Kelo and the Fourteenth Amendment: Exploring a Constitutional Koan

(Author Unknown)

In the practice of Zen Buddhism, a koan is a statement that is intentionally insoluble to the rational mind, a tool by which to practice threading through life's seemingly paradoxical events with without being the slightest bit perturbed. Yet the Japanese Zen masters have nothing on us red-blooded Americans, who for over a century have become unconsciously adept at sustaining such paradoxes, accepting what are essentially contradictory propositions in Constitutional Law, between the original scope of the Bill of Rights and that since the Fourteenth Amendment.

As Madison elaborated in Federalist 45, the Constitution for the United States of America was sold as a list of strictly limited powers; leaving the bulk of governance up to the several States. The reason for this preference is obvious**:** the Anti-Federalists largely represented States that so feared centralized power that they would never have ratified the Constitution had it not carefully proscribed the national government.

During the ratification process, the Constitution's detractors insisted that it be further amended; else ratification would fail. Madison (*a Federalist*), in an attempt to broker a deal, authored most of the proposed amendments designed to further restrain the Federal government. As an example of this tension, he made an early attempt to incorporate elements of the Bill of Rights against the States in an original Fourteenth Amendment**:**

> No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.

That Article passed in the House but then failed in the Senate (*then consisting of the appointees of State legislatures*). The Anti-Federalists, fearing Federal control of State laws, had got their way.

The Preamble to the Bill of Rights states the purpose of those Amendments with an appropriate tone of warning, "*in order* ***to prevent misconstruction or abuse of its powers****, that* ***further declaratory and restrictive clauses*** *should be added*."

Further restrictive clauses, for an already limited government, to prevent abuse of power.

Key among these restrictive clauses was the Tenth Amendment, which reserved all powers, not enumerated in the Constitution, to the States or to the people. It was a simple one-liner. Nothing could be clearer.

The Tenth Amendment was the key to Federalism. Its constraints empowered a system of limited representative governments with accountability kept local to the people, hopefully to keep injustices confined to the smallest possible scope. The Tenth also permitted wide differences in State laws. If the people of a State wanted a government religion, the Tenth Amendment permitted that. If a State wanted to regulate speech, or to socialize private property, the Constitution was mute. None of the rights articulated in the Bill of Rights could be enforced by the national government in Federal Court. If the people didn't like the government of a particular State and couldn't change it, they had the freedom to move and apply their energies in another State.

Similarly, the States exercised the latitude in their powers routinely, particularly in numerous eminent domain cases throughout the nation's first eighty years. Many involved takings on behalf of private consortia to help finance construction of everything from canals to railroads. In fact, Abraham Lincoln made his name as a lawyer advocating for precisely such public takings on behalf of private interests. There was nothing the Federal government could do about it.

After the Civil War, depending upon whom you choose believe, the Fourteenth Amendment was meant either to change that relationship between the Federal government and the States; or it was only meant to address the inequalities of slavery.

The nexus of that Constitutional change was in Section 1, which made the scope of Federal power less clear that it was originally. While it invoked Federal protections for individuals within a State according to the Bill of Rights, it didn't clarify how or where those protections applied**:**

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 clearly showed the potential to make the will of the people as expressed through their legislators of far less importance because the power to determine the manner in which laws "*abridge the privileges and immunities of citizens*" could easily be interpreted as equivalent to prescriptive veto power over all State and local legislation. Still, the Tenth Amendment remained

on the books. So, to what degree would States retain their powers, versus the degree the Courts would determine how "*equal protection*" applied?

There are those who argue that concern about that potential is misplaced, contending that the current activist interpretation of the Fourteenth Amendment is at odds with its original intent, which was merely to incorporate black slaves into American life with the rights of full citizenship and no more. Such was indeed the interpretation of the Slaughterhouse Cases, which held for almost fifty years.

Others contend that the original intent of the Fourteenth Amendment was not to be constrained to matters of race, but that it was meant to incorporate the entire Bill of Rights from its inception.

Still a third group holds that the Fourteenth Amendment was a Trojan Horse aimed at paying off European bondholders after the Civil War by empowering investors in corporations with the legal tools by which to gain gradual control the Federal government and therewith the States.

That such enormous ambiguity should exist in an Amendment to the Constitution, speaks volumes to its secret construction, hasty passage, and coerced ratification. Such gives one cause to reconsider the intent behind the Constitutional mischief we have seen over the last hundred-twenty years.

At the time, there were competing factions within the controlling Republican Party**:** conservatives, who believed in the narrow interpretation of the Fourteenth Amendment, with no conflict with the Tenth, and so-called radical Republicans who advocated full incorporation of the Bill of Rights under Federal jurisdiction. There was also an overlay of lawyers representing industrial interests among both groups, particularly railroads. From what I can tell, without having read the Congressional Record, given the urgency of post-war Reconstruction, these factions simply agreed to the Fourteenth Amendment each believing that they could later control what it meant according to their preferences. The radicals got the language they wanted while the conservatives (*then in control of the Presidency and the Supreme Court*) retained the power to control it by interpretation (*hence the full elaboration of the Amendment in the Slaughterhouse Cases, including elements having nothing to do with the case*). Those factions, conservative and radical (*now including the Democratic left*), have fought over the meaning of the Fourteenth Amendment ever since, with the integrity of the Constitution being the clear victim.

As evidence of the intrigue involved in that fight, consider the seemingly innocuous Citizenship Clause.

> All **persons** born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Two railroad lawyers then in Congress: Roscoe Conkling and John A. Bingham had taken the trouble to omit the word "*natural*" from the usual legal term "*natural persons*." Both of them later admitted that their purpose in the omission was to confer the rights of citizenship to corporations (*this link has a fascinating history that is the source of these few paragraphs*). The railroads managed to get that interpretation out of the Supreme Court via the COURT CLERK, John Chandler Bancroft Davis (*a railroad lawyer, former Assistant Secretary of State, a socialist, and quite possibly a Marxist*). Mr. Davis inserted his own headnotes when he published the ruling, County of Santa Clara v. the Southern Pacific Railroad (*California*). The note (*supposedly*) quotes Chief Justice Waite stating that the Court was of the unanimous opinion that corporate persons were equivalent to Fourteenth Amendment citizens. That headnote wasn't a ruling and therefore carried no force of law, nor is there any other record of whether a Court majority (*that included several former railroad lawyers*) supported such a conclusion. Chief Justice Waite was so sickly that it was unlikely he would have even known of the publication. Worse, there is evidence on the historical record of Davis having distorted for political effect his reports of a Marxist confab in Europe.

Legitimate or not, the dam had broken. Attorneys began citing *Santa Clara v. Southern Pacific* as if it was established precedent. Of the 307 subsequent Fourteenth Amendment cases brought before the Supreme Court, only 19 were about equal rights for human beings, while 288 were suits brought by corporations seeking the rights of natural persons. "*Equal protection*" had become available only for those who could afford it: corporations who had become, for the first time, "*citizens*" under the Fourteenth Amendment.

Corporations have limited liability, pooled risk, immortality, and can more easily concentrate capital in the hands of a few than can individuals. They don't have to contend with raising children, sickness, old age, inheritance taxes, or planning for retirement. Equal protection of corporations had thus become an unequal playing field intended to benefit the investor class at the expense of small business and private land ownership, something the Founders had rightly feared, being only too familiar with the excesses of the corporations of European royalty.

> "I hope we shall crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government in a trial of strength, and bid defiance to the laws of our country." — Thomas Jefferson

That's but one problem with the Fourteenth Amendment, and by far not the least.

Over the fifty years following the Slaughterhouse Cases, various attempts were made to invoke the radical interpretation of Fourteenth Amendment privileges and immunities. The conservative interpretation was first diluted in Gitlow v. New York (1925), fittingly protecting a publisher from a State law against the crime of anarchy, in this case via his publication of the Communist Manifesto! For the first time, a case had successfully invoked First Amendment protection against a State law via the Fourteenth Amendment privileges and immunities.

Either the communists have better lawyers, or Satan has a sense of humor.

Over several ensuing decades, bits and pieces of the Bill of Rights were brought under Fourteenth Amendment protection under a doctrine known by the Orwellian name of, "*selective incorporation*." The modern Court has been ruling selectively ever since.

Under this new (*some say original*) interpretation of the Fourteenth Amendment , a constitutional orginalist now has a very tricky problem applying the original Tenth Amendment**:** Either invoke the original conservative intent of the entire original Constitution and Bill of Rights to constrain only the Federal government and therefore defer to State law, **OR** apply the power to over-ride local, State, or Federal Law, usually without recourse to any level of representative government, citing the Bill of Rights selectively as the court majority sees fit, empowered by the radical understanding of the original Fourteenth Amendment.

The Court could now have it both ways**:** If the emperors in black robes prefer the States have the option to decide that "*public use*" includes increased tax revenues from taking private property and turning it over to another private concern ala Kelo, no problem, deny Federal jurisdiction in the spirit of Federalism. On the other hand, if State representatives pass legislation to squelch pornography or outlaw sodomy as a risk to public health, no problem, call pornography or sodomy free expression, cite the First Amendment via Fourteenth Amendment privileges and immunities, and deny the will of the voters expressed by their State representatives.

It is a koan so simple and elegant as to mystify any self-respecting Zen Master.

It was the selective incorporation doctrine, applied to the Fourteenth Amendment that made the Supreme Court political, because it allowed unelected courts to usurp powers otherwise held by elected representatives. The mere existence of the judicial option inhibits self-government, because people rightly don't pay as much attention to discovering, promoting, and electing outstanding state and local representatives when they know that every law is subject to the very slow, expensive, remote, and seemingly indomitable powers exerted by Federal courts.

Everybody's hands are tied, nobody can make a decision, and your vote doesn't matter much anyway because some judge can toss out the law.

But, but, but… there had been the injustice of slavery under the old system and afterward with Jim Crow laws in the reconstructed South! So, what was so bad about equal protection? Well, it goes back to that the tension that existed at the very founding of this country**:** Powers sufficient to reverse historic injustices can have their perverse consequences when directed to unjust purposes…

Or in other words**:** There's nothing quite so malleable as a complicated web of partially contradictory precedent, a web that the Fourteenth Amendment has transformed into a judicial entitlement.

After eighty years of selective incorporation, people have become accustomed to an intrusive Supreme Court protecting individual rights at the expense of the majority. So, it is natural that property rights activists would assume that in Kelo v. New London the Court would constrain individual protection against eminent domain takings to the uniform definition of public use characteristic of Federal takings. But what was particularly fascinating in the case of Kelo is that it was the Court **liberals** who uncharacteristically took the Federalist route**:** permitting any local government to define what constitutes "*public use*" and call THAT "*equal protection*." This includes the latitude to find that "*public use*" includes increased tax revenues resulting from invoking eminent domain to take land from one owner and give it to another private interest (*usually corporate*). One need only notice how many local governments are dominated by Democrats to understand why the "l*iberals*" on the Court ruled in such a classically conservative fashion**:** they were "*conserving*" political power sufficient to be power for sale.

Thus, the majority opinion in Kelo is consistent with the selective incorporation doctrine as applied to the Fifth Amendment over the last eighty years (*not to mention the corporate intent behind the drafting of the Fourteenth Amendment*). Kelo merely cemented in place the *status quo ante* particularly common here in California, effectively government corruption in speculative land use. "*Just compensation*" will likely be at a price suppressed by the mere threat of such action, with much of the land's former speculative value taken from its owner and handed to the developer as a purchase discount. The most common application is forced "*redevelopment*" of large blocks within cities to be replaced with high-density complexes of commercial and residential housing. Some call it Sustainable Development. This author calls it "*Sustained Developers*," a system too often resembling highly organized crime.

Although anyone who believes in the sanctity of private property rights should be unhappy about how Kelo will work out for small landowners in Connecticut, one must be cautious where desirable ends are pursued by dubious means. We already have too much Federal power expressed through the courts and need to make local elections more meaningful to voters; else they will keep asking for (*usually totally uncompensated*) regulatory takings of uses of other people's land, expecting that there won't be any adverse consequences when it comes to *their* houses. Now, with Kelo, more people surely will focus on confining the scope of legitimate takings through their State representatives, as we have already seen in several instances (*notably Utah*). So, in that respect, Kelo is not all bad news; it may work out to *increase* property rights protections at the State level, especially when people in States without them retaliate.

The lesson of selective incorporation is not constrained to the Fifth Amendment. Consider the Second Amendment, the original intent of which clearly restrains the Federal government from passing gun control laws. Although the Framers of the Constitution indisputably regarded the natural right to self-defense as individual, it is doubtful that they intended the Second Amendment to violate State power to regulate their militias in any manner they chose. Now, with the Fourteenth Amendment, if the Court wants gun control, voila! Just cite that the original intent was to leave gun control up to the States and then lean on State governments to exert more gun controls using the inducement of Federal funds. If, on the other hand, the Court wants to end gun control, no problem! Extend Federal protection under the Second Amendment to individuals via the Fourteenth. Once again, judges will likely decide what our laws will be.

One of the most important natural rights of a people is that of free association. It goes without saying that for free association to exist it is just as important for a group to be able to exclude an individual as it is for an individual to be able to join that group. For example, if a group chooses to get together as a church, they rightly have the option to exclude those who express the intent to corrupt the principals and practices of that faith; else what is the point in having a church?

Now, let's assume these folks want to do more together than just worship, but as part of the free exercise of their religion, specifically protected under the First Amendment, they also want to live with each other in a full blown city and exclude those who disagree. When the Constitution was written, such was perfectly legal. Maryland was Catholic, Pennsylvania was Quaker, and New England was Protestant. Now… well, that would be illegal.

Thus, in the name of protecting the liberty of a few to live wherever they will, what we have allowed is slow destruction of free association among the many to set their own rules for common conduct. It doesn't matter if the issue is religion, sexual orientation, or simply a common interest

in rational precaution (*such as keeping male homosexuals away from boys in large organized groups*), free association is under attack through the courts, with far reaching consequences when it comes to developing tightly knit communities reflecting the combined will of individual people. Liberty has been tightly circumscribed in the name of "*freedom*" and "*equality*."

It is a Constitutional koan approaching Orwellian doublethink.

These fundamental changes in our laws were brought about by means of Congressional perfidy, and executed through the courts without representation, accountability, or recourse (*other than the unlikely option of impeachment*). If the people had really wanted these changes, their elected representatives could have amended the Constitution. It is the *expediency* with which elites view Court action, and the high cost of access to anybody else that have led us to this state of affairs. It is government by the few, unrepresentative and tyrannical.

Some would argue that racism is an offense so onerous as to deserve exception, but one could also reasonably argue that the moral force exerted by the black leadership of the early civil rights movement had more to do with improvements in racial equality than did orders from Federal judges. The point is**:** the several States and local representatives used to have the option of deciding how such things were managed by consent of the people, with the natural law of competition among communities as a the principal mediating force. Just as slavery might have become economically untenable without a horrendously expensive and destructive Civil War, now market competition among States is far less likely to exert its discipline over real estate racketeering as it normally would.

As a consequence to this enforced uniformity via creeping mandates from the Federal bench, a nation in foolish lockstep wanders ever farther down the path to legal perdition, heedless of the evil foisted upon it.