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## COMMENTARY

# The Property Rights Test

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Despite current hype from Senate Democrats, the landmark cases of the next five years probably won't concern civil rights, abortion or other issues that have liberals so worked up. Current court vote-counts leave little room for major shifts, no matter what the judicial philosophy of Justice Sandra Day O'Connor's replacement. Instead, I believe some of the biggest cases will deal with property rights.


A confirmed Justice John Roberts may well find waiting on his desk one property-rights case potentially as momentous as the unfortunately decided *Kelo v. City of New London*. In *Kelo* the court gave government the right to take property from one private citizen or company and give it to another. In this anticipated case -- *The Stearns Company, Ltd. v. United States* -- the lower courts have overturned centuries of precedent, demonstrating that, when it comes to protecting private property, in Ronald Reagan's favorite maxim, government isn't the answer; it's the problem.

*Stearns* concerns one of the most ancient principles in property law, that ownership includes an absolute right of access (what the law calls an "easement") and lawful use. In 1937, a Kentucky family -- owners of the Stearns company -- sold a tract of land, now part of the Daniel Boone National Forest, to the federal government. They kept the right, subject to environmental restraints, to mine the coal underneath, and the easement.

In the late 1970s, Congress banned any mining in national forests, with two exceptions: where property rights already existed and, if they did not exist, where the secretary of the interior said mines could operate anyway. When regulations were issued, technicalities excluded Stearns from claiming so-called "valid existing [property] rights." The bureaucrats told the company to ask for permission. To protect its property rights, the company sued.

The case took two decades going through the courts. Three years ago the Court of Federal Claims ruled that the government's actions constituted a taking of private property for public purposes -- and the Constitution

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required the property owner to be compensated. The court said that, even if permission were granted, an Interior "sign-off" was no property right. "The fact that an act of governmental grace or benefit may have returned. . . the plaintiff's right to mine does not alter the denial of [property] rights." Last year, a three-judge panel of the Court of Appeals for the Federal Circuit in Washington, D.C. reversed the Court of Claims, a decision the full Federal Circuit Court upheld in April. In the next few weeks, the Supreme Court must decide whether or not to review that decision.

Few constitutional protections are less ambiguous than the requirement that private property must not be taken for public use "without just compensation." It is rooted in common law and is almost as ancient as common law itself. To guard against abuse, the Framers made these principles explicit, matching the government's blunt power to compel sale of private property with an equally blunt obligation to pay for it. When another branch attempts to shirk this duty, the Constitution requires the judiciary to defend property owners. If the Appeals Court's decision stands, for the first time in American history the courts will have created a giant detour around this core constitutional requirement.

For property owners, particularly owners of rights on government land, this detour has very practical consequences. Mineral rights command a market value, because of the unqualified right to access them freely, without the consent of the surface owner. Without this right, the mineral rights are worthless, and, as the law has long recognized, being able to petition a government agency for permission to access them is all but worthless. Knowing a legal route had been opened for depressing property values and acquiring land for virtually nothing may be why one Interior Department official called the Appeals panel's ruling "probably the most significant 'taking' decision ever to come out of Federal Court."

There are implications for other constitutional rights, as well. Imagine if we said newspapers were free to operate -- as long as they asked the government's permission to access their offices and printing plants from the public roads and sidewalks. Does anyone doubt that assurances that permission would be routinely granted could quiet the indignation and protest of journalists everywhere?

No one expects most papers to rise to the defense of property owners. But, now that this case has reached a policy level, why is the Department of the Interior fighting the original Court of Claims decision? Protecting economic liberty and property rights should be fundamental for this administration.

The understanding of rightful "public use" may change over time. Yet the obligation of compensation does not, and justice requires that government pay for what it takes. If the Supreme Court recognizes the profound issues at stake in Stearns and accepts it for review, Justice John Roberts and his brethren will have an opportunity in their next term to confirm one of the bedrock rights of our entire legal system. That would be a landmark decision.

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