

# Limited Government versus the Supreme Court



**T**hey may prove to be blessings in disguise. Two recent Supreme Court decisions—one on federalism, the other on property rights—should serve as wake-up calls for those who believe in limited government and individual liberty. For too long conservatives who understand the Enumerated Powers Doctrine and the role the Constitution plays in limiting the power of government have allowed the religious right to essentially hijack the debate over judicial philosophy in America. The lit-

mus test for any judge must always be his or her view on *Roe v. Wade*, as though abortion and abortion alone should determine who sits on the federal bench.

Now, abortion is a serious issue—one in which I've always believed neither side gave due credit to the valid arguments of the other. And I am a pro-choice advocate (up until the fetus is viable outside the womb) who nevertheless believes *Roe* was wrongly decided, giving a police power to the federal government that the Constitution denies the federal government. That said, the manner in which the debate over abortion so controls the debate over judicial philosophy is absurd. Simply put, there are more important issues out there, such as federalism and private property rights, the cornerstones of our liberty.

The federalism case was *Gonzales v. Raich*, in which the Supremes, by a 6-to-3 vote, ruled in a California medical marijuana case that the federal War on Drugs trumped a state law that allowed the sick and dying to ease their pain through the use of marijuana. (The federal government's war on pain killers across the board is bizarre.) This shameful decision clearly undermines the essence of federalism. Governance within our constitutional framework is to occur primarily at the state and local level. The national government is there to protect our liberties and to leave the states pretty much alone. Of course, that concept was undermined long ago, when Franklin Roosevelt threatened to pack the Court if it didn't go along with his extraconstitutional initiatives.

But this is the Rehnquist Court, the one that breathed new life into federalism in *Lopez*, telling Congress it didn't have the power to tell the people of Texas what kind of gun laws they had to

have. So, the *Raich* decision was a real blow to those of us who believe in federalism. Interestingly, Justice Antonin Scalia voted with the majority, prompting my colleague Roger Pilon to dub Scalia a "fair-weather federalist." True. Nino evokes federalism when it suits him. When it doesn't, as when his cherished War on Drugs is in any way constricted, he doesn't recognize federalism when it's staring him in the face.

The second lamentable decision, and the one provoking the loudest protests, was *Kelo v. City of New London*, where in a 5-to-4 vote the Supremes ruled it was fine for a local government to use the frightening power of eminent domain, not for public use as stated plainly in the Fifth Amendment, but for private gain that would generate added tax revenues for the city. Fifteen private residences are to be destroyed to make room for an office building and upscale housing for corporate executives. Never mind if your house has been in the family for generations, you're out of luck. As Justice Sandra Day O'Connor put it in a stinging dissent, the fallout of this decision will not be "random." The little

guy will get hit for the benefit of the wealthy and politically powerful—in virtually every instance.

The good news with *Kelo* is that the reaction has been so strong that federal legislation has been introduced that would prevent the federal government from using economic development as a rationale for employing eminent domain. It would also apply to states and localities that planned to use federal funds for their development projects. Good for Congress if they pass this legislation. They are overdue to do something right. Further, our good friends at the Institute for Justice, who fought the good fight in the Supreme Court, will be taking the battle to the states where, in one after the other, they will reassert the primacy of private property in America.

One last point: The so-called liberal bloc on the high court was in the majority on both of these egregious decisions. In both judgments it was the little guy who got screwed. Whatever happened to liberals looking out for the little guy? What happened is that liberals are more interested in enhancing the power of government than they are in protecting the rights of average Americans—something private property and federalism were specifically designed to do.

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—Ed Crane