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THE *KELO* DECISION AND THE FOURTEENTH AMENDMENT

LAURENCE M. VANCE

ARE THERE ANY LIMITS on the state's power of eminent domain? Is the Supreme Court the final arbiter in all cases? Does the Fourteenth Amendment incorporate the Bill of Rights? Is federalism dead? Is decentralization an illusive dream? These are questions that have once again been raised since the U.S. Supreme Court handed down its already infamous June 23, 2005, decision in the case of *Kelo v. City of New London*.[1]

In the Kelo decision, the city of New London, Connecticut, exercised the power of eminent domain to seize the private property of Susette Kelo and eight other petitioners who owned a total of fifteen properties in the historic Fort Trumbull area of the city. The property owners claimed that the forfeiture of their property violated the "takings" clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation") because their property was seized for an economic development scheme that was, according to the Connecticut Supreme Court that ruled against the petitioners, "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas."[2]

Laurence M. Vance is a freelance writer and adjunct instructor in accounting at Pensacola Junior College (lmvance@juno.com).

[1]The case was argued February 22, 2005, and decided June 23, 2005. The vote was 5–4, with Justice Stevens delivering the opinion of the Court, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justice Kennedy filed a concurring opinion. Justice O'Connor filed a dissenting opinion, in which she was joined by Justices Rehnquist, Scalia, and Thomas. Justice Thomas also filed a separate dissenting opinion.

[2]*Kelo v. City of New London* (2004).

The fact that the property was seized by a nonprofit entity (the New London Development Corporation) authorized by the city to acquire property in the city's name, by purchase, or by eminent domain, did not enter into the question.

The Connecticut Supreme Court should have ruled as the Ohio Supreme Court did recently when it reversed the decision of a lower state court and halted the city of Norwood and a developer from using eminent domain to take private homes for commercial development.[3] But the fact that it didn't does not mean that the U.S. Supreme Court should have heard the case.

The U.S. Supreme Court ruled that the city's seizure of private property for private development qualified as "public use" even though the land was not going to be used by the public. The Court reasoned that since economic development is "a traditional and long accepted governmental function" and there is "no principled way of distinguishing economic development from the other public purposes" and the seizure of the land was for a "public purpose," the land seizure meets the "public use" requirement of the Fifth Amendment.

There are a number of things that relate to this case that should clearly be obvious to libertarians and others who favor liberty, private property, federalism, decentralization, and limited government:

- Private use is not public use.
- Public purpose is not public use.
- Economic development projects are not the business of any government—federal, state, or local.
- The taking of private property, for any reason, is theft, whether it is taken by an agent of the state or the state itself.
- The taking of private property, for any reason, is theft, whether it is taken for public or private use.

What may not also be so clear is that:

- The Bill of Rights was meant to apply to the federal government, not to the states.
- The Constitution nowhere grants to the federal government the right to overthrow state laws.
- The Supreme Court had no jurisdiction to hear the case.

[3] *Norwood v. Horney* (2006).

Private property advocates, genuine and self-proclaimed, have voiced their disapproval of the *Kelo* decision.

Libertarian groups like the Institute for Justice, which appealed the case to the U.S. Supreme Court, and the Cato Institute, which filed an *amicus curiae* brief with the Court, have argued that the sky is falling.[4]

Conservatives have gotten in on the act as well, especially those writing for *Chronicles* magazine. Scott Richert, the executive editor, maintains that

> the Supreme Court has expanded the concept of eminent domain to include circumstances that the common law would have flatly rejected—and, in so doing, has expanded the power of local and state governments to tyrannical levels. (Richert 2005, p. 40)[5]

According to Stephen Presser, the Raoul Berger Professor of Legal History at Northwestern University, "No one's property can now be regarded as safe from rapacious and well-connected developers and their official allies" (Presser 2005a, p. 47).[6] And in the midst of an unrelated *Chronicles* book review Scotchie (2005, pp. 34–35) states that the *Kelo* decision "has effectively abolished private property" (Scotchie 2005, pp. 34–35).[7]

In the spirit of bipartisanship, Democrats and Republicans in Congress joined together to express their "grave disapproval" of the ruling. The House passed a resolution to that effect (H. Res. 340) by a margin of 365–33. The House Majority Leader at the time, Tom DeLay (R-TX), called the ruling a "George Orwell novel of a court decision" (quoted in Stolberg 2005, p. 10). Congressman Delay then introduced several bills designed to restrict the government's power of eminent domain. In the House we had the "Eminent Domain Limitation Act of 2005" (H.R. 3631) and the "Private Property Rights Protection Act of 2005" (H.R. 4128). In the Senate we had the "Private Property Rights Protection Act" (S. 1895). Both the House (H.R. 3083) and the Senate (S. 1895) introduced a bill called "Protection of Homes, Small Businesses, and Private Property Act of 2005."

A statement by Justice O'Connor in her dissenting opinion has been quoted by conservatives and libertarians alike: "Any property

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[4]See also Richman (2005, pp. 9–13) and Hornberger (2005, pp. 2–9).

[5]See also Richert (2006a, pp. 14–16; and 2006b, pp. 20–22).

[6]See also Presser (2005b, pp. 27–29; and 2006, pp. 14–16).

[7]See also Landess (2006, pp. 17–19) and Fleming (2006, pp. 10–12).

may now be taken for the benefit of another private party."[8] I don't know what is so shocking about this; if it were true then it would certainly be nothing new. The essence of government is theft. The state lives and breathes by lying, stealing, and killing.

Justice O'Connor can't possibly be taken seriously. Government at all levels had the power to take any American's property and dispose of it any way it chose long before the *Kelo* decision. As even the conservative opponent of the *Kelo* decision, Richert (2006b, p. 21), has stated:

> Anyone who thinks that Suzette Kelo's situation was unusual is fooling himself. The only thing that made her case any different from thousands of others across the country was that she decided to spend the time, effort, and—most importantly—money to fight it all the way to the Supreme Court.

What happens if someone refuses to pay his property taxes? What happens if a sufficient quantity of drugs is found on someone's property? Who is Justice O'Connor trying to kid? The good justice even admitted as much in her dissent: "Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use."[9]

In *Berman*, a Washington, D.C. "urban renewal" case, the Supreme Court ruled, in language strangely preminiscent of *Kelo*, that private property could be taken from an individual for a "public purpose" if done for the purpose of "redevelopment." The Court made no bones about the government's power: "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way" (*Berman v. Parker* [1954]). The Court had the audacity to conclude that "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking" (ibid). So, as long as someone is paid for his property, it matters not whether he didn't want to sell or what the government ultimately does with the property.

In the case of *Hawaii Housing Authority v. Midkiff* (1984), the Supreme Court ruled that a Hawaii land redistribution act which involved taking property from lessors and transferring to lessees did not violate the "public use" clause of the Fifth Amendment. The Court's opinion stated:

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[8]*Kelo v. City of New London* (2005).

[9]See, e.g., *Berman v. Parker* (1954) and *Hawaii Housing Authority v. Midkiff* (1984; dissenting opinion).

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. . . . In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause. (*Hawaii Housing Authority v. Midkiff*)

The author of the Court's opinion in this case? Justice Sandra Day O'Connor.

Lost in all this debate over the *Kelo* case is the fact that a man's property doesn't just include the physical piece of ground upon which he builds his house. The state takes property from its citizens without "just compensation" in the form of money and gives it away to other citizens in the form of TANF, food stamps, WIC, Medicare, Medicaid, EITC, Social Security, subsidized housing, etc., all the time. The federal government has redistributed trillions of dollars from taxpayers for the benefit of other private parties since the beginning of Lyndon Johnson's Great Society. Is the state taking property in the form of money any less egregious than the state taking property in the form of land? Why the brouhaha over the state taking property from one citizen and *selling* it to another, but not over the state taking property from one citizen and *giving* it to another?

The biggest hypocrites here are the members of Congress who complained about the *Kelo* decision while continuing to authorize the very programs that confiscate the wealth of American citizens. They have no problem with taking trillions of dollars of the taxpayers' money and redistributing it on income transfer programs and pork-barrel projects. They write the tax laws that allow the government to seize a portion of every man's income. The real attitude of the Republican-controlled Congress toward private property rights can be seen in the 2004 Republican Party Platform:

> The core of ownership in America has always been ownership of private property that a citizen can call his or her own. Republicans respect this tradition. For reasons both Constitutional and environmental, therefore, President Bush and the Republican Congress will safeguard private property rights by enforcing the Takings Clause of the Fifth Amendment and by providing just compensation whenever private property is needed to achieve a compelling public purpose. We oppose efforts to diminish the rights of private citizens to the land they own. (http://www.gop.com/media/2004platform.pdf)

Only a politician could talk about safeguarding private property rights while taking someone's property.

It matters little to Susette Kelo whether the city of New London takes her property to make a public park, sell it to a private developer, give it away, or condemn it. She wants to keep her property. It is little consolation to her that the city of New London uses her property for a city government office complex rather than selling it to a developer. In fact, if the city took the property in order to construct a city office complex or a city park, she would have no recourse whatsoever in the Connecticut court system. If the city built an office building and then a few years later demolished the building and sold the land to the highest bidder for "redevelopment," there would be no cause for concern. If the city built a public park and then a few years later allowed the property to fall into disrepair so that it was of no value to the public, there is nothing that Ms. Kelo or her heirs could do about it. The case could even be made that a private individual or group would make better use of the Kelo property than the city of New London, Connecticut.

The whole argument over the *Kelo* case comes down to the disposition of stolen property.

Lew Rockwell, one of the most notable defenders of private property rights, asked an important question soon after the *Kelo* decision was reached: "where's the Kelo calamity?" (Rockwell 2005). The answer is that it never materialized.

Rather than giving states and localities a green light to defraud citizens in the name of "public use," "urban renewal," "redevelopment," or "public benefit," the states and localities immediately began working to enact laws against *Kelo*-type takings. Within six weeks of the *Kelo* decision, the state of Alabama enacted legislation to curb eminent domain abuse. According to the Institute for Justice (2005): "Alabama legislation prohibits cities and counties from using eminent domain for private development or for enhancing tax revenue." The Institute also points out that Connecticut legislators have called for a moratorium on the use of eminent domain until their legislatures can revise property laws. Even the city of New London has agreed to allow Susette Kelo to stay in her property for now.

On the federal level, an amendment (H.Amdt 427) was attached to a large House Transportation, Treasury, and Housing and Urban Development appropriations bill (H.R. 3058) to prohibit the use of funds in the bill to enforce the judgment of the Supreme Court in the *Kelo* decision. In the same bill can also be found this provision:

> No funds in this Act may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless

> eminent domain is employed only for a public use: *Provided*, That for purposes of this section, public use shall not be construed to include economic development that primarily benefits private entities. (H.R. 3058, sec. 726)

The closing paragraph of the *Kelo* opinion, which very few people seem to have read, reads as follows:

> In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek. (*Kelo v. City of New London* [2005])

In light of this closing paragraph and everything that occurred immediately following the *Kelo* decision, I fail to see the calamity.

THE FOURTEENTH AMENDMENT

The Supreme Court's reasoning was clearly flawed, but the *best* decision was reached nevertheless. I call it the best decision instead of the *correct* decision or the *proper* decision because it was the closest thing to the Court refusing to hear the case. As Congressman Ron Paul (R-TX) explains:

> The Supreme Court should have refused to hear the Kelo case on the grounds that the 5th amendment does not apply to the states. If constitutional purists hope to maintain credibility, we must reject the phony incorporation doctrine in all cases—not only when it serves our interests. (Paul 2005)

Thus, there is a larger issue here that is of greater concern. Libertarian and conservative opponents of the *Kelo* decision and the Supreme Court justices on both sides of this case are proceeding on the assumption that the Fifth Amendment's eminent domain provisions apply to the states because they have been incorporated into

the Fourteenth Amendment. Thus, in the second section of her dissenting opinion, Justice O'Connor, in the dissenting opinion, joined by Justices Rehnquist, Scalia, and Thomas, opens with the statement:

> The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." (*Kelo v. City of New London* [2005])

She made the same assumption in her opinion in the *Hawaii Housing Authority* case:

> The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the Public Use Clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State. We conclude that it does not.

Although the incorporation doctrine is commonly accepted now, this was not the purpose of the Fourteenth Amendment or the intention of those responsible for it. There are five things to be observed that bear this out.[10]

Original Intent

Did the Congress that passed the Fourteenth Amendment (June 13, 1866) or the states that ratified it (July 9, 1868) intend that the Amendment incorporate, in whole or in part, the Bill of Rights? It is a telling indictment of the incorporation doctrine that nowhere in the Fourteenth Amendment does it say anything about incorporating any part of the Bill of Rights. The wisdom exercised by Chief Justice Marshall in *Barron v. City of Baltimore* (1833) should be followed here. In writing about the applicability of the Bill of Rights to the states, Marshall clearly explains why such was not the case:

> Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation

[10]The definitive work on the Fourteenth Amendment is, of course, Berger (1997) and also (1989). The argument that the Fourteenth Amendment was adopted illegitimately can and has been made, but is irrelevant here since it is in fact recognized as part of the Constitution by every court in the land and is not likely to ever be seriously debated, let alone repealed.

> of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language. (*Barron v. City of Baltimore*)

It is inconceivable that if such a thing took place that such a significant doctrine as incorporation would be so veiled that it would take years before some Supreme Court judge discovered that there was such a thing.

The Blaine Amendment

We know from the opening line of the First Amendment ("Congress shall make no law") that the Amendment applied only to the federal government. It is a fact of history that James Madison's proposal in 1789 to extend to the states the freedom of speech and of the press was rejected by the Congress that gave us the Bill of Rights. When the Constitution refers to the states it clearly says so. For example, it says in Article I, sec. 9 of the Constitution that "no Bill of Attainder or ex post facto Law shall be passed." That this only applies to the federal government is evident because in the next section it prohibits states from passing "any Bill of Attainder" or "ex post facto law."

This view of the Constitution prevailed even after the addition of the Fourteenth Amendment to the Constitution. In 1875, which was several years after the adoption of the Fourteenth Amendment, an amendment to the Constitution was proposed in the House of Representatives by James G. Blaine (1830–1893), the speaker of the House from 1869–1875. Known as the Blaine Amendment, it reads:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations. (*Congressional Record* 1876)

The Blaine Amendment passed in the House but not in the Senate so it was never sent to the states for ratification. The purpose of the amendment—to keep Catholic schools from receiving state funds—is irrelevant. What is relevant is the opening phrase, which should be compared with the opening phrase of the First Amendment:

> No state shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The wording of the Blaine Amendment shows that the Congress at the time did not consider the First Amendment to be incorporated into the Fourteenth Amendment. And if that bulwark of the Bill of Rights—the First Amendment—was not incorporated into the Fourteenth Amendment, then neither was the Fifth Amendment or any of the others in the Bill of Rights. And such was the case until late into the nineteenth century.

Due Process

If the Fourteenth Amendment "incorporates" the Fifth Amendment, then why did the framers of the Amendment find it necessary to repeat verbatim the "due process" clause of the Fifth Amendment? Notice the italicized portions of the Fifth and Fourteenth Amendments that appear below:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

The "due process" clause in the Fourteenth Amendment must have the same basic meaning as it does in the Fifth Amendment. The meaning of the clause in the Fifth Amendment controls the meaning in the Fourteenth, and not the other way around. The "due process" clause is both separate and conceptually distinct from the "takings" clause in the Fifth Amendment.

This is exactly what Justice Frankfurter emphasized in his concurring opinion in *Adamson v. California* (1947):

> The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought

> not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth.

But, it is sometimes argued, the "due process" clause incorporates the Bill of Rights; it is merely a shorthand expression for the rights enumerated in the Bill of Rights. But given what Frankfurter says above, and given that each of the amendments that make up the Bill of Rights was adopted separately and independently, the "due process" clause in the Fifth Amendment must exclude the rights (really the protections and prohibitions) enumerated in the rest of the Bill of Rights. Therefore, there is no way that the "due process" clause in the Fourteenth Amendment could be said to incorporate the Bill of Rights and apply those amendments to the states.

Writing the opinion for the Court in the case of *Bartkus v. Illinois* (1959), Justice Frankfurter summarized the case against incorporating the "due process" clause:

> We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States.

In the aforementioned *Adamson v. California*, decided just a few months after the *Bartkus* case, Justice Frankfurter described the negative consequences of the incorporation doctrine:

> To consider "due process of law" as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen. A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791. Such a view not only disregards the historic meaning of "due process." It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into

> the pigeon-holes of the specific provisions. It seems pretty late in the day to suggest tat a phrase so laden with historic meaning should be given an improvised content consisting of some but not all of the provisions of the first eight Amendments, selected on an undefined basis, with improvisation of content for the provisions so selected. (*Adamson v. California*)

He also gave the Court a history lesson:

> Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of 70 years—the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. . . . The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. (Ibid.)

Justice Frankfurter concluded:

> Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments. (Ibid.)

Alexander Hamilton a long time ago summarized the meaning of "due process" with the dictum that the words "have a precise technical import, and are only applicable to the process and proceedings of

courts of justice; they can never be referred to an act of legislature" (Hamilton 1961–79, vol. 4, p. 35). This has been confirmed numerous times by the Supreme Court. The meaning of "due process" in its historical context was discussed in *Davidson v. City of New Orleans* (1877) by Justice Miller:

> The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866. The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal government, it is found in the fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offence; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

The conclusion reached in this case by the Court is extremely relevant to the *Kelo* decision:

> It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. (Ibid)

It is unfortunate that *Davidson v. City of New Orleans* was not cited by the Supreme Court in its *Kelo* decision.

In *Hurtado v. California* (1884), the meaning of "due process" was taken up again in yet another "takings" case:

> Due process of law in the latter [the Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil

> and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

Could the members of Congress who passed the Fourteenth Amendment or the legislators in the states who ratified it have ever imagined that the Supreme Court would use the "due process" clause of the Fourteenth Amendment to declare a state's law against sodomy unconstitutional (*Lawrence v. Texas* [2003])? I think not.

Privileges or Immunities

Writing the dissenting opinion in *Adamson v. California*, Justice Black stated that one of the "chief objects" of the Fourteenth Amendment was to apply the Bill of Rights to the states. But the Fourteenth Amendment cannot be separated from its place in history. Consider the time in which the Fourteenth Amendment was adopted. The Thirteenth Amendment abolished slavery; the Fourteenth Amendment made the freed slaves citizens on an equal basis with existing citizens. In the infamous case, *Dred Scott v. Sandford* (1857), Chief Justice Taney related how Negroes

> are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

So, as Justice Miller, who wrote the opinion in the *Slaughter-House Cases* (1873)[11] explains, the Fourteenth Amendment was designed for "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him" because "something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much."

Notice the italicized words in the first sentence of the Fourteenth Amendment that are referenced in the second sentence:

> All *persons* born or naturalized in the United States and subject to the jurisdiction thereof, are *citizens* of the United States and of the

[11]Three cases involving Louisiana butchers who challenged a state law granting a 25-year local monopoly to one New Orleans livestock slaughterhouse.

> State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment was intended to confer a narrow, limited set of privileges.

But, it is sometimes argued, it is the "privileges or immunities" clause that incorporates the Bill of Rights; it is it, and not the "due process" clause that is merely a shorthand expression for the rights enumerated in the Bill of Rights. But as no reference is made to the Bill of Rights in the Fourteenth Amendment, and no mention of *rights* occurs in the text of the same, this is just as speculative as the similar claim for the "due process" clause.

When the phrase "privileges or immunities" was mentioned in the Fourteenth Amendment, it was not intended to be an isolated phrase the meaning of which to be decided by future Supreme Court justices. It is found in the Constitution, which, it should be noted, did not have any amendments when it was adopted but only contained a preamble and seven articles. The opening paragraph of the second section of Article IV of the Constitution reads as follows: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This clause was itself taken from Article IV of the Articles of Confederation:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

Here we have the general followed by the specific, thus limiting the "privileges and immunities." And according to the principle set down by James Madison in the *Federalist No. 41*:

> Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain

> nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity.

In the *Slaughter-House Cases*, the Supreme Court, in comparing Article Four of the Articles of Confederation and the Constitution, came to the conclusion that

> there can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

The "privileges or immunities" of the Fourteenth Amendment couldn't possibly be a reference to the rights enumerated in the Bill of Rights for the simple reason that it had a history of contrary usage before the Fourteenth Amendment was ever thought of; the privileges and immunities preceded the Bill of Rights.

"What, then," asked Justice Field in his dissenting opinion in the *Slaughter-House Cases*, "are the privileges and immunities which are secured against abridgment by State legislation?" In *Corfield v. Coryell* (1823), Justice Washington, writing for a federal circuit court, had already thoroughly explained:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated by the laws or constitution of the state in which it is to be

> exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expression of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate the mutual friendship and intercourse among the people of the different states of the Union."

This was partially quoted by both sides in the *Slaughter-House Cases*.

The import of the Fourteenth Amendment is clear, as Justice Field also explained in his dissenting opinion:

> The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation.

Lyman Trumbull (1813–1896), the onetime justice of the Supreme Court of Illinois and chairman of the Senate Judiciary Committee at the time of the adoption of the Fourteenth Amendment, said about that amendment during the debates over the adoption of the Ku Klux Klan Act of 1871:

> The protection which the Government affords to American citizens under the Constitution as it was originally formed is precisely the protection it affords to American citizens under the Constitution as it now exists. The fourteenth amendment has not extended the rights and privileges of citizens one iota. (*Congressional Globe* 1871)

If the Fourteenth Amendment incorporates anything it incorporates the Civil Rights Act of 1866, which was passed over the veto of President Johnson. This was the view of virtually every member of Congress, Republican or Democrat, who participated in the debates on the Fourteenth Amendment. Senator Trumbull, the draftsman of the bill, stated that the first section of the Fourteenth Amendment was "a reiteration of the rights as set forth in the Civil Rights Bill" (quoted in Berger 1989, p. 40). Those rights he elsewhere stated were "the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property" (*Congressional Globe* 1866).

In his *Slaughter-House* dissenting opinion, Justice Field confirmed this in his two references to the Civil Rights Act:

> This legislation [the Civil Rights Act] was supported upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an involuntary servitude.

> Senator Trumbull, who drew the act and who was its earnest advocate in the Senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the amendment, and to secure to all persons in the United States practical freedom.
>
> In the first section of the Civil Rights Act Congress has given its interpretation to these terms [privileges and immunities], or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legislation of a similar character, extending the protection of the National government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress reenacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment.

The Fourteenth Amendment, which was intended to confer a narrow, limited set of privileges, has been expanded by the judiciary way beyond the intentions of even the most radical Republican during Reconstruction. The result of this is the erosion of federalism, which is always followed by an increase in the power of the central state.

Selective Incorporation

If the Fifth Amendment has been incorporated then why do many states not have grand juries? The opening clause of the Fifth Amendment reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

The Supreme Court ruled back in 1884, in the case of *Hurtado v. California*, that the grand jury requirement doesn't pertain to the states. To this day, states can use grand juries if they choose, but they don't have to—without violating the Constitution. The doctrine of "selective incorporation," which some will then argue, was hatched in the mind of Supreme Court judges—like the "right" to have an

abortion (*Roe v. Wade* [1973]) or the "right" to receive welfare benefits (*Goldberg v. Kelly* [1970]).

But what about the other provisions of the Fifth Amendment?

In *Palko v. Connecticut* (1937), the Supreme Court ruled that the "double jeopardy" clause of the Fifth Amendment did not apply to prosecutions in state courts, stating that "there is no such general rule" that "whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state." But in *Benton v. Maryland* (1969), the Court overruled the *Palko* decision and maintained that "the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment."

In *Malloy v. Hogan* (1964), the Supreme Court held that "the Fourteenth Amendment prohibits state infringement of the privilege against self-incrimination just as the Fifth Amendment prevents the Federal Government from denying the privilege." This overruled the 1947 case of *Adamson v. California* (1947) where the Court affirmed that "protection against self-incrimination is not a privilege or immunity of national citizenship."

This means that not only have certain amendments from the Bill of Rights been selectively incorporated by the Supreme Court, but certain parts of amendments have likewise been incorporated. This results in three problems. One, how does anyone know what the law will be from one day to the next? Which part of which amendment will be the next to be incorporated? Two, this is not the rule of law; this is government on a whim. The Constitution means what five members of the Supreme Court say it means—the Congress, the state legislatures, and the people be damned. And three, the Supreme Court that has the power to incorporate has the same power to unincorporate.

The incorporation doctrine is a creation of the U.S. Supreme Court, not the Congress that drafted the Fourteenth Amendment. The Court underwent a gradual change of opinion on the matter, as can be seen by comparing two cases that relate to the First Amendment and two cases that relate to the Fifth Amendment.

In the case of *Prudential Insurance Co. v. Cheek* (1922), Justice Pitney stated:

> The Constitution of the United States imposes upon the states no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence. . . . But, as we have stated, neither the Fourteenth Amendment nor any other provision of the

> Constitution of the United States imposes upon the states any restrictions about "freedom of speech" or "freedom of silence."

But in the case of *Gitlow v. New York* (1925), the Court ruled that a New York law violated the free speech clause of the First Amendment because that part of the First Amendment was incorporated into the Fourteenth Amendment:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

The *Gitlow* case even expressly overruled the *Prudential Insurance* case:

> We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.

In the case of *Fallbrook Irrigation Dist. v. Bradley* (1896), Justice Peckham stated:

> The fifth amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the federal government, as has many times been decided.

But in the case of *Chicago, Burlington and Quincy Railroad Co. v. City of Chicago* (1897), the Court considered its jurisdiction to

> re-examine the final judgment of the supreme court of Illinois, and to certain rulings of the state court, which, it is alleged, were in disregard of that part of the fourteenth amendment declaring that no state shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction.

The opinion of the Court, written by Justice Harland, concluded that

> a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

The result of this opinion is that: "Compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment."

This is the case that started the Supreme Court down the slippery slope of incorporation, as explained by Justice Brennan in his opinion in the *Malloy v. Hogan* decision:

> The extent to which the Fourteenth Amendment prevents state invasion of rights enumerated in the first eight Amendments has been considered in numerous cases in this Court since the Amendment's adoption in 1868. Although many Justices have deemed the Amendment to incorporate all eight of the Amendments, the view which has thus far prevailed dates from the decision in 1897 in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use.

Although the wholesale incorporation of the Fifth Amendment was clearly not the intention of the justices in the *Chicago, Burlington and Quincy Railroad* Co. case, it is now cited as such by the Supreme Court in "takings" cases.

Writing for the majority in *Lucas v. South Carolina Coastal Council* (1992), Justice Scalia remarks that

> the practices of the States prior to incorporation of the Takings and Just Compensation Clauses, see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) which, as JUSTICE BLACKMUN acknowledges, occasionally included outright physical appropriation of land without compensation.

And more recently, in the *Kelo* case, where the Court held that "the city's proposed disposition of petitioners' property qualifies as a 'public use' within the meaning of the Takings Clause," this statement appears at the beginning of the case: "The question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution" (*Kelo v. City of New London* [2005]). Then there is a footnote that reads:

> "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).[12]

To lay the groundwork for the Supreme Court's misapplication to the states of the Fifth Amendment's privilege against self-incrimination

[12]See footnote 1 of *Kelo v. City of New London* (2005).

in the *Malloy v. Hogan* case, Justice Brennan quoted an incidental remark in *Twining v. New Jersey* (1908):[13]

> It was on the authority of that decision [*Chicago, B. & Q. Railroad*] that the Court said in 1908 in *Twining v. New Jersey*, *supra*, that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."

However, in his dissenting opinion, Justice Harlan quotes the same remark from the Twining case but this time also gives the next sentence that follows immediately after: "If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

Justice Harland recognized the true intent of the majority in the *Malloy* case:

> I can only read the Court's opinion as accepting in fact what it rejects in theory: the application to the States, via the Fourteenth Amendment, of the forms of federal criminal procedure embodied within the first eight Amendments to the Constitution. While it is true that the Court deals today with only one aspect of state criminal procedure, and rejects the wholesale "incorporation" of such federal constitutional requirements, the logical gap between the Court's premises and its novel constitutional conclusion can, I submit, be bridged only by the additional premise that the Due Process Clause of the Fourteenth Amendment is a shorthand directive to this Court to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States.

Harland believed that "the reasoning behind the Court's decision carries extremely mischievous, if not dangerous, consequences for our federal system in the realm of criminal law enforcement" (ibid.). He accepted the proposition of the majority that "continuing re-examination of the constitutional conception of Fourteenth Amendment 'due process' of law is required, and that development of the community's sense of justice may in time lead to expansion of the protection which due process affords" (ibid.), but he did not understand

> how this process of re-examination, which must refer always to the guiding standard of due process of law, including, of course, reference to the particular guarantees of the Bill of Rights, can be

[13]A case that the *Malloy* case overthrew, along with *Adamson v. California*.

> short-circuited by the simple device of incorporating into due process, without critical examination, the whole body of law which surrounds a specific prohibition directed against the Federal Government. The consequence of such an approach to due process as it pertains to the States is inevitably disregard of all relevant differences which may exist between state and federal criminal law and its enforcement. The ultimate result is compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the States' sovereign powers or by dilution in federal law enforcement of the specific protections found in the Bill of Rights. (Ibid.)

The breakdown of federalism that has resulted from all the litigation associated with the Fourteenth Amendment was anticipated by an opponent of that amendment in the Pennsylvania State House that debated its ratification:

> The regulation of the civil relations of each State is placed under the control of the Federal Government, the States to be used simply as instruments to execute its will, and nearly their entire civil and criminal jurisprudence placed under the control of Congress. (Quoted in Fairman 1949, p. 114)

So, just as the anti-federalists were right, so were the opponents of the Fourteenth Amendment.

THE *KELO* DECISION

As mentioned previously, the reasoning of the Supreme Court in the Kelo case was clearly flawed, but the best decision was reached nevertheless. However, it would have been far better, since the Supreme Court chooses which cases it hears, for the Court to have simply refused to hear the case. Back in the days before the Fourteenth Amendment, when the Constitution was followed by the Supreme Court much more closely than it is today, a Fifth Amendment "takings" case was brought before the Court. In *Barron v. City of Baltimore*, the case cited earlier in which Chief Justice Marshall explained why the Bill of Rights did not apply to the states, the unanimous Court ruled, without even hearing the arguments from the City of Baltimore:

> We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state,

> and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed. (*Barron v. City of Baltimore*)

The same reasoning should have prevailed in the *Kelo* case. As Congressman Ron Paul again explains:

> The issue in the Kelo case is the legality of the eminent domain action under Connecticut law, not federal law. Congress can and should act to prevent the federal government from seizing private property, but the fight against local eminent domain actions must take place at the local level. (Paul 2005)

But as also mentioned previously, the ruling for the City of New London and against the *Kelo* petitioners cannot be said to be the correct decision or the proper decision because it is a decision that never should have been made. It was, therefore, destined to be a bad decision no matter how it was decided.

It is a bad decision either way because the Supreme Court did not uphold the constitutional principle of federalism. Yes, the Court affirmed the judgment of the Connecticut Supreme Court, but this can hardly be considered a victory for federalism since federalism was the last thing on the justices' minds when they rendered their decision.

It is a bad decision because it further strengthens the myth of the Fourteenth Amendment. It is the Fourteenth Amendment that gave us *Roe v. Wade*. It is the Fourteenth Amendment that gave us *Brown v. Board of Education* (1954).[14] It is the Fourteenth Amendment that is used to grant automatic citizenship to children of illegal immigrants. It is the Fourteenth Amendment that has, more than anything else, been used to increase the power and scope of the federal leviathan.

It is a bad decision either way because it diverts attention away from the real issue: the legitimacy of eminent domain itself. As Future of Freedom Foundation president and libertarian supporter of the *Kelo* decision, Jacob Hornberger (2004, p. 6), explains:

> Lost in all this "public use" controversy is a fundamental question: Why should government have the power of eminent domain anyway? If it needs a piece of property, why shouldn't government officials be expected to negotiate for its purchase, just as everyone else does? If someone refuses to sell, then the government can simply go and purchase its property elsewhere.

[14] I have hit a nerve. By all means read Cottrol, Diamond, and Ware (2003), but then see Roberts and Stratton (1995, pp. 29–50), and finally the unsigned article, "The Issue is Economics, Not Who Likes You: The Damage of *Brown v. Board of Education*" (1995, pp. 1–4).

As I said previously, the whole argument over the *Kelo* case comes down to the disposition of stolen property. But as Mencken (1919) once said: "Government is a broker in pillage, and every election is sort of an advance auction sale of stolen goods."

THE CONSTITUTION

The Constitution has utterly failed and failed utterly to do what it was intended to do: act as a check on the federal government. The Constitution has been a dead letter since the (so-called) Civil War. In the words of another Justice Marshall—Thurgood Marshall (1908–1993)—in a speech on the occasion of the bicentennial of the U.S. Constitution:

> While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws.[15]

The federal system of dual sovereignty or divided authority was all but destroyed by Lincoln's War, as Woodrow Wilson (1908, p. 178) wrote:

> The old theory of the sovereignty of the States, which used so to engage our passions, has lost its vitality. The war between the States established at least this principle, that the federal government is, through its courts, the final judge of its own powers.

The seeds of this were, of course, sown long before Lincoln's war. Through its power of judicial review (which is not mentioned in the Constitution), first exercised over two hundred years ago in *Marbury v. Madison* (1803), the federal judiciary has become the ultimate arbiter, and worse—its own final authority. Jefferson did not think too highly of the results of the *Marbury* case. Here is Jefferson, who was intimately connected with the case since Madison was his Secretary of State:

> This practice of Judge Marshall, of traveling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly, perhaps, because it in some measure bore on myself. Among the midnight appointments of Mr. Adams, were commissions to some federal justices of the peace for Alexandria. These were signed and sealed by him, but not delivered. I found

[15]Speech delivered at the annual seminar of the San Francisco Patent and Trademark Law Association on May 6, 1987.

> them on the table of the department of State, on my entrance into office, and forbade their delivery. Marbury, named in one of them, applied to the Supreme Court for a mandamus to the Secretary of State (Mr. Madison) to deliver the commission intended for him. The court determined at once, that being an original process, they had no cognizance of it; and there the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery. The object was clearly to instruct any other court having the jurisdiction, what they should do if Marbury should apply to them. Beside the impropriety of this gratuitous interference, could anything exceed the perversion of law? . . . Yet this case of Marbury and Madison is continually cited by bench and bar, as if it were settled law, without any animadversion on its being merely an *obiter* dissertation of the Chief Justice.[16]

Jefferson further said about the judiciary:

> Whether the judges are invested with exclusive authority to decide on the constitutionality of a law has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the Executive or Legislative branches.[17]

And Jefferson was not alone. Virginia senator John Taylor (1753–1824) wrote against the idea that "five or six men, installed for life" should be invested with "a power of regulating the constitutional rights of all political departments" (Taylor 1992, p. 198). Justice Scalia is kidding no one but himself when he chides Justice Breyer in his concurring opinion in *Apprendi v. New Jersey* (2000) for proceeding "on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean." "It means what it says," declares Scalia, no doubt with a straight face.

But it's not just the judiciary. Congress has been without restraint since Justice Marshall ruled in the case of *McCulloch v. Maryland* (1819) that even though "among the enumerated powers, we do not find that of establishing a bank or creating a corporation," yet

> the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making "all laws which shall

[16]Thomas Jefferson to William Johnson, 12 June 1823, quoted in Jefferson (1943, pp. 320–23).

[17]Thomas Jefferson to W.H. Torrance, 11 June 1815, quoted in Jefferson (1905, vol. 14, pp. 303–04).

> be necessary and proper, for carrying into execution the foregoing powers."

Just a short time later, in *Gibbons v. Ogden* (1824), we see the beginnings of the destruction of state sovereignty with the commerce clause. The results of this were most recently evident in the case of *Gonzalez v. Raich* (2005). There the Supreme Court ruled that Congress's authority under the "commerce" clause includes the power to regulate (prohibit) the medical use of marijuana, thus overthrowing California state law.[18] The aforementioned Senator Taylor asks us to imagine whether

> the States, when forming a constitution, and reserving a considerable share of political power to themselves, could have intended that this reservation should be merely didactick, and utterly devoid of the only means by which it could be preserved? Such a doctrine amounts to the insertion of the following article in the constitution: "Congress shall have power, with the assent of the Supreme Court, to exercise or usurp, and to prohibit the States from exercising, any

[18]In a brilliant dissent, Justice Thomas argued:

> If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers. . . . By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power. . . . Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. . . . Further, the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States' traditional police powers. (*Gonzalez v. Raich*)

It is interesting to note that Woodrow Wilson, writing before he became the president who "kept us out of war," addressed the continuing abuse by the Congress of the "commerce" clause. He maintained that there were "attempts now made during every session of Congress to carry the implications of that power beyond the utmost boundaries of reasonable and honest inference" (Wilson 1908, p. 178). He concludes that

> if the power to regulate commerce between the States can be stretched to include the regulation of labor in mills and factories, it can be made to embrace every particular of the industrial organization and action of the country. (p. 179)

This he views as "obviously absurd extravagancies of interpretation" (ibid.).

> or all of the powers reserved to the States, whenever they shall deem it convenient, or for the general welfare. (Taylor 1992, p. 199)

Our Constitution has been reduced to a series of abused clauses: the "necessary and proper" clause, the "commerce" clause, the "general welfare" clause, the "due process" clause, the "privileges or immunities" clause, and the "takings" clause.

FEDERALISM AND DECENTRALIZATION

We were assured by James Madison in *Federalist No. 45* that the federal government under the new Constitution would be harmless because:

> the powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Clearly, the anti-Federalists were right.

In vain does one look to the federal government to check its own power or protect the rights of the citizens in the states. The federal government is ever seeking to increase its power and is the greatest violator of citizens' rights. If the federal government can't be counted on to follow its own, admittedly imperfect, Constitution, there is no stopping its hegemony. Although outrages and injustices are no doubt perpetrated on the citizenry every day by states and localities, it is the federal leviathan that is by far the greater evil. We don't need the federal government to police the states; we need the states to police the federal government. We need a resurrection of the Kentucky and Virginia Resolutions;[19] we need, as Robert E. Lee wrote in a letter to a New York editor, that "the Union, *as established by our forefathers*, should be preserved, and that the government, *as originally organized*, should be administered in purity and truth."[20] Any Supreme Court decision that increases federalism or decentralization is a welcome sight, even if it is an imperfect one.

I have found no greater exposition of these principles than that given by Thomas Jefferson in a letter written in 1816:

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[19]See Watkins (2004).

[20]Robert E. Lee to C. Chauncey Burr, 5 January 1866, quoted in Jarvis (2006).

> No, my friend, the way to have good and safe government, is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to. Let the national government be entrusted with the defence of the nation, and its foreign and federal relations; the State governments with the civil rights, laws, police, and administration of what concerns the State generally; the counties with the local concerns of the counties, and each ward direct the interests within itself. It is by dividing and subdividing these republics from the great national one down through all its subordinations, until it ends in the administration of every man's farm by himself; by placing under every one what his own eye may superintend, that all will be done for the best. What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and power into one body, no matter whether of the autocrats of Russia or France, or of the aristocrats of a Venetian senate. And I do believe that if the Almighty has not decreed that man shall never be free, (and it is a blasphemy to believe it,) that the secret will be found to be in the making himself the depository of the powers respecting himself, so far as he is competent to them, and delegating only what is beyond his competence by a synthetical process, to higher and higher orders of functionaries, so as to trust fewer and fewer powers in proportion as the trustees become more and more oligarchical. The elementary republics of the wards, the county republics, the State republics, and the republic of the Union, would form a gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government.[21]

Federalism and decentralization are two effective weapons in the war against the federal leviathan. Sadly, these principles have been all but forgotten.

CONCLUSION

I have maintained throughout that although the Supreme Court's reasoning in the *Kelo* case was clearly flawed, the best decision was reached nevertheless because it was the closest thing to the Court refusing to hear the case. The outcome was the same: the decision of the Connecticut Supreme Court stands. The *Kelo* decision cannot be defended on constitutional grounds. Supporters of the decision wanted the Court to overturn the Connecticut decision as it overturned the decision of the New York Supreme Court in the celebrated

[21]Thomas Jefferson to Joseph C. Cabell, 2 February 1816 quoted in Jefferson (1905, vol. 14, pp. 421–23). See also Tucker (1999).

case of *Lochner v. New York* (1905). There the Court invalidated a "bad" (from the standpoint of freedom of contract) New York labor law which mandated that "no employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day." But as history has shown, this set a terrible precedent, and led to even more government intervention and central planning, culminating in the New Deal. Intervention by the federal government in the affairs of the states under the guise of protecting rights is intervention nonetheless, and should be opposed because, in the long run, it destroys the very principle that limits the power of the central state.

REFERENCES

Berger, Raoul. 1997. *Government by Judiciary: The Transformation of the Fourteenth Amendment*. 2nd ed. Indianapolis, Ind.: Liberty Fund.

_____. 1989. *The Fourteenth Amendment and the Bill of Rights*. Norman and London: University of Oklahoma Press.

Congressional Globe, 39th Cong., 1st Sess. 475 (1866).

Congressional Globe, 42nd Cong., 1st Sess. 576 (1871).

Congressional Record. 1876. 44th Congress 1st. Session. 5453.

Cottrol, Robert J., Raymond T. Diamond, and Leland B. Ware. 2003. *Brown v. Board of Education: Caste, Culture, and the Constitution*. Lawrence: University of Kansas Press.

Fairman, Charles. 1949. "Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding." *Stanford Law Review* 2.

Fleming, Thomas. 2006. "The Royal Prerogative." *Chronicles* 30 (March).

Hamilton, Alexander. 1961–79. "Remarks on an Act for Regulating Elections," New York Assembly, 6 February 1787. In *The Papers of Alexander Hamilton*. Vol. 4. Harold C. Syrett et al., eds. New York and London: Columbia University Press.

H.R. 3058, 109th Congress (2005).

Hornberger, Jacob G. 2005. "Freedom and the Fourteenth Amendment." *Freedom Daily* 16 (November).

——. 2004. "The Bill of Rights: Eminent Domain." *Freedom Daily* 15 (December).

Institute for Justice. 2005. "With Governor's Signature Today, Alabama Will Become First State to Curb Eminent Domain Abuse After Kelo." August 3, 2005, http://www.ij.org/private/castle/8_3_05pr.html.

"The Issue is Economics, Not Who Likes You: The Damage of *Brown v. Board of Education*." *Issues & Views* 11 (Summer 1995).

Jarvis, Gail. 2006. "Robert E. Lee." January 15. http://www.LewRockwell.com/jarvis/jarvis93.html.

Jefferson, Thomas. 1904. *The Writings of Thomas Jefferson*. Andrew A. Lipscomb and Albert Ellery Bergh, eds. Washington, D.C.: The Thomas Jefferson Memorial Association. Vol. 14.

——. 1943. *The Complete Jefferson*. Saul K. Padover, ed. New York: Tudor.

Landess, Tom. 2006. "Outgrowing the Past." *Chronicles* 30 (January).

Mencken, H.L. 1919. *Prejudices: First Series*. New York: Alfred Knopf.

Paul, Ron. 2005. "Lessons from the Kelo Decision." July. http://www.LewRockwell.com/paul/paul.259.html.

Presser, Stephen B. 2006. "Does the Federal Government Protect Private Property? Life, Liberty, and Takings." *Chronicles* 30 (March).

——. 2005a. "Crying 'Halt!'" *Chronicles* 29 (September).

____. 2005b. "Did the Supreme Court Destroy Property Rights in the Kelo Case?" *Chronicles* 29 (December).

Republican Party Platform. 2004. http://www.gop.com/media/2004platform.pdf.

Richert, Scott P. 2006a. "Think Locally, Act Locally." *Chronicles* 30 (January).

____. 2006b. "Unjust Compensation: What's Not to Love?" *Chronicles* 30 (March).

——. 2005. "Master of Your Domain" *Chronicles* 29 (September).

Richman, Sheldon. 2005. "The Supreme Court Repeals the Constitution." *Freedom Daily* 16 (September).

Roberts, Paul Craig, and Lawrence M. Stratton. 1995. *The New Color Line: How Quotas and Privilege Destroy Democracy*. Washington, D.C.: Regnery.

Rockwell, Lew. 2005. "Where's the Kelo Calamity?" August. http://www.LewRockwell.com/rockwell/kelo-calamity.html.

Scotchie, Joseph. 2005. "The Road to Ideology." *Chronicles* 30 (January).

Stolberg, Sheryl Gay. 2005. "Republican Lawmakers Fire Back at Judiciary." *New York Times* 1 July.

Taylor, John. [1822] 1992. *Tyranny Unmasked*. Reprint, Indianapolis, Ind.: Liberty Fund.

Tucker, St. George. [1803] 1999. *View of the Constitution of the United States.* Reprint, Indianapolis: Liberty Fund.

Watkins, William J., Jr. 2004. *Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and Their Legacy*. New York: Palgrave Macmillan.

Wilson, Woodrow. 1908. *Constitutional Government in the United States*. New York: Columbia University Press.