Intellectual history often presents its students with shocks, most prominently: how is it that people seemed to reject an idea that in retrospect was brilliant or useful? Conversely, how is it that people believed that intellectual mediocrities were learned savants?

Justice Scalia's latest statement on Supreme Court doctrine suggests that he will be a fit subject for the latter topic:

> Justice Antonin Scalia predicted Monday that the Supreme Court's decision in *Kelo v. City of New London* will be overturned.
>
> Speaking to students at the Chicago-Kent School of Law, Scalia criticized the decision allowing the city of New London to use eminent domain to seize property for economic development, the Chicago Sun-Times reports. "I do not think that the *Kelo* opinion is long for this world," Scalia said.
>
> Scalia ranked Kelo among the top cases in which the court made a mistake of political judgment, according to the Sun-Times account. The others were the *Dred Scott v. Sanford* decision in favor of a slave owner and the *Roe v. Wade* decision finding a constitutional right to abortion.
>
> "My court has, by my lights, made many mistakes of law during its distinguished two centuries of existence," Scalia said. "But it has made very few mistakes of political judgment, of estimating how far … it could stretch beyond the text of the Constitution without provoking overwhelming public criticism and resistance. *Dred Scott* was one mistake of that sort. *Roe v. Wade* was another. … And *Kelo*, I think, was a third."

This must set some sort of record for obtuseness. In *Roe* and *Dred Scott,* the Court short-circuited the political process by holding that certain statutes were unconstitutional (in *Dred Scott,* Congressional prohibition of slavery in the territories; in *Roe,* state abortion laws). In *Kelo,* by contrast, the Court refused to block the results of the political process: it upheld the result of state and local democratic decision-making. How in the world can deferring to the actual judgment of democratic electorates constitute a *political* mistake of misjudging the public will?

Same to you, buddy

In case slower learners didn't recognize the point, Justice Stevens' opinion for the court emphasized that if states wanted to institute their own restrictions on the use of eminent domain authority, they were welcome to do so. Many did, although many of these laws were basically cosmetic. In short, then, in those areas where people felt strongly that eminent domain power had been abused, they changed the law. That's the way democracy is supposed to work.

Deferring to the elected branches can represent a mistake of *legal* judgment, or *moral* judgment. See, e.g., *Korematsu,* or the *Civil Rights Cases,* or *Buck v. Bell.* Deferring to the elected branches can represent a mistake of political judgment if there is reason to believe that election results were achieved through force, or fraud, or injustice. But here? It's simply incoherent.

Maybe this is a time to start reconsidering the absence of an age limitation for Supreme Court justices. Scalia has already acknowledged that in many important cases, he doesn't even bother to read the briefs. If he's too tired to the job, I'm sure we can find others.

I've long been mystified by many scholars' belief that Scalia is some sort of intellectual giant. Most of his theories, I think, will eventually be regarded as a sort of jurisprudential phrenology, promising scientific results but actually just judicial quackery. Consider his views on *Kelo* to be a brief for the prosecution.