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Supreme Court ruling opens the door to abuse

By Michael Reksulak and William F. Shughart II
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The Fifth Amendment to the U.S. Constitution says in part: ". . . nor shall private property be taken for public use, without just compensation."

Until last week, courts generally had interpreted that clause as limiting local government's powers of eminent domain to projects of genuine public benefit, such as highways and schools. But in a stunning reversal on Thursday, the U.S. Supreme Court ruled that the New London Development Corp. could "take" property owned by Susette Kelo and her neighbors on the Connecticut city's waterfront, not for a "public use" but to transfer it to private real estate developers who expect to profit from building an upscale hotel and office complex.

Commentary on the 5-4 decision in *Kelo vs. City of New London* focused attention on the reasoning of the court's majority, who embraced a "broader and more natural interpretation of public use as 'public purpose,' " and on Justice Sandra Day O'Connor, whose scathing dissent warned that the ruling "wash(es) out any distinction between private and public use of property." She wrote further: "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

As economists, we share O'Connor's concerns for two reasons. First, economic theory tells us that secure private property rights are one of the essential foundations of a free society and an important engine of growth. By raising the odds that eminent domain powers will be exercised expansively, the Kelo decision has seriously undermined those rights. If privately owned land can be taken for any use

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developers and local government officials creatively can cloak in a "public purpose," then private property plainly will be worth less.

The pop you heard last week may have been the bursting of the real estate "bubble."

Second, by deferring to the expertise of New London's public officials, as set forth in the city's "carefully considered development plan," the Supreme Court has opened the door wider to rent-seeking by powerful local interests.

Real estate developers often wield considerable political influence at the local level. Their personal financial stakes in zoning laws and other policy issues affecting property values provide strong incentives to involve themselves actively in civic affairs and to seek appointment to planning boards and economic development agencies, where they can work to sway land-use decisions. (For example, the executive director of the Mississippi Development Authority -- the state's lead economic development agency -- is chairman of a real estate investment firm that specializes in ownership and operation of office properties.)

The Kelo decision supplies convenient camouflage for eminent domain actions that are little more than corporate welfare in disguise. The only pretext now needed is to claim, as New London did, that transferring property from one private party to another will serve the "public purpose" of stimulating the local economy, "creating" jobs and new sources of tax revenue.

The goals of re-election or reappointment to public office heighten local government officials' responsiveness to lobbying by politically well-organized groups seeking to exploit eminent domain processes for their own gain. Lowball offers of "just compensation" are a predictable consequence of that influence. In the words of University of Chicago law professor Richard Epstein: "You get frequent corruption as people pressure city halls to seize land on the cheap."

Mid-Southerners already know how this works. In February 2001, under the pretense of encouraging economic development, the State of Mississippi initiated proceedings at the behest of Nissan Motor Co. to condemn 1,300 acres of privately owned land near Canton, some of which had been in the possession of the Archie family for 60 years, to make way for the company's new automobile assembly plant.

The Archie family eventually won a judgment allowing them to keep

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their property, forcing Nissan to redesign part of the facility's layout. Other families had to fight in court to receive a fair price for their property. One of the landowners initially was offered \$9,200 for a 1.6-acre parcel seized on Nissan's behalf; in December 2001, a Mississippi jury awarded him \$20,000. Another elderly couple, whose three acres were adjacent to the plant's water tower, eventually accepted a settlement offer of \$295,000.

O'Connor's fear that farms will be replaced by factories evidently is not farfetched. However misguided, the Kelo ruling is now the law of the land. One might want to ask, though, whose land is it?

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