actually to be used for a genuine public purpose and the large majority of the condemned tract was re-sold at a handsome profit to the Monorail Authority.

The idea that some judges are willing to rewrite our Constitution to favor of their own policy preferences is not just political rhetoric. I'm here to tell you that it is happening in our Supreme Court and the Court of Appeals on a regular basis. And among the most threatened individual rights is the right to private property, in part because it is among the least understood and the most under-appreciated. When you strip the issue down to the bone, the control of property is power. When it is in the hands of private individuals, the private control of wealth helps to safeguard a broad distribution of political power and independence from excessive government control.

How do you like the idea of the government taking your property by force and then selling it to another private party at a profit? Does that seem like just compensation to you? Do you believe that it respects the rights of a citizen for the government to take his property not for a public use, but to transfer the bulk of it to other persons who the government thinks will make better use of it? Isn't there something fundamentally wrong when, if you wanted the leftover property back, you might not be able to buy it for the same compensation you the government gave you? Is that just compensation? In short, the idea that we are free of the Kelo decision in Washington because our Constitutional protections are more stringent is unfortunately wrong. If you read the provision, it is pretty clear that the government can't take private property just to transfer it to others for private use with very specific and limited exceptions. In the Seattle Monorail case, the Supreme Court quite simply failed in its obligation to protect private property from government takings for private use.

Another prominent example of judicial activism occurred last year in the Court of Appeals and gives us an opportunity to talk a little bit about the subject of regulatory takings. In that case, my opponent reversed a Superior Court decision that would have required the government to compensate the owners of 32 acres of privately owned trees that the State destroyed to prevent potential infestation by four male beetles and one female that had escaped a quarantine. While the owners were not in any way responsible for the escape of the beetles or the resulting danger, the Court held that the maintenance of common decorative trees was a public nuisance that the government could abate without compensation. Although the destruction of the trees was done supposedly "to avert a public calamity," the Court found that compensation by the public was not required because, although "This action was an injury to their property, but it did not reduce it to an irreclaimable desert." Despite admitting that the destruction of the trees had damaged the owners' property, the Court denied compensation with the justification that the beetles apparently presented a public emergency similar to a fire spreading through the city. The Court's ruling ignored the plain language of Washington's Constitution that, "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner". According to the Court's reasoning, property is only damaged for purposes of the Constitution if the government's activity reduces the land to "an irreclaimable desert." In other words, for government action to be considered damage to property--the damage must render the property totally useless and the destruction must be permanent. How can that possibly be what the framers of the Constitution meant by damage to property? Furthermore, if we consider the Courts' usual unwillingness to second-guess legislative assertions of emergency powers in other cases, Judge Becker's suggestion that we can think of one escaped female beetle as an emergency akin to a spreading city fire ought to give all of us reason to fear for our liberty.

So I put the question to you, what if the City suspected, without proof, that your

house might be infested with termites and thought that burning it down was the most reliable way to prevent the possible infestation from spreading to your neighbors? How would you feel if the government said to you, we don't have any hard evidence that there are termites in your house, but we need to burn it down just to be on the safe side? And, by the way, you won't be getting any compensation because we won't be reducing your land to an irreclaimable desert. How would you feel about that?

In *Bodin v. Stanwood*, 79 Wn. App. 313, 901 P.2d 1065 (1995), a 1995 case, Judge Becker held that a physical invasion of sewage on private property from government sewage lagoons was not a "damaging" of that property requiring compensation under Wash. Const. Art. I, sec. 16, unless the flooding was shown to be permanent. The opinion similarly said that a continuing risk of being flooded by sewage under the control of the government does not amount to a taking or damaging unless the actual flooding is either recurrent or chronic. Again, I put the question to you whether a constant threat of being flooded by sewage might make you feel a little hesitant about making use of your property for certain purposes. How much comfort would you take in the fact that the invasion wasn't permanent, recurrent or chronic? Would you build a house or barn there? Would you let your kids play in the sewage-contaminated yard after the floodwaters had receded?

In 1999 the Court of Appeals issued a decision denying compensation to a property owner where the government denied a prospective purchaser of property a business license, derailing the sale and preventing a building permit application from vesting until after a re-zone that made the proposed project unlawful and seriously harmed the property's value. The opinion said that, "[a] takings claim arises. . . when the government . . . destroys some . . . fundamental attribute of property ownership, such as . . . the right to dispose of the property." However, when the City interfered with the owner's sale of the property, the Court decided that no fundamental attribute of ownership had been harmed. The Court further held that, "property owners do have vested rights to use their property

under the applicable zoning ordinances” but where the City has created ambiguity about the zoning, the owner has no protection because, “for such a right to vest, there can be no dispute about the applicable zoning or what uses are allowed under the applicable zone.” In other words, the owner was penalized for the City’s mistake in creating a zoning ordinance that was unclear in its application. In response to the owners’ argument that the wrongful denial of a business license “damage[d]” their property interests and required compensation under the Washington Constitution, Judge Becker wrote that, “it is not clear from the text whether ‘taking’ and ‘damaging’ carry different meanings.” Judge Becker then answered the question by depriving the word “damaging” of any independent meaning in the Washington Constitution. I quote:

Because “taken” as it is used in the Fifth Amendment now encompasses nontangible injuries to land, the distinction between “taken” and “damaged” in article I, section 16 is no longer useful or compelling. Our courts have recognized this collapse of meaning by holding that “the state constitution’s protection against regulatory takings is coextensive with the Fifth Amendment provision.”

As discussed above, the denial of the business license is not a “taking,” and likewise it is not a damaging.

The Court of Appeals thus deprived the word “damaged” of its constitutional force and essentially wrote it out of the constitution to the detriment of the right to property.

A citizen’s security of tenure in his/her home and the assets that provide for his/her family is a basic and fundamental characteristic of human liberty. The Magna Carta was won by people that were tired of holding their land subject to the arbitrary whims of their feudal overlords. The American Revolution was fought over taxation without representation. And our bloody Civil War was fought for the principle that it is fundamentally wrong to appropriate another person’s body and the fruit of his labor without his consent. Judicial decisions circumscribing private property rights in the name of public benefit have rendered this country and our own state of Washington less free than they were before.

Let me suggest that, whatever side of the political spectrum you live on, you should care deeply about our constitutions and you should not want judges re-writing them, even though they might sometimes further your own views by doing that. A Constitution that is flexible enough for judges to make up new rights with no basis in the text and history is also sufficiently flexible to let those same judges define your other rights out of existence. Nowhere is that more starkly evident than in the realm of the right to property. Being committed to property rights, you have a special understanding of what it means to a family to have its own little piece of the earth that it possesses and controls for its own uses and purposes, with the expectation that they are secure in their tenure and ability to control that little piece of the earth without permission from the King. Please let your voice be heard on this issue.

As Thomas Jefferson said, “Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction.” We have a solemn obligation to pass the great constitution of our heritage—not a blank paper—down to our children. We desperately need Judges that understand the role of property in our concept of human liberty and are willing to protect our Constitution rather re-writing it. I humbly submit that I will do that. Mary Kay Becker has demonstrated that she will not. Let us keep the flame of liberty burning in the hearts of our people and make the dream of America endure through the ages.