THE PRICE OF POLITICS

Lessons from *Kelo v. City of New London*

KYLE SCOTT

The Price of Politics: Lessons from *Kelo v. City of New London*

Kyle Scott

ROWMAN & LITTLEFIELD EDUCATION

A division of

ROWMAN & LITTLEFIELD PUBLISHERS, INC.
Lanham • New York • Toronto • Plymouth, UK

Published by Lexington Books
A division of Rowman & Littlefield Publishers, Inc.
A wholly owned subsidiary of The Rowman & Littlefield Publishing Group, Inc.
4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706
http://www.lexingtonbooks.com

Estover Road, Plymouth PL6 7PY, United Kingdom

British Library Cataloguing in Publication Information Available

Scott, Kyle, 1977–
The price of politics : lessons from Kelo v. City of New London / Kyle Scott.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-7391-3383-5 (cloth : alk. paper)—ISBN 978-0-7391-3384-2 (pbk. : alk. paper) — ISBN 978-0-7391-3385-9 (electronic)
1. Eminent domain—United States. 2. Human rights—United States. 3. Eminent domain—Connecticut—New London—Cases. 4. Kelo, Susette—Trials, litigation, etc. 5. New London (Conn.)—Trials, litigation, etc. I. Title.
KF5599.S36 2009
343.73'0252—dc22 2009032234

Printed in the United States of America

∞™ The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI/NISO Z39.48-1992

Printed in the United States of America.

The Price of Politics: Lessons from *Kelo v. City of New London*

Acknowledgments

During the year it took to write this book, I received unprecedented support and encouragement from my colleagues at the University of North Florida. Matthew Corrigan did a tremendous job encouraging me and keeping me insulated from administrative tasks, even while he was feeling his way through his first year as chair, which made the completion of this book possible. Darren Wheeler, who was completing his own book at the time, proved to be a valuable resource during the process.

Outside of the department, I received helpful comments from Michael Zuckert who read an earlier draft of one of the chapters. Also, the comments from the participants—particularly Teena Wilhelm at the 2008 Southern Political Science Association annual meeting—were quite informative.

My friend Justin Allen contributed in many ways. Most importantly, he reminded me that some of the best ideas occur outside of academic circles.

I have now worked with Joseph Parry on two books. It has been a pleasure in each instance, and I hope to work with him in the future.

Chapter 2 of this book, like all of my thinking on politics in some way or another, was inspired by the teaching of the late Ross Lence. It is almost an injustice to credit him as he would have done a much better job writing this book. While his ideas have informed mine, I am so far removed from his grasp of politics and the great books that I can only hope he will excuse my efforts.

Finally, to my brilliant and beautiful wife, Bethany, and our two brilliant and beautiful children, Braden and Berkeley. It is your patience, joy, and love that made this work possible and give it meaning.

List of Tables

Introduction

For the most part, Supreme Court decisions fly under the public's radar, but the 2005 Supreme Court decision of *Kelo v. City of New London* captured everyone's attention. The reaction was in response to the Court's curtailment of individual property rights. People feel strongly about their rights, especially their property rights. A public statement by Connecticut's Governor M. Jodi Rell is indicative of the public response: "This issue is the twenty-first century equivalent of the Boston Tea Party: the government taking away the rights and liberties of property owners without giving them a voice. But this time it is not a monarch wearing robes in England we are fighting—but five robed justices at the Supreme Court" (Rell 2005). The immediate questions are: Why are people so attached to their property rights? And, should they be?

Property has a dual value: intrinsic and instrumental. Intrinsic values are those that are good in and of themselves. Instrumental values are those values that can lead to outcomes consistent with intrinsic values. Most rights have only intrinsic or instrumental value: property has both. Property has an intrinsic value because people naturally think in terms of what belongs to them and what belongs to others. The desire to acquire and to secure possessions is a basic human characteristic—for better or worse—that cannot be ignored. Therefore, property rights protect a part of humanity that is natural to its existence. Property has an instrumental value in that it helps guarantee other rights and leads to economic development. Countries with secure property rights achieve greater economic prosperity and also see the successful protection of other rights. Property is regarded as a basic human right by Americans, a sentiment that can be traced to the earliest colonies. Property is essential to one's existence, independence, and happiness. "Without property, real and personal, one could not enjoy life and liberty, and could not

be free and independent" (Levy 1995, p. 18). This was the understanding of property during the founding era, and it still exists among many in the general public. Aside from the moral considerations of property, there are also legal and historical considerations that derive from the moral considerations. Americans consider property a constitutionally protected right and saw the Court taking away that right.

This book argues that the Court's decision was wrong. The Court's reading of the Constitution and the nation's legal heritage was flawed. The majority in *Kelo* suffers from a faulty jurisprudence. The primary consideration in the Court's decision was the social effect of the property seizure. Such utilitarian pragmatism[1] has no place in Supreme Court decisions. Judges should be constrained by the law and Constitution; elected officials are the only ones who can be excused for utilitarian pragmatism. Once judges begin acting like legislators, they will upset the delicate balance Alexander Hamilton described in *Federalist* #78. In looking to uncover the meaning of the Constitution, judges should read the text literally, and if there is still uncertainty, they should consult those who drafted and ratified the document by exploring primary documents from the era as well as the legal and political philosophies that influenced the authors of those documents. Certainly the Constitution can err, and when it does, it ought to be corrected. This is the job of the people and their elected representatives. The Court interprets what the document says; it should not have the power to amend it.

Undoubtedly, there will be criticism of my method of constitutional interpretation. Those who go to the original sources are characterized as *originalists* and criticized as such.[2] I can hardly understand why this is a criticism, as even those who are not originalists go back to the Constitution and debate what it says. The only people worthy of derogatory references are those who say that the Constitution has no bearing on the interpretation of the Constitution. Those who take the document seriously as a binding force on modern politics ought to be congratulated. Some people advocate a departure from the Constitution and advocate a new reading of it; this does not preclude the position of the originalists but instead advocates a move away from the original document. These revisionists simply state that the original reading does not meet modern needs, but they do not refute the original reading or the originalists' methodology.

For example, Bruce Ackerman's defense of the unconventional method of amending the Constitution during Civil War Reconstruction does not deny the originalist position. He simply holds that the original intention, the most literal interpretation, of Article V should not have bound Reconstruction era politics. This does not deny an originalist reading of Article V. All it says is that such a reading ought not to be binding because of the unique conditions

lawmakers confronted during Reconstruction. Such a position is ultimately unpalatable as it advocates lawlessness and relativism, which is why Ackerman, too, slips into a form of originalism as he defends his position on the grounds that American history has often seen unconventional methods of lawmaking. According to Ackerman, unconventional lawmaking is consistent with the original intention of the founders. Simply put, according to Ackerman, the Reconstruction interpretation and violation of Article V is no different than what was done when the U.S. Constitution was drafted or when the colonists declared their independence. Thus, in practice, even Ackerman is an originalist.

Very few constitutional scholars make arguments that do not directly draw upon the Constitution. The question is, What does the document say and how do we settle a dispute over interpretation when one arises? My position is that one should consider the historical, legal, and philosophical influences of those who penned the words of the document under consideration. Still, some disagree with this position, but I think it has less to do with the method and more to do with the ideology that usually accompanies the method.

Originalists are typically aligned with conservative viewpoints, which is also true of advocates of economic liberties. In this book, I employ—and therefore tacitly defend—the originalist methodology, while not aligning myself with all of its proponents and practitioners. If nothing else, this book is a call to bridge the ideological gap on matters of constitutional interpretative methodology. The first step is to suggest that one should not reject the originalist position because one does not like the politics of those who call themselves originalists, but rather confront the methodology on its merits.

The argument over originalism parallels the central concern for this book: property rights. Property rights are not rights for the rich or for the conservative. Property rights are fundamental for the preservation of all other rights. In this book, I seek to show that there is a unity of rights, and that rights should not be an ideologically divisive issue, on the grounds that the principles underlying all constitutionally protected rights are the same. While people may disagree about what rights should be promoted and to what extent, there should be some agreement that all constitutionally protected rights are important for everyone. Throughout this book I will show how government infringement on property rights is not just economically damaging but damaging to all other rights without resorting to slippery-slope arguments. I do this by drawing on the thought of those thinkers who informed the thought of the revolutionary and founding generation to show that all of the rights in the Bill of Rights are derived from the same source and rest on the same principle.

My view of the Constitution and the rights contained therein dictates how I will discuss the subject. By taking the position that the Constitution is the ultimate authority on what the Constitution says, I do not find it necessary to partake in the usual practice of providing a history of all case law pertaining to the subject matter at hand. While useful in some books, in this one it would be merely pedantic. This book does not provide a history of case law as I am more interested in uncovering the discrepancy between our era and the founders' era than in tracking the ebb and flow of judicial decisions. This book argues that in *Kelo* there has been a departure from the original meaning of the Constitution. Rather than simply trace the Court's decisions on the question of property rights and decide whether *Kelo* is consistent or inconsistent with these decisions, this book argues that the decision is inconsistent with the original meaning of the Constitution and investigates the implications, meaning, and potential reasons for the departure.

The question may then be raised, How can one decide if a case is consistent with the Constitution without relying on other cases? My methodology for Constitutional interpretation does not require an extensive treatment of precedent or legislative action. While one certainly cannot ignore previous decisions, one should not be bound by them in interpreting the Constitution. When interpreting the Constitution, we should first understand for ourselves what the Constitution says and then look at the cases to see if they are consistent or inconsistent with the Constitution. This requires one to embark on a first reading of sorts. Cases should not cloud our vision of the Constitution. We should look to the Constitution for its meaning, rather than to the Court.

I prefer the Constitution to precedents because precedents can rest on shaky ground. When we recognize that judges are not above error or bias then it becomes clear that a decision can be an incorrect reading of the Constitution. Imagine that a decision (D_1) is made that comes close to, but does not fully achieve, a correct reading of the Constitution as it applies to the matter in question. Now, if D_1 is used by a later Court to interpret the Constitution, then D_2 will have moved one step away from the Constitution because it sees the Constitution through the lens of D_1. It is easy to imagine how far away from the Constitution we get when we reach D_{20} or D_{30}. Whereas some decisions may move us closer to the Constitution, even if they build upon previous decisions, they will never get us to the Constitution, and the general trend will always be a move away from the Constitution.

My view of the development of judicial precedent is an applied version of Plato's Forms as discussed in Book X of the *Republic*. Plato states that there is an ideal table (as there is an ideal for everything), and the carpenter makes a table that approximates the ideal but does not achieve it. There is a painting based upon the carpenter's rendering of a table, which is further removed

from the true table than the carpenter's version. Those who see the painting or make poems about tables based upon the painting are even further removed from the true table. Such is the case with some Constitutional doctrines. I do not argue that the Constitution is the true form of justice, only that it is the true form of the Constitution and everything else is merely an interpretation.

So while I may argue for a reading of the Constitution that the Court has never articulated as a controlling standard, I have no qualms with departing from the Court's reading of the Constitution or arguing for a position that the Court never has, because it is the Constitution I look to, and not the Court, when seeking what is constitutional. I certainly admit that the Constitution can err, and where it does it ought to be corrected through the proper channels. But this book argues that on the question of property, the Constitution with the Bill of Rights properly conceives of property and its place within the community, economics, and politics.

This book is composed of seven chapters. Each chapter can stand on its own because each chapter addresses a different dimension of the property debate. But, each successive chapter does build upon the previous. This is particularly important for the more subtle aspects of my argument. For instance, in reading the state constitutions, I read *ought* as binding rather than suggestive. The reader will not understand why this is the case unless my reading of the common law tradition and John Locke—and their respective influence on the colonies and state constitutions—in the previous chapters has been understood and carried over.

Chapter 1 will show that the legal and historical origins of property rights can be traced to the common law. By discussing property rights in England, the chapter serves as a foundation for later discussions of why property rights are important in the United States. This chapter shows the historic and legal origin of property and due process rights as well as the intrinsic and instrumental value of these rights.

Chapter 2 provides an analysis of John Locke's thought on property. By focusing on the *Second Treatise*, I will discuss Locke's understanding of property and its connection to his political theory. Chapters 3 and 4 will refer back to this chapter in order to demonstrate Locke's influence on the nation's founding and the centrality of property in both Locke's thought and in the U.S. Constitution. This chapter provides a philosophical justification for property rights and continues to discuss the intrinsic and instrumental value of property rights and their relation to due process rights.

Much of the legal history written on the American founding ignores the legal culture of the colonies. Chapter 3 seeks to help rectify this deficiency in political science literature. The colonies had their own constitutions and laws before the U.S. Constitution was written. In order to gain a clear

understanding of what the Constitution meant by *property,* I will look to the constitutions, charters, and laws that preceded the U.S. Constitution. I will focus primarily on the constitutions of the colonies and the Northwest Ordinance. This chapter will link the historical and philosophical origins of rights in England to the development of rights in America.

Next, I will focus on the ratification of the Bill of Rights and postrevolutionary American thought. While there were other important figures in the founding era, it was James Madison who made the strongest argument for the protection of property rights. And because it was Madison who drafted the Bill of Rights in which the protection of private property was codified, it is important to understand Madison's thought on the matter. I will demonstrate the close parallel between Locke and Madison in addition to a discussion of how Madison's ideas should inform our interpretation of the Constitution and Bill of Rights.

Chapter 5 deals with the three eminent domain cases decided by the Supreme Court in the 2004–2005 term. In discussing each of the cases, I will test the logic used by the justices in the opinion, critically examine each case's use of case law, and draw out instances in which the Court departed from the original meaning of the Constitution. I focus primarily on those cases that are referred to in the opinions and do not give a general survey of eminent domain case law, for the reasons described earlier. It is only necessary to show that there has been a departure from the founders' understanding of property; there is no need to track the deviation to advance the book's thesis. While this chapter examines earlier decisions, I still stand by my earlier claim that the Constitution, and not precedent, should be what is binding. I provide a discussion of these earlier cases to provide a frame of reference for the nonspecialist and to show the specialist just where I depart from the standard reading of property rights.

Chapter 6 will provide a quantitative explanation of why certain states have acted to restrict *Kelo*-type seizures and others have decided to allow *Kelo*-type seizures. Drawing on the research of economists, political scientists, and legal scholars, I construct a model that shows the factors that affect a state's response to *Kelo.* Chapter 6 will show that property rights have become politicized, and the protection of those rights has become an ideologically and socially divisive issue. The result is that all rights become threatened, which then weakens the protection afforded to citizens by these rights. This chapter demonstrates the dramatic departure modern America has made from the origins outlined in chapters 1–4. In this chapter, I repeat some of the earlier discussion of the *Kelo* decision and the history of property rights in an effort to refresh the reader's mind and to allow the reader who may be interested in only the quantitative discussion to forgo the earlier chapters and read just the final two.

If property rights cannot be shown to affect our daily lives, few people outside of academic circles will understand why they are important, or even care. In chapter 7, I look at the relationship between property rights and economic well-being. I begin by assimilating the work of economists who have uncovered the connection between property rights, legal structures, and economic well-being, and move on to my own analysis of the connection between property rights and economic well-being in the United States. By showing readers that the protection of property rights is positively correlated with economic prosperity, readers will see the practical implications of protecting private property.

As Leonard Levy argues, "If an economic right is involved, the Court never questions the reasonableness of the government's means. Economic rights, especially those of individuals, are inferior rights . . . economic due process of law, the old substantive due process, is dead even as to personal rights in property. The Court has abdicated the responsibility of judicial review in such cases, although it has not in any other Bill of Rights cases" (Levy 1995, p 14). This book provides historical and empirical support for this claim, discusses why it has occurred, and provides a normative critique of the development.

NOTES

1. I take this phrase from Albert W. Alschuler (2000).
2. My method could be termed *textualist,* but because my reading of the text is informed by those who originally penned the document, I consider there to be no functional difference between the two terms. I use *originalist* because when I go to the document, I try to understand it as those who wrote it understood it, thus trying to grasp its original meaning.

Contents

Chapter 1

Property Rights and the Common Law Tradition

To successfully promote economic development and secure individual liberties, the protection of private property must come first. The U.S. Constitution's protection of property rights can be traced to a number of sources. The colonial charters and state constitutions that came before the U.S. Constitution all had property rights provisions. But even those documents were not the genesis of property rights. To understand what property rights meant—in legal terms—for the drafters and ratifiers of the Constitution and the Bill of Rights, one must go to the source: the common law. The influence of the common law on the colonial generation is undeniable, and I will demonstrate how the common law's adherence to property rights found its way to America. In the course of doing so, I will go to the Magna Carta, Edward Coke, and William Blackstone—three of the most significant sources of common law thought. An examination of these sources will show that property rights deserve protection. This chapter will provide a historical and legal justification for a renewed interest in property rights. This point is best made by Bernard Siegan:

> For purposes of interpreting the United States Constitution, the most important meaning of a particular term is that given to it by its Framers and ratifiers. The evidence is persuasive that these people accepted the position of Blackstone and Coke that Chapter 39 (and Chapter 29 of a subsequent revision of the charter) had more than procedural meaning; it was meant to prevent the King from depriving his subjects of their rights . . . Blackstone stated that this chapter "alone would have merited the title that the Magna Carta bears, of the great charter." He construed the chapter as protecting "every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of

> his peers of the law of the land." Blackstone considered the rights of life, liberty, and property to be comprehended in the common law's "absolute rights of personal security, personal liberty, and private property." (Siegan 1997, p. 22)

This chapter will show that Siegan's claims regarding Blackstone are valid and that the same sentiment can be extended to the Magna Carta and Coke.

I begin with the Magna Carta simply because it is the clearest statement of the common law's position on the matters dealt with in this book. But, the reader should not be misled to think that the common law, and property rights, began with the Great Charter. Between 1164 and 1179, Henry II made great strides in protecting the rights of ownership. Beginning with the Constitutions of Clarendon, he showed his preference for jury trials in settling matters of disputed possession. This provision led to a weakening of the Church's claim of ownership of all land in England. Henry also oversaw provisions for the speedy remedy for a dispossessed freeholder, as such a freeholder was seen as not secure in his rights or possessions (Hogue 1986, p. 153). These provisions, and others that led up to the Magna Carta, show a strong attachment to property and a clear understanding that property must not be arbitrarily controlled by the government or Church.

While modern Americans may not be familiar with Coke, his influence on the revolutionary and founding generation is undeniable. His reading of the common law and justification for higher-law constitutionalism provided Americans with their sense of rights and limited government. Blackstone's influence was equally pervasive. Early Americans developed their understanding of common law and the Magna Carta via Coke and Blackstone. Due to Enlightenment influences, Americans developed their own strand of limited government, but the effects of common law can still be clearly seen.

This chapter will not give an itemized list of all things common law and their eventual adoption and development into the American system in the way I have done previously (Scott 2008). This chapter will deal with common law as a theory that was adopted by early Americans and adapted to their specific needs.

I. MAGNA CARTA

The Magna Carta is not a single document frozen in time. The Magna Carta was written and revised a number of times, and its history helps inform our understanding of the document. The first version of the document was signed in 1215 by John, King of England, and Ireland on the plains of Runnymede. Subsequent versions were introduced in 1225 and 1297. With each iteration,

changes were made, and each change reinforced the principle that the law alone was sovereign. James Holt clearly expresses what I take to be the most accurate description of the progression of the Magna Carta by focusing on its natural law and ancient constitutional heritage:

> The Charter only survived alongside natural law by being raised to the same universal terms. Chapter 29 had become a convenient formulation of natural right. . . . The history of Magna Carta is the history not only of a document but also of an argument. . . . But the history of the argument is a history of a continuous element of political thinking. In this light there is no inherent reason why an assertion of law originally conceived in aristocratic interests should not be applied on a wider scale. If we can seek truth in Aristotle, we can seek it also in Magna Carta. The class and political interests involved in each stage of the Charter's history are one aspect of it; the principles it asserted, implied, or assumed are another. Approached as a political theory, it sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law. If the matter is left in broad terms of sovereign authority on the one hand and the subject's rights on the other, this was the legal issue at stake in the fight against John, against Charles I, and in the resistance of the American colonists to George III. (Holt 1992, p. 8–9)

My concern is not with the document but with the argument. The argument expressed in the Magna Carta was taken up by Coke, Blackstone, and the American colonists. The argument is that of a political theory that recognizes the importance of the rule of law—thereby providing a due process of law—for the sole purpose of protecting one's life, liberty, and property. The right to life, liberty, and property has both intrinsic and instrumental values, whereas under the common law, due process has only an instrumental value, that of protecting life, liberty, and property. The instrumental and intrinsic value of the right to life, liberty, and property will receive its fullest expression through John Locke, who shows that property is the linchpin keeping all three together. But the common law provides the historical and legal basis for the rule of law. By examining the common law, we can come to understand the theory of self-rule as an instrumental value adopted by the American colonists.[1]

"It is universally agreed that the concept of 'due process of law' is rooted in Magna Carta, or the Great Charter, which was forced on John I by a group of feudal barons at Runnymede in 1215" (Gedicks 2008, p. 15). On June 19, 1215, in order to end the conflict between the barons and himself, King John signed the Magna Carta. Prior to signing, King John had taken arbitrary action against the barons through the Angevin judicial system, a group that was opposed to the feudal aristocracy. John had begun to infringe on the basic