THE COURTS

Crying "Halt!"

by Stephen B. Presser

A federal judge whom I know lamented that the Supreme Court term that ended last June was the worst in recent memory. That judge loves the Constitution but could find few signs that this term's key decisions were based on that document. A Court that can rule that medical marijuana grown for home use substantially effects interstate commerce; that states and localities may take for a "public purpose" the land of A to give to another private party, B, who will generate more tax revenues; and that it is permissible to display the Ten Commandments on public property when they have been there for 50 years but not when they have recently been installed is engaged in some very bizarre jurisprudence.

Still, there were some salutary developments. The Supreme Court trashed the federal government's wrongful prosecution of the once-venerable Arthur Andersen accounting firm. (It was a Pyrrhic victory, however, since Andersen's thousands of employees have gone on to other places, and the company could not be resurrected.) The Court did also, in a sense, protect private property when it held that peer-to-peer file-sharing operations such as Grokster could be held responsible for their users' breaches of copyright and when it ruled that cable operators could not be forced to allow competitors access to their lines. Neither of those were predictably popular decisions—the first, because it must have disappointed millions who had been downloading music for free, and the second, because it will allow the few giant cable firms to continue something close to monopoly pricing. Still, both of those decisions were at least principled and, in a sense, courageous. And the Court pleased us oenophiles when it ruled that a state may not bar internet wine sales from out-of-state wineries if it permits them for in-state wine producers.

One could also discern that the Court was playing both sides against the middle, as it did most prominently in the two Ten Commandments cases. Advocates of separation of Church and state were delighted by the ruling that recent attempts to have the Ten Commandments placed in Kentucky courthouses were impermissible; members of the Moral Majority were pleased when the Court decided that the monument to the Ten Commandments on the grounds of the Texas state capitol could stay. Property-rights advocates should have been happy with the file-sharing and cable cases, if appalled by the "public purpose" eminent-domain case. Advocates of increasing the power of states and localities might have been pleased by the eminent-domain case but concerned about the wine one.

It is risky to impute a collective mind to a Supreme Court that has for so long consisted of shifting five-person majorities (the usual shifters were Justices Anthony Kennedy and Sandra Day O'Connor, but, in the Ten Commandments cases, the elusive justice was Stephen Breyer), but at least the swing justices may believe that it is important to create a sense of moderation, in order to discourage criticism of the Court, in general, or to keep from giving the Republicans a strong political issue, in particular. If the Court had, for example, completely neglected property rights or thrown out all Ten Commandments displays on public property, President Bush, like President Roosevelt before him, would have been able to claim it necessary to save the Constitution from the Court and the Court from itself.

If that was the strategy—to remove the Court from politics and to get another "moderate" on the bench—one can only hope that it fails and that President Bush, in appointing John Roberts, did not heed the siren song currently being sung by the Democrats in the Senate that, because the retiring Justice O'Connor was a "moderate," she must be replaced by another "moderate" in order to maintain "balance." That is, of course, code for the proposition that, since O'Connor voted not to overturn *Roe* v. *Wade*, the President must appoint a like-minded jurist, else the Democrats will be able to reject the nominee as an "extremist." In judicial selection, as in most American politics, the "moderates" are simply those you agree with; the "extremists," those you don't.

If what this Court has been engaging in is moderation, moderation is not what it was when I was young, because, whatever decisions the Court may have rendered this term, the primary casualties, as usual, were the rule of law and popular sovereignty. Instead of exercising moderation, the Court underscored how arbitrary it can be; how infrequently constitutional law dictates the result in politically important cases, such as those involving religion, race, abortion, and private property; and how important it is that President Bush fulfill his campaign pledge to appoint judges similar to Associate Justices Antonin Scalia and Clarence Thomas. Those two, the President said during both of his campaigns, understand that it is not the job of judges to legislate and that the Constitution should only be interpreted according to its original understanding. Any other interpretive strategy makes the judges lawmakers, which is a betrayal of their role, limned in *Federalist* 78, as the agents of the people.

Very possibly, the Supreme Court (or the slippery justices) may have outsmarted themselves, because their hopelessly inconsistent and, in some cases, plainly wrong decisions only clarify the need for a serious course correction. One or two more "moderate" appointments like Kennedy, O'Connor, or Breyer, and we can kiss the chance of the kind of jurisprudence ostensibly embraced by the President goodbye—at least for the next few decades.

Of all the significant cases decided by the Court this term, the "takings" case, *Kelo* v. *New London*, was the most shocking. In it, the Court held that New London could take Susette Kelo's home (presumably providing "just compensation," although valuing property, particularly in the context of governmental expropriation, is a chancy business) in order to allow private development of the property, which would generate more tax revenues for New London. The Fifth Amendment does permit governmental taking—with just compensation—of private property, but only "for public use." Until *Kelo*, "public use" had usually been thought to mean purely governmental undertakings, such as highways, official buildings, or perhaps public-housing projects. In *Kelo*, however, the Court appeared to permit any state or locality to take private prop-

erty and convert it to any use that, in the wisdom of governmental officials, would provide a public benefit, such as greater tax revenues or greater economic development. This means that no one's property can now be regarded as safe from rapacious and well-connected developers and their official allies. As the dissenting Justice O'Connor (in one of her best opinions in years) put it, the Court has "effectively . . . delete[d] the words 'for public use' from the Takings Clause of the 5th Amendment" and thereby

> refus[ed] to enforce properly the federal Constitution. . . . Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

In *Kelo*, then, as O'Connor suggests, the Supreme Court rewrote the Fifth Amendment. The majority in *Kelo* did leave open the possibility, however, that the people of the states (or localities) could amend their constitutions or laws to ensure that, in their particular jurisdictions, "public use" would be narrowly construed, so that the threat to private property could be mitigated by citizen action. Indeed, Sen. John Cornyn (R-TX) and others quickly filed bills in Congress that, if passed and signed, would "declare Congress's view that the power of eminent domain should . . . not be used to further private economic development" but only for true "public uses." This would not exactly overrule *Kelo*, but it might restrict "1) all exercises of eminent domain power by the federal government, and 2) by state and local government through the use of federal funds," as Senator Cornyn explained. Similar efforts are under way in several states.

The cure for an errant Supreme Court is for citizens to remember that "We the People" are the sovereigns in our Republic and that we can, at any time, recapture the Constitution. A shortcut to doing that is to appoint better jurists to the U.S. Supreme Court; sometimes that shortcut is unavailable, however, and the longer and more difficult paths of state and federal legislation, or even of constitutional amendment—spurred on by citizen action—must be employed. The Supreme Court (as one of the greatest judges never to sit on that Court, Learned Hand, explained) should not be permitted to become Nine Platonic Guardians, with the discretion to remake the law or the Constitution at will. This is precisely what has been allowed to happen for too long, and the American President and people should put a stop to it.

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EDUCATION

You Can't Always Get What You Want

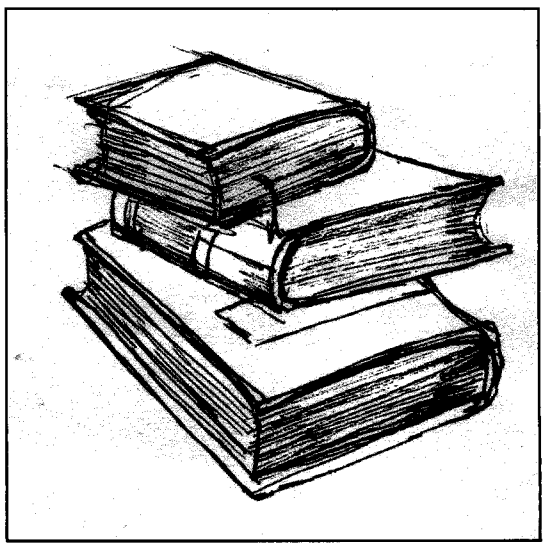
by Nicole Kooistra

My meeting with the college dean was a disillusioning experience. I had figured that it would take about ten minutes to fill out the required paperwork to transfer from this private college to a state university, but, when I emerged a half-hour later, I realized how naive I had been about higher education. I had only expected to go through the formalities, but the dean forced me to explain my decision in full. I told him that my classes had been unsatisfying and the books I was studying, insignificant. He told me I was making a mistake, that I would be lost amidst the chaos of a public university. His manner, more than his words, shook me: He spent the whole time sighing, and by his look he seemed to think that I would soon be a college dropout. I returned to my dorm room in tears. I had come to realize that I would not get an education where I was, and the dean had insisted I would not find one where I was going. Unfortunately, we were both correct, at least in part. American colleges are not educational institutions.

I did not learn this lesson from books but from experience. As a student who has attended three different colleges, I have learned not to put my faith in the institution of the university. Of course, I was reared to be skeptical. After sending me to a private school for kindergarten and first grade, my mother decided that she could teach me better at home. I remained at home through my high-school years, attending community college for the classes that were difficult for her or simply impractical in the home environment (chemistry, for example). After I graduated, I enrolled at a private liberal-arts college, where I stayed for one year before transferring to the large public university I now attend. Why did I exchange an elite school for a workaday state university? My reasoning was that, if I was going to receive the same education at both, I should choose the one that would cost my parents less.

My first class as a college student proved to be typical of my college experience. A mandatory course for freshmen, it was intended to introduce us to a wide range of disciplines, yet the focus was on all that is non-Western and irrelevant. The one classic work we read was Plato's *Republic*; the rest of the term took up everything from the poetry of Bedouin women to Chinese philosophy. That is what I get for going to a *liberal*-arts college, but, at the state university, I took an American-novels class that included Hannah Foster, Kate Chopin, and Toni Morrison but had no room for Mark Twain or Ernest Hemingway. Ultimately, the text hardly matters, since professors are content to ignore both author and historical context while constructing their own interpretations. My American literature professor spent more time on race and homosexuality in *Moby Dick* than on any other aspect of the story.

Deconstructionism is only a symptom of a disease that goes deeper. Universities have rejected their original purpose, which was to train the mind and better the soul through the study of the classics; now, the announced goal is to make the student employable. The degree becomes the end instead of the education behind it—and who cares about literature? This affects all students to some degree, but especially men, who, for the most part, envision themselves providing



Elizabeth Wolf