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Private- Property Rights

How could . . . the government . . . have the nerve to come and take away from the poor working people and give it to the rich? . . . They say, “I demand, you going to be moving, you like it or not.” What right do you have if you let them do what they want? The American people don’t got no rights.

—Mary Ann Pillow, featured on KAET *Horizon*

This is my home. It’s been my home for 36 years. If I move, it won’t be a home. It’ll just be a house I’m living in. And I don’t think I’d ever get to a place where I could ever call that home.

—Kenneth Pillow

IN MARCH 2003, the *New York Times* reported the sad plight of farmers in Communist China whose land was being taken by the government to build factories. Song Defu heard about it the previous May, when his cornstalks were reaching for the sky. The television news reported that farming no longer would be allowed in his town, and that 500 farmers would be displaced in favor of an industrial park. A few days later the bulldozers came and the fields were plowed under—despite a provision in the Chinese Constitution providing that local villages “must not illegally alter or annul contracts,” including land leases. The village leader swears it was all by the book. “All the proper procedures were carried out,” he declared.

“[T]here are always a minority who are unhappy.” The human consequences were devastating. “Farmers who have lost their land, yes, they find work,” another villager remarked, “but it’s often just picking and selling old garbage in Beijing.”¹

Just business as usual in a totalitarian state where property rights are not recognized. Such a scenario could never take place in a free society committed to private-property rights like America, right? After all, the U.S. Constitution expressly limits the exercise of eminent domain—the right of a government to take property—to instances of “public use,” and only when “just compensation” is made. Public use typically entails the construction of schools, roads, or the like. Unfortunately, excesses in the use of this carefully bounded power play out every day in cities across the nation.

Randy Bailey owns a brake shop on the corner of Country Club Drive and Main Street, a major intersection in Mesa, Arizona. For more than 20 years, Randy and his father before him have installed brakes that stop cars on a dime. Randy hopes one day to hand the shop down to his son. The shop does a good business, and it is emphatically not for sale.

But these days, that doesn’t matter, because cities view all property as up for grabs.² Eminent domain is one of the most destructive powers of government, and historically it has been used only for public purposes such as roads, schools, and hospitals. But increasingly, it is abused to serve private ends that happen to coincide with the government’s policy objectives. If a city views a property as underutilized—that is, if it might produce more tax revenue or generate more jobs in someone else’s hands—city officials may exercise the power of eminent domain to take it from the current owner and give it to someone they like better.

If that sounds more like socialism than a nation grounded in a belief in the sanctity of private-property rights, that’s

because it is. But it's socialism of the most perverse kind, a sort of Robin Hood in reverse, whereby property is taken from poor and working-class people and given to wealthy, politically connected people or corporations. In most instances, it's corporate welfare of the most naked kind. Most people have no idea that the phenomenon of eminent domain abuse exists at all—or that it could happen in America—until it happens to them.

Randy Bailey learned that painful lesson when he started hearing rumors that Ken Lenhart, the owner of an Ace Hardware store, wanted to expand and relocate to the very corner occupied by Bailey's Brake Service and his neighbors—a Maaco auto body shop, a restaurant, and several homes and other businesses. Lenhart started buying up some properties, often tearing down the existing structures and leaving the wreckage on the lot. Lenhart contacted the city and asked it to assemble the other properties so he could purchase the entire corner.

The city obliged, designating the corner part of a "redevelopment" zone. Never fear, the city advised the property owners: We promise you'll be fairly compensated. But several owners, including Bailey, didn't want to leave. Bailey wanted to remain at his location for precisely the reason Lenhart coveted it: It is the prime commercial intersection in Mesa. Moreover, all of his customers knew that's where he was located.

Growing alarmed, Bailey contacted Lenhart and asked him to make Bailey's Brake Service part of the project. Don't talk to me, Lenhart responded, talk to the city.

The city took bids to redevelop the corner, drawing its specifications to match Lenhart's desires. Not surprisingly, Lenhart won the bid. Not only would the city condemn all the property he wanted to acquire and sell it to him at below-market prices, it would throw in a two-million-dollar subsidy to

boot. The city told Bailey and his neighbors that they could negotiate over price, but not the right to stay.

As properties around his shop were being bulldozed, Bailey fought back. Represented by the Institute for Justice, he filed an opposition to the eminent domain action arguing that it violated the Arizona Constitution's guarantee that "private property shall not be taken for private use." The city argued that "public use" really meant "public benefit," and that the city's determination of public benefit was dispositive. The city repeatedly increased its cash offers, asserting publicly that Bailey was really interested only in more money. The bureaucrats simply could not grasp the concept that Bailey actually didn't want to sell at any price.

Bailey lost the opening round in trial court, but the court granted an injunction halting the bulldozers. As the case went to appeal, Bailey's cause was backed by the *East Valley Tribune*, *Arizona Republic*, and even a segment on *60 Minutes*. Finally the Court of Appeals struck down the condemnation because its principal beneficiaries were private.³ Randy Bailey had vindicated his property rights—but only after several years of constant anxiety to win a battle he should never have had to fight.

Randy Bailey's case reveals only the tip of the confiscatory iceberg. In a 2003 report entitled *Public Power, Private Gain*,⁴ my colleague Dana Berliner compiled more than ten thousand cases over a five-year period in which the eminent domain power was threatened or used to take private property from one private owner to transfer it to another.* Because no central database exists, these only comprised the cases that

*Eminent domain abuse is not just an American phenomenon. A delightful Australian movie, *The Castle* (available in many video stores), depicts a working-class family's poignant battle to save their home from government confiscation. I recommend it highly.

she was able to actually document, leading her to conclude that they represent only a fraction of the actual number. Among the states with high numbers of eminent domain abuses were California, Kansas, Michigan, Maryland, Ohio, Pennsylvania, Florida, and New Jersey.⁵ New York, Missouri, and Kansas have the weakest legal safeguards against eminent domain abuse.

New York may be the most flagrant abuser of its eminent domain power. Between 1998 and 2002, it condemned small businesses for the New York Stock Exchange, the New York Times Company, Costco, and Stop & Shop. An inner-city church was taken for commercial development, while a family furniture-building business in East Harlem was taken for a Home Depot. Protections against eminent domain abuse in New York are virtually nonexistent. All a condemning authority has to do is publish a small advertisement in the legal notices section of the local newspaper. It does not have to state the consequences of the owners' failure to act. Yet if the owners happen not to see the notice, or to act promptly, they will lose their right to challenge the taking on public-use grounds 30 days following publication.⁶

Even in jurisdictions with rules less draconian than New York, the odds are stacked heavily against property owners who want to keep their homes and businesses. The concepts of negotiation and voluntary sale are a cruel joke. Typically, the government will make an offer for property it desires, and if the owner declines, it can secure from a local court an "order of immediate possession," transferring ownership to the government. Then the bulldozers move in. Few property owners have the money to hire a lawyer in an uphill battle to establish that the proposed use is not public. Indeed, lawyers in such cases usually derive their fees from the compensation award—so the lawyers can be paid only if the government

succeeds in taking the property. In the overwhelming majority of eminent domain cases, the property owners have no choice but to capitulate in the taking, and the only dispute is over the amount of compensation. Once the lawyers receive their share, the owners are often left with less than fair-market value.

How could such outrageous abuses exist in a free society? The answer lies both in judicial abdication and in the voracious appetites of local governments.

Both the original constitution and the 14th Amendment provide protections for property rights. The 14th Amendment provides that states may not deprive a person of property without due process of law. The Fifth Amendment, which applies to the states through the 14th Amendment, places a substantive limit on government power, providing in relevant part that “[n]or shall private property be taken for public use, without just compensation.”

Unfortunately, the “public use” limitation was read out of the Constitution by the U.S. Supreme Court decision in *Hawaii Housing Authority v. Midkiff*.⁷ In that case, fittingly decided in 1984, the Court found that the state’s use of eminent domain to combat the concentration of land ownership and to redistribute property constituted a valid “public use.” Maybe in a socialist country, that would be true; but in a nation grounded in the sanctity of private-property rights, it was astonishing. What was worse was that the decision was unanimous.

After *Midkiff*, local governments were untethered from federal constitutional constraints to redistribute private property however they saw fit; and in all too predictable a fashion, they proceeded to do so with reckless abandon in pursuit of tax revenues, job creation, and grandiose redevelopment schemes. A classic example involved the Archies, an extended

family that had spent their entire lives on land in rural Canton, Mississippi. In 2000, the state passed the “Nissan Act,” which authorized the state to pour money and incentives into a new automobile plant, while authorizing the Mississippi Major Economic Impact Authority (MMEIA) to condemn properties for the new facility. The property owned by the Archies and their neighbors made up only 28 acres at the southern end of a project that would comprise 1,400 acres. Both Nissan and the former head of MMEIA admitted publicly that the project could proceed even without the Archies’ land. But MMEIA pressed the fight because “[w]hat’s important is the message it would send to other companies is we are unable to do what we said we would do.”

Teaming up with Martin Luther King III and the Southern Christian Leadership Conference, the Institute for Justice challenged the taking in state court and secured stays against the condemnations. On the eve of consideration of the case by the Mississippi Supreme Court—and in the face of enormous public backlash—the state dismissed the eminent domain proceedings. Lonzo Archie, one of the residents whose property was saved, proclaimed, “We could not be more happy. My father and the rest of our family can now live out our days on our land.”⁸

The Archies’ sentiment—a fervent desire for government simply to leave them alone—is shared by many victims of eminent domain abuse around the nation. In the Cleveland suburb of Lakewood, Ohio, Jim and Joann Saleet lived in a home they called their “dream house” for 38 years, and raised four children there. The home had “all our memories in it,” Joann recounted. The tidy neighborhood is perched on a cliff overlooking a park. The view is fantastic—making the neighborhood, in the eyes of the city’s planners, the perfect location for a \$151 million development comprising luxury homes and

a shopping complex. To accomplish that goal and obtain the anticipated new tax revenues, the city deemed the neighborhood “blighted” and wielded the draconian tool of eminent domain.

“No one wants to see people lose their homes,” consoled Mayor Madeline Cain, “but this is absolutely necessary for our future.” Professional urban planners backed the city. If a lawsuit threatened by the Institute for Justice succeeded, warned Cleveland State University professor Edward H. Hill, “the ability of local government to recycle land will pretty much be over.”⁹

Recycle land? That may be the best euphemism yet devised to depict a practice that variously has been characterized as “urban renewal,” “economic redevelopment,” and other beneficent-sounding terms. Usually, recycling applies to discarded products. The homes slated for bulldozing by the city of Lakewood were still a vital part of the community.

For Mayor Cain and many advocates of eminent domain, a property is ripe for taking if it can be put to “a higher and better use.” In cold economic terms, that label could apply to nearly every property in America. Indeed, in Lakewood, the city deemed a home blighted if it lacked central air-conditioning or an attached two-car garage, or if its lot size was below five thousand square feet—a definition that encompassed 90 percent of the city’s homes, including those owned by the mayor and every member of the city council.¹⁰

In human terms, there simply is no higher or better use of property than for a home. And that view ultimately (but barely) prevailed when the city’s scheme was submitted to a public vote and defeated by a slender margin of 39 votes out of nearly 16,000 cast. The mayor was retired as well. Fortunately, the Saleets will be able to live out their lives in their home overlooking the park. But thousands of Americans will

not be as fortunate so long as eminent domain abuse runs rampant. In a free society, the burden should be placed on the government to demonstrate that the seizure of private property is necessary to a genuine public use,* and owners should be left in a position as close as possible to the one they previously occupied.

Government does not take private property only through outright physical occupation. In many instances, it subjects property to such heavy regulation that it has the same real-world effect as a taking, usually in an effort to achieve some policy objective but to impose the costs upon one individual rather than to spread them throughout the community.¹¹

The Supreme Court has always given lip service to the notion that regulation can amount to a taking, triggering an obligation of providing just compensation. But its standard historically has been nebulous—in one famous 1922 case, Justice Oliver Wendell Holmes declared, “if regulation goes too far it will be recognized as a taking”¹²—and regulations reaching the Court never seemed to go “too far.”

But that began to change in the early 1990s with the case of David Lucas,¹³ a South Carolina developer who bought two beachfront lots for \$975,000, intending to build a house for himself on one and sell the other. The lots were in a residential area that already had been heavily developed with lovely homes.

But two years after he purchased the lots, the state enacted the Beachfront Management Act, ostensibly to address environmental concerns. Instead of purchasing Lucas’s property,

*Given the dramatic expansion of government activities today—from sports facilities to water parks—in my view, “public use” for purposes of eminent domain should apply only to traditional government functions such as schools and roads. If the government is engaged in profit-making activities that compete with the private sector, it should have to resort to the free market just as other market participants must.

the state took away his right to develop it. The value of his land—which before the new law had risen to \$1.2 million—was reduced by the stroke of a pen to less than zero, because Lucas would still be required to pay taxes and carry insurance on it.

The South Carolina Supreme Court agreed with the state that Lucas should bear the burden of the diminution of the value of his property because the law advanced a public interest. But in a landmark ruling, the U.S. Supreme Court held that the law was in effect a taking of Lucas's property, because it deprived the owner of all of the property's value and was not necessary to abate a nuisance.¹⁴

Ironically, once the state was forced to compensate Lucas to obtain his land, it decided that its environmental concerns weren't worth the money, and sold the lots to another developer. It is enlightening to observe how rationally government can act when it has to bear the costs of its own regulations.

Though the *Lucas* decision was an important step forward for the rights of property owners, the Court's present takings jurisprudence still contains huge loopholes that allow government to run roughshod over property rights without paying just compensation. One loophole is the Court's rule that in order to trigger compensation, a regulation must deprive the owner of 100 percent of the value of the property at issue. As a result, enterprising local governments now often make sure to leave the owner at least a modicum of the property value—say, 5 percent—in order to avoid a finding that the property was taken. That means that oppressive laws such as historical-preservation ordinances, which deprive owners of the ability to alter or renovate their homes, or rent-control ordinances, which often limit property owners' ability to collect a fair return on investment or to control who lives in the property,

are extremely difficult to challenge, at least under the takings clause.

Another loophole is the rule stating that in order for a regulatory taking to be “ripe” for judicial challenge, there must be a final government decision. That requires first an actual decision by government, then the exhaustion of all manner of administrative appeals. In the best of circumstances, this process can take years. But clever governments often frustrate any realistic chance of legal challenge by declining ever to reach a final decision—which of course serves the goals of slow-growth advocates by preventing development even though theoretically the process is proceeding.¹⁵

Those skewed rules leave property owners vulnerable to government extortion—sure, we’ll grant your development permit, if you agree “voluntarily” to build us a park—and unfortunately, too many governments engage in precisely such practices. In 1994, the Supreme Court recognized this practice, and set out to put an end to it. Florence Dolan, an elderly widow, wanted to expand her hardware store in Tigard, Oregon. Fine, said the city, as long as you build us a new bicycle path and dedicate an area of your property as a public greenway. The Court ruled in a 5-4 decision that in order to expropriate part of Mrs. Dolan’s property without just compensation as a condition to receiving a variance, the government would have to show both that an “essential nexus” existed between the costs imposed upon the community by proposed development and the conditions sought by the city, and that there was a “rough proportionality” between the development burden and the conditions.¹⁶ In this case, the expansion of the store likely would increase vehicular traffic, so that the city reasonably could have required Mrs. Dolan to reimburse it for added street lanes or traffic signals. But the requirement of building a bicycle path or dedicating

a greenway bore little relationship to the costs imposed upon the city by the store expansion. They were very simply goodies the city desired. So the Court overturned the lower court's decision sustaining the confiscatory exactions.

The *Dolan* decision especially could aid individual property owners burdened by excessive government demands in return for permission to develop property. But in the real world, developers often merely cave in to such demands, because they must deal with the city over and over again. Property owners who fight back may find that the city has many other tools available to make their lives miserable. That is the heart of the conundrum: We cannot protect our property rights unless we are willing to stand up for them; but many property owners conclude that it is easier and less costly to capitulate than to fight. That tendency pushes the pendulum away from the sanctity of property rights toward an ever-encroaching erosion of liberty. Decisions such as *Lucas* and *Dolan* demonstrate that for those who are willing to fight back, justice can triumph.

Yet another systemic abuse of property rights is civil asset forfeiture. It's a story of cops and robbers—except in this instance, they're sometimes one and the same.

Young Jesse Robles learned that painful lesson one evening in 2003 when he was visiting friends. A knock on the door turned out to be two police officers, who announced that it smelled like “Cheech and Chong” and proceeded to enter the house and search it. They found no evidence of drug use. Eventually, they opened a safe, and inside was \$1,600 and a marijuana cigarette. The money belonged to Robles, who kept his earnings from his pizza job in his friend's safe. No one was charged with any wrongdoing, but the cops kept the money, which went into the police coffers. It sounds more like something that would happen in an authoritarian coun-

try: no warrant, no charges, no arrest; but the police keep the cash. How could such a scenario occur—with frequency—in a free society?

Pursuant to the practice of civil asset forfeiture, when the police suspect that certain property is connected to a crime, the government may seize it, under the “legal fiction” that the property itself is guilty of the crime. Indeed, the property rather than the owner is the named defendant in the case.*

Starting from that rather bizarre premise, the applicable rules are, perhaps not surprisingly, rather skewed against the individual. That is because whereas an individual charged with a crime is afforded extensive constitutional protections, asset forfeiture is subject to civil rather than criminal rules. In other words, there is no presumption of innocence. The government need only demonstrate, by a preponderance of the evidence, that the property was in some way connected to an unlawful activity.¹⁷ No charges need have been filed against anyone for commission of the underlying crime. Most distressingly, no “innocent owner” defense exists: the owner whose property is forfeited need have no connection with illegal activity. If a home is rented to someone who engages in prostitution, it can be seized even though the landlord has no knowledge of it; if a mortgaged home is used for drug possession, it can be seized with the mortgage company bearing the loss.†

*That phenomenon leads to odd case captions, such as the one in the New Jersey case discussed below, *State of New Jersey v. One 1990 Ford Thunderbird*.

†Fighting asset forfeiture laws can make for strange bedfellows, with mortgage companies teaming up with criminal-defense attorneys to fight government overreaching. IJ filed an *amicus curiae* brief in one case, *U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993), in which the U.S. Supreme Court ruled that the government must provide notice before seizing certain types of assets. Afterward, Mr. Good wrote IJ a letter expressing his gratitude for defending his property rights, and noting that while the

That's what Tina Bennis found out after her husband was arrested for soliciting a prostitute. As a double whammy for the unfortunate Mrs. Bennis, he was using her car at the time. The police seized the car, and she tried to recover it, arguing that she had nothing to do with the crime. But while acknowledging that obvious fact, the U.S. Supreme Court held that her innocence was irrelevant: The *car* had been involved in the crime; therefore, it could be confiscated.¹⁸

Making civil asset forfeiture even more subject to abuse is the widespread practice of the federal government and many states of allowing law-enforcement officials to retain the seized assets for their own use and benefit. That practice creates a strong financial incentive for such officials to wield asset forfeiture as frequently and broadly as possible—and violates the due-process right of individuals to have impartial officials making objective decisions at every turn. Not surprisingly, the combination of the war on drugs and the desire of law-enforcement officials to sweeten their coffers has contributed to escalating use of the civil-asset-forfeiture power.

In 1999, the 17-year-old son of Cumberland County, New Jersey, deputy sheriff Carol Thomas was arrested for dealing drugs. Unfortunately for Ms. Thomas, at the time of her son's arrest, he was driving her 1990 Ford Thunderbird. The police seized the car, which was owned and paid for by Carol Thomas. To put it mildly, she was completely unaware that her son was dealing drugs, for which he was duly prosecuted.

Because she had no defense as an innocent owner, Thomas counterclaimed against the state, challenging the state policy allowing police to retain seized assets. Repre-

case was argued he was in Central America fighting for the Sandinistas. Most IJ supporters and beneficiaries exhibit a somewhat more consistent support for private-property rights.

sented by the Institute for Justice, Ms. Thomas obtained evidence that over the course of three years, state law-enforcement authorities had collected \$32 million in asset forfeitures. They used the proceeds for all manner of goodies. The Gloucester County prosecutor spent \$733.96 on bagels and \$21,000 on travel and hotels. The Morris County prosecutor (who is now a judge) used \$29,000 of seized assets for a “chiefs retreat” at the Seaview Marriott Resort, a posh golf course and resort on the Jersey Shore. He also purchased exercise equipment. The Essex County prosecutor spent nearly \$5,000 for an executive retreat at the Pleasantville Chateau, a luxurious faux-castle in West Orange. He also spent nearly \$30,000 on interior decorating (perhaps making his the only prosecutor’s office in the nation to be professionally decorated). The Warren County prosecutor spent \$340 on a golf game.¹⁹

State trial court judge G. Thomas Bowen struck down the statute as a violation of due process, ruling that “the augmentation of the county prosecutors’ budgets . . . provides to those in prosecutorial functions financial interests which are not so remote as to escape the taint of impermissible bias in enforcement of the laws.”²⁰ Although the ruling was made under both the federal and state constitutions, it had no immediate effect beyond the boundaries of the Garden State, meaning that additional lawsuits will be necessary to curb such abusive practices in other states.

Government violates private-property rights in ways other than regulating or taking property. Several cities have enacted inspection laws, especially aimed at rental properties, that allow city officials to enter and search the premises without a warrant, notice, or consent of the owners, ostensibly to check for violations of various city codes. Such a law in the Chicago suburb of Park Forest, Illinois, also charged a \$60 fee for ten-

ants who refused to allow their homes to be searched and who forced police officers to obtain a warrant. Richard Reinbold, a landlord, challenged the law on behalf of his tenants in a suit filed by the Institute for Justice. “In my opinion, this is the housing Gestapo,” Reinbold proclaimed. “We don’t want to live in a Fourth Amendment–free zone.”²¹ Federal district judge Joan Gottschall struck down the law in part,²² and the city subsequently repealed it. But like a bad penny, similar rental-housing inspection laws continue to crop up around the country.

A number of themes emerge from these examples of grassroots tyranny taking the form of violations of private-property rights. First, like economic liberty, private-property rights are a freedom that most Americans think they have, until the government takes them away. Second, while many people equate property with wealth, the preservation of private-property rights is of vital and intimate concern to every American. It is still a cornerstone of the American Dream to own a home and to secure the comforts of modern life. That dream often is rendered illusory when government can regulate or take property on the barest of pretenses. Indeed, it is those at the bottom of the economic ladder who least possess the knowledge and resources to take on city hall.

Moreover, just as with our other rights, we all have a vested stake in protecting private-property rights, even if we may be able to gain a momentary advantage in their violation. The powerful developer who today invokes a city’s power of eminent domain to secure desired property may tomorrow suffer the same fate if the city decides that property could be put to better use or should be subject to confiscatory development restrictions.

During the New Deal, the U.S. Supreme Court relegated property and economic rights to second-class status, inferior

to “fundamental” rights such as freedom of speech.²³ Since that time, both property rights and economic liberty have received little protection, despite their central importance to our nation’s doctrinal devotion to individual liberty and the free-enterprise system.

Over the last few years, private-property rights have experienced something of a renaissance. In the *Dolan* case, Chief Justice William Rehnquist remarked, “we see no reason why the Takings Clause, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation.”²⁴ At an even more fundamental level, Justice Anthony Kennedy has declared it an “essential principle” that “[i]ndividual freedom finds tangible expression in property rights.”²⁵

We should hope that a majority of the justices retain those insights and act upon them. With vigilance and a willingness to fight to protect our precious liberties, perhaps such insights will not only once again permeate American jurisprudence, but will also inform the decisions of government officials so that they will act with appropriate self-restraint in exercising powers that touch upon these important rights.