

# This Is My Land

The Supreme Court should protect property rights against vengeful government officials.

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**R**onald Reagan used to tell a joke about the Soviet Union that got to the heart of something very important about freedom. “What’s the difference,” he would ask, “between the Soviet Constitution and the U.S. Constitution? The Soviet Constitution guarantees freedom of speech. The U.S. Constitution guarantees freedom *after* speech.”

When the Supreme Court hears arguments on Monday in Harvey Frank Robbins’ case against the federal government, it would do well to keep Reagan’s point in mind: Freedom means not just the right to act, but the right to act without fear of reprisal.

As William Blackstone noted in the 1760s, private property, along with personal security and individual liberty, is an essential part of freedom because “there is no other mode of compulsion, or of abridging man’s natural free will, but by an infringement or diminution of one or the other of these important rights.”

Private property creates a barrier that insulates people from each other and from the government, thereby protecting personal autonomy and human dignity. Thus all rights are, in a way, property rights—and property plays an essential role in protecting other rights, including speech. Anyone whose home or business is liable to confiscation if he criticizes the government, or joins an unpopular church, or refuses to quarter troops in his house, or declines to testify against himself, does not really have these basic rights.

## A ‘HARDBALL EDUCATION’

These principles came together for Robbins in 1993, when he bought a ranch in Wyoming, not knowing that the previous owner had agreed to give the Bureau of Land Management an easement over the land. BLM agents, however, had neglected to record the easement, so when the purchase went through, Robbins got the land free and clear.

Realizing their mistake, the agents ordered Robbins to sign over

the easement, and when he refused, they grew belligerent. “The federal government doesn’t negotiate,” one official told him. Instead, they promised that Robbins’ refusal would “come to war” and that they would give him a “hardball education.” Then they began a vendetta against him that would last to the present day.

They cancelled his right of way over government-owned land, repeatedly harassed the guests at his ranch, cited him for minor infractions while letting similar violations by his neighbors go unnoticed, and brought him up on criminal charges of interfering with federal agents during their duties. The jury acquitted him after deliberating for less than 30 minutes.

After enduring years of such treatment, Robbins sued, arguing, among other things, that the BLM agents had violated his Fifth Amendment right to exclude others from his property. The trial court and the U.S. Court of Appeals for the 10th Circuit agreed, but the government asked the Supreme Court to reverse in *Wilkie v. Robbins*. “No court,” said Solicitor General Paul Clement in his brief, has “ever recognized a constitutional right against retaliation . . . in the context of property rights.”

This astonishing argument is potentially far more dangerous to the rights of property owners than the notorious *Kelo v. New London* decision two years ago, which held that government can use eminent domain to transfer property from one private owner to another whenever politicians think doing so would be in the public interest.

If the Court rules against Robbins, home and business owners would find it much harder to resist when the government demands their property.

## AMBITIOUS BUREAUCRATS

It is unfortunately common for officials, especially at the local level, to use their power to intimidate property owners. Licensing requirements, safety and sanitation regulations, inspection requirements, and other rules give ambitious bureaucrats plenty of opportunities.

In 1993, the president of the Village Board of Sussex, Wis., manipulated permit requirements and bureaucratic delays to force

two landowners to give him a portion of their land for his own personal use. He persuaded the Army Corps of Engineers to regulate the property as a wetland and even pretended to find Native American artifacts on the property to increase pressure on the owners.

In two cases from San Bernardino, Calif., in 1996, code enforcement officials used health and safety inspection laws to harass apartment and motel owners, hoping to induce them to give up their property for redevelopment.

Local officials in Carlsbad, Calif., required homeowners Craig and Robin Griswold to give up their constitutionally protected right to vote on property assessments when the couple asked for building permits. (The Griswolds are now fighting the case in federal court, represented by the Pacific Legal Foundation.)

#### WITHOUT REPRISAL

It's hard to imagine what else property rights might mean, other than that an owner can refuse the government's demands without fear of reprisal. The defining characteristic of property is that it insulates us from others—creating a locus of security, privacy, and autonomy. Official retaliation for the assertion of property rights violates their very essence by piercing that shield and striking at the independence that private property protects—thus, in Blackstone's words, “abridging man's natural free will.”

The Supreme Court has often recognized that constitutional freedoms must include freedom from retaliation. In *United States v. Jackson* (1968), for example, the Court found it unconstitutional for the government to structure the death penalty in ways that encouraged defendants to give up their right to a jury trial. The Federal Kidnapping Act allowed the death penalty only on a jury's recommendation, which meant that the accused was more likely to plea bargain. This, the Court declared, “needlessly chill[ed] the exercise of basic constitutional rights.”

The next year, the justices repeated the point when they considered whether a North Carolina court could impose a more severe penalty on a defendant being retried after successful appeal. The due process clause, the Court declared, prohibits judges from acting out of “vindictiveness against a defendant for having successfully attacked his first conviction.”

And in the First Amendment realm, the Court has held that “to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”

These decisions reflect the common-sense understanding of the concept of a “right.” To have a right to something means to be free to act without fear of injury or prosecution: to be free to choose for oneself, rather than being coerced. When government intimidates people into acquiescing to its demands, their rights are rendered meaningless.

A shop owner who must pay a mafioso to get him to not trash his store is not really free. Neither is the landowner who must give up his property to get the government off his back.

#### WORSE THAN KELO

Decades ago, this realization gave rise to the theory of “unconstitutional conditions,” the rule that even those benefits that government is under no obligation to provide cannot be made contingent on a person waiving her constitutional rights. If government could pressure people to give up their freedom of religion or expression, or other rights, in exchange for benefits,

the reasoning goes, then officials would be severely tempted to leverage official power and wealth against the citizenry.

Although this doctrine is complicated, the Court made clear in *Nollan v. California Coastal Commission* (1987) that bureaucrats can't demand unlimited concessions from property owners who seek permission to build on their land.

Solicitor General Clement has responded to these arguments by claiming that the rule against retaliation applies only to free-speech cases. Although he admits that “the Fifth Amendment is of course entitled to equal footing with the First,” his brief goes on to argue just the opposite: There are “a variety of . . . legal doctrines that apply in the First Amendment context alone,” he claims. The Supreme Court has allowed “a degree of permissible governmental interference with property rights that is wholly alien in the context of First Amendment speech rights.” Thus the state has “substantial leeway” to interfere with property rights, while freedom of speech has greater protection.

Of course, it's true that, since the 1930s, courts have accorded property rights only grudging protection, thanks to the theory of “rational basis review”—a concept that appears nowhere in the Constitution but was adopted by a politically motivated Court in the 1930s.

Nevertheless, the Court has admitted in *Lynch v. Household Finance Corp.* (1972) that “the dichotomy between personal liberties and property rights is a false one,” because “the right to enjoy property without unlawful deprivation . . . is in truth, a ‘personal’ right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.”

In fact, when it comes to property rights, the rule against retaliation should apply at least as forcefully as with speech.

The reason government retaliation is banned in the First Amendment context, for example, is that retaliation might chill expression by the speaker and others. But property rights are not just chilled but actually destroyed by government retaliation. A person who suffers retaliation for speaking out can still have his message heard. But since the most basic element of property rights is the ability to say “no” to those who would take one's land, any action that deprives a person like Frank Robbins of the freedom to say “no” isn't merely a threat but actually destroys his property rights completely.

Two years ago, the nation was outraged by the *Kelo* decision's insensitivity to the rights of property owners. But if the Supreme Court rules against Frank Robbins, Americans will face an even graver threat than misuse of eminent domain.

Without constitutional rules against official manipulation and abuse, officials will be free to intimidate property owners into simply giving up their land without just compensation and without legal protection. Why would bureaucrats buy land through eminent domain if they could just pressure people into giving up their land for free?

*Wilkie v. Robbins* represents an important opportunity for the Supreme Court to scale back the scope of government power and to ensure security for people who simply want the freedom to say “no.”

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