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Examining the Current Abuse of the Doctrine of Eminent Domain

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Abstract

The current application of the doctrine of eminent domain is representative of a steady degradation of individual property rights. Although the 5th Amendment, which protects the eminent domain clause, states that property can only be appropriated for a "public use," the Supreme Court has consistently ruled that eminent domain can be applied if the disputed land will be used for some "public purpose". The linguistic distinction between public "purpose" and public "use" is crucial in the interpretation of the doctrine of eminent domain because the term "purpose" is much vaguer than "use" and consequently leads to a greater abuse of the doctrine. Through examining the original intent of legislative authors and reflecting on three landmark Supreme Court eminent domain cases, this paper will seek to demonstrate how and why an abuse of power is taking place today. This paper will also examine the differences and implications of the terms "use" and "purpose" and will argue for an amendment to the Constitution that would clarify the 5th Amendment's eminent domain clause so that the abuse of this doctrine will stop immediately.

"Wherein excess power prevails, property of no sort is duly respected."
James Madison 1792

Eighty-seven-year-old Wilhelmina Dery, an appellant in the 2005 U.S. Supreme Court eminent domain case of *Kelo v. City of New London*, certainly did not think her property was respected when the home she lived in since 1918 and the surrounding properties were appropriated by the government simply to create a higher tax base. Eminent domain is defined as the power of the state to seize private property without the owner's consent. Protected by the Fifth Amendment of the United States Constitution, this doctrine states, "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Since the landmark U.S. Supreme Court Case of *Berman v. Parker* (1954) when the judicial branch interpreted, and therefore redefined, the historic Doctrine of Eminent Domain to be broadly applicable for any "public purpose" rather than the more narrow construction of "public use," the government's abuse of power has led to a steady degradation of individual property rights. An in-depth comparison between "use" and "purpose" will appear later in this paper. What may appear to be a meaningless interpretation of the term "public purpose" is instead the crux of a "slippery slope" of abuse, where one landmark decision has continued to adversely influence property rights for decades to come.

Through examining a brief history of the doctrine of eminent domain, along with the original intent of James Madison, a key author of the Bill of Rights and the Federalist Papers, and looking closely at three landmark Supreme Court eminent domain cases, this paper will demonstrate how, since the 1954 *Berman* case, the United States judicial branch of

government is applying the Doctrine of Eminent Domain to unfairly appropriate private property for its own use without the owner's consent. This paper will also argue for an amendment to the Constitution that will restrict the execution of eminent domain to applications which would be consistent with the original intent of the legislative authors; such as the provision or improvement of critical infrastructure, which includes: hospitals, highways, dams, state and national security, and telecommunication facilities. In addition, property owners should receive just compensation not only in the fair market value of their land, but in compensatory damages as well.

However, controversy revolving around eminent domain dates back much further than the landmark 1954 case. The original ambiguity of the eminent domain clause stems from the question: What constitutes a public use? The clause specifies nothing about what types of public use can justify the seizing of private property or what is meant by "just compensation". This ambiguity can only be resolved through an amendment to the Constitution which would specify the guidelines for applying eminent domain and work to preserve the original intent of the doctrine. This paper will argue that the original intent was to protect individual property rights, and implement a government annexation of property under the doctrine of eminent domain only in limited circumstances when the property can be guaranteed to satisfy a greater public good and the Public Use clause of the Fifth Amendment.

A Brief History of the Origin of Eminent Domain

The seizing of private property for government use in the United States dates back to colonial America. During the American Revolution, the colonial government would appropriate private property to develop roads, accommodate the military, and obtain numerous goods, often without compensating the owner whatsoever. It is ironic that our nation's Revolution was being waged to break free from an overly oppressive government, to wit: the King of England; and yet, oppressive actions were being taken by the same people who resisted. During this time period, just compensation was not legally required as many believed it was the duty of the property owner to forsake his property for the greater good of the community. It was also especially common for the government to seize the private property of individuals who were suspected of aligning with the British. (Rackove, *Dictionary of American History*)

Still, many colonists did not believe that it was their obligation to give up their property, especially without compensation. This frustration eventually led to the creation of the eminent domain clause of the Bill of Rights, written by James Madison in 1791. This clause is now a part of what is we know as the Fifth Amendment to the U.S. Constitution. According to author and historian Jack Rackove, Madison was a strong supporter of, "the protection of freedom of conscience, rights of property, and basic civil liberties. He thought the real danger to rights came from state governments, not national government." (Rackove, *Dictionary of American History*)

Historically, the significance of the Bill of Rights is evident in the very fact that the thirteen original colonies had to ratify these amendments that limited the government's power before the Constitution would be adopted. Rackove's analysis of Madison is a clue early on in American history that although the ambiguity of the Bill of Rights is open to interpretation by the judicial branch, its amendments were established to limit the power of the government; not to grant an extensive abuse of power.

Madison's Original Intent in Authoring the Bill of Rights

Whenever considering whether or not an abuse of power is taking place concerning the application of any law, it is crucial to consider the original intent of the legislative authors. Considering original intent is important because it encourages consistency with respect to how a law or amendment is applied. If the judicial branch did not take the legislative authors' intent in to consideration, interpretation of the Constitution would be malleable and subject to the personal opinion of whomever sat on the bench at the time. Founded on a belief in state and individual rights, the United States Constitution serves as a covenant to its people that it will consistently protect the rights of the *individual*, not the personal opinion of government officials at any given time.

Transitioning from British rule, the thirteen original colonies sought to ratify a Constitution that would limit the power of the government. Therefore, no matter how vague an amendment may appear, the mindset of early America must be considered when interpreting the law. Evidence of this mindset is clear in early documents like the Federalist Papers as well as other historical discourse. Consequently, clauses like the eminent domain clause of the Fifth Amendment are clearly in place to limit the power of the government to seize property unfairly and without just cause. According to a speech given by Madison in 1792,

"As a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected."

Madison also recognized that an amendment would prove fruitless if it were too complicated, so he intentionally constructed the Fifth Amendment to be relatively vague to benefit and protect the individual. He wrote in the *Federalist No. 62*,

"It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; that no man who knows what the law is today can guess what it will be tomorrow."

This statement reinforces the advantage of deferring to original intent for matters of consistency, for if the judicial branch did not take the legislative authors' original intent in to consideration, "no man who knows what the law is today can guess what it will be tomorrow" (Madison). It has become a sad irony that the ambiguity of these laws is working against the greater public, when in fact these laws were intentionally vague, not to leave room for the government to interpret for its own advantage, but to accommodate the needs of the people in a developing society. These accommodations would include the construction of critical infrastructures to sustain the basic needs of an American populace that is maturing and requiring technological advances. For example, accommodations like the creation of highways and railroads for the

transportation of both people and commerce, in addition to technology like the need for a 20th Century Kennedy Space Center; advancements that clearly benefit the United States, its people and the world, but that were not likely predicted as a need by our founding fathers.

However, beginning with the Supreme Court case of *Berman v. Parker 1954*, the U.S. judicial branch ruling demonstrates how the government is widely interpreting the law to benefit only a few. The ruling permits transferring property from one private agency to another private agency and declaring and subsequently abstractly rationalizing that the creation of a greater tax base, while forcing property owners out of their homes simply because they are dubbed as "slums," constitutes as a "public purpose." Through a review of the three landmark eminent domain Supreme Court cases, all of which resulted in the loss of the private citizen's property, this paper will show how an abuse of power in relation to the application of eminent domain has expanded over the decades.

Berman v. Parker 1954

Property rights were first ignored in the principal landmark eminent domain case of *Berman v. Parker 1954*. Among growing government concern about blighted neighborhoods in the Washington D.C. area, the United States passed the District of Columbia Redevelopment Act of 1945. The Act led to the creation of the District of Columbia Redevelopment Agency whose members were given the task of collecting data about blighted areas in the community and then designing a redevelopment plan that would rid the city of these sub-standard living conditions.

Through the Redevelopment Act, the Planning Commission was given the power to exercise eminent domain if necessary. A survey of housing conditions run by the Commission in Southwest D.C. in 1950 revealed that, "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating" (*Berman v. Parker*, Douglas opinion). The Planning Commission chose to implement eminent domain over the entire area, and not on a piece-meal or property by property basis, with the belief that the existence of these "slums" or substandard living conditions were a threat to public health.

The appellant, Berman, owned a department store in the area that was to be appropriated for eminent domain. The appellant claimed that the taking of his property was unconstitutional because it was commercial and not residential property, and although the store resided in an area that contained many blighted homes, the department store itself was not classified as a "slum" or "blighted." Additionally, the appellant claimed that if his property was seized, it was not going to be redeveloped for a "public use" as guaranteed in the takings clause of the Fifth Amendment, but rather, redeveloped and conveyed to the management of another private agency for their private, commercial use.

The power of the state to utilize eminent domain is guaranteed in the Fifth Amendment and is applied to all of the states through the 14th Amendment. Because the area in question in *Berman v. Parker* took place in Washington D.C., the Supreme Court ruled that, "The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs." In other words, as Washington D.C. is not technically a state, Congress has what is traditionally known as a police power over the area. Therefore, in the case of *Berman v. Parker*, the Supreme Court exercised great deference to Congress to establish what constituted a "public use" (Lersch, *Northern's Exposure*). The deference shown by the Court is problematic because this allowed the legislative branch to interpret a law – a responsibility that belongs to the Supreme Court, not Congress.

In the concurring opinion, Justice Douglas stated that, "The role of the judiciary in determining whether that power [eminent domain] is being exercised for a public purpose is an extremely narrow one." This is where the Justice Douglas was wrong. Out of respect for Congress, the legislative body of the United States, as well as the governing body of the District of Columbia, the opinion of the Court stated that a "public purpose" was satisfied in the taking of Berman's property and was therefore constitutional because the redevelopment plan came from Congress. Douglas wrote in his opinion, "When the legislature has spoken, public interest has been declared in terms well nigh conclusive." However, the Court's assumption that the legislature always has the public's best interest at heart is to strip the Supreme Court of their credentials. It is the duty of the Court as the supreme Judicial Branch of the United States to interpret whether or not Congress is legislating in a constitutional manner. Simply because Congress passes an Act such as the Redevelopment Act of 1945, does not automatically guarantee that the act is either in the best interest of the public, or constitutional for that matter. That interpretation is up to the Court, which Douglas and the Court seem to have failed to recognize in Douglas' concurring opinion.

The United States Congress's decision to pass an act so extensive that it would seize a citizen's private property only to convey it to another private agency under the guise of a greater "public purpose," along with the Supreme Court's subsequent failure to interpret this act as unconstitutional mark a turning point in the government's abuse of the eminent domain doctrine. Before the Berman case went to the Supreme Court, in the 1953 Circuit Court Trial, known at that point as *Schneider v. District of Columbia*, Circuit Judge E. Barrett Prettyman ruled that the taking of Berman's property would be unconstitutional because it would not satisfy the "public use" requirement of the eminent domain clause. Barrett wrote in his opinion, "The extensions of the concept of eminent domain, to encompass public purpose apart from public use, are potentially dangerous to basic principles of our system of government." The Court's decision that state legislatures may exercise wide latitude in determining what serves as a "public purpose" in *Berman v. Parker*, only set the stage for further abuse in cases like *Hawaii Housing Authority v. Midkiff* (1984) and *Kelo v. City of New London* (2005).

Hawaii Housing Authority v. Midkiff 1984

Thirty years after the *Berman* case, further misinterpretation of the proper application of eminent domain took place in the Court decision of *Hawaii Housing Authority v. Midkiff* (1984). The Hawaii State Legislature passed the Land Reform Act of 1967 after discovering that nearly forty-seven percent of the state was owned by a mere seventy-two private land owners (forty-nine percent of Hawaii was owned by the State). According to the state legislature, "to reduce the perceived social and economic evils of a land oligopoly," it would be necessary to apply the doctrine of eminent domain to seize property from these land owners and then sell it to those citizens who were only able to rent property at this point, as very little property was on the market. This plan not only endorsed a deviation in the ideals of a capitalist America by proposing

a socialist solution of a redistribution of wealth, but it also inaccurately applied the doctrine of eminent domain and the "public use" clause to do so. No "public use" standard or qualification is satisfied when property is being appropriated from one private individual and conveyed to another private individual.

This is a good time to include a reminder about the guarantees of the Fifth Amendment; specifically, the Public Use Clause. It states that, "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for *public use*, without just compensation." (Italics added) The Supreme Court was at fault in their decision to endorse Hawaii's Land Reform Act on the basis that the application of eminent domain would satisfy a "public purpose." Nowhere in the Public Use clause is there a guarantee that property will be used for a public *purpose*; it is in fact, the *public use* clause. "Use" is not only more specific than "purpose," "use" is the term that is protected. In the concurring opinion for *HHA v. Midkiff*, the Court seems to employ the terms "use" and "purpose" as synonyms, when in fact, they are not. Purpose can be defined as a, "practical result, effect, or advantage" (dictionary.com) whereas use is defined as, "to employ for some purpose; put into service; make use of"(dictionary.com).

The Fifth Amendment guarantees that a citizen's property can only be appropriated through eminent domain if it satisfies a public "use." Justice O'Connor incorrectly defended the actions of the Hawaii Housing Authority on the basis of fulfilling a public purpose or intent of the government. The deference shown by the Court to the Hawaiian Legislature was strongly grounded in the Court's decision in *Berman*. Justice O'Connor writes in her opinion, "The Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"

Ultimately the Court ruled that there only needs to be a "rational relationship" between the taking of property and some *purpose* that will benefit the public. Therefore, they essentially threw out the requirement that a government taking of property must be for a public use stating, "The State's power to condemn property is as broad as its extensive police power."

It is unfortunate that, as in the *Berman* case, one needs to examine the ruling from the court directly preceding, or below, the Supreme Court to get a clear understanding of the abuse that is taking place. According to the ruling of the Court of Appeals for the Ninth Circuit, the Land Reform Act was simply, "A naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit."

Kelo v. City of New London 2005

The slippery slope of government abuse of power, and the incorrect conclusion that the term "public purpose" satisfies the "public use" clause, was most recently displayed in the 2005 Supreme Court case of *Kelo v. City of New London*. In 2000, the city government of New London, Connecticut reactivated the New London Development Corporation (NLDC), a private agency under control of the city government, to create plans to redevelop the area of New London and promote economic growth. The reactivation of the NLDC was prompted by the construction of a new research facility for the pharmaceutical company Pfizer on the outskirts of the town. The goal of the city was to promote economic activity that could potentially be brought in by the Pfizer plant.

The NLDC determined that a large portion of the redevelopment would need to take place in the older neighborhood of Fort Trumbell. The city gave the NLDC permission to exercise eminent domain to seize 115 properties in the Fort Trumbell area, but fifteen land owners refused. These appellants, led by Suzette Kelo, refused to sell their property on the grounds that the appropriation of their property would violate the "public use" requirement of the Fifth Amendment; because their land would immediately be turned over to private corporations to stimulate the local economy and promote a larger tax base.

Referring to both the *Berman* case and the *Midkiff* case, the majority of the Supreme Court ruled that condemning private property to promote economic development served as a logical "public purpose" for the city of New London. According to Justice Stevens, who delivered the concurring opinion, "It [the Court] has embraced the broader and more natural interpretation of public use as "public purpose." It is imperative to note that in the Supreme Court review of the Kelo case there were no allegations that any of the properties being condemned were blighted or in poor condition. Rather, properties were only being seized because they happened to be in the area of a desired condominium development. A narrowly divided Supreme Court ruled in a 5:4 decision that such economic development qualified as valid public use under both the Federal and State Constitutions.

In her dissent to the Kelo majority ruling, Justice Sandra Day O'Connor wrote, with some apparent disgust, "For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. 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."

Justice Thomas also disagreed adamantly with the majority decision and wrote in his dissenting opinion, "The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." Thomas went on to distinguish between the terms "use" and "purpose" and criticizes the majority's employment of the terms as synonyms. Moreover, he critiqued the rulings made in *Berman* and *Midkiff*, and how those landmark decisions adversely influenced the majority in *Kelo*.

Thomas, an adamant Originalist, wrote, "The weakness of those two lines of cases, and consequently *Berman* and *Midkiff*, fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the 'public purpose' standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered." As an originalist, Thomas subscribed to the view that interpretation of the U.S. Constitution should be consistent with the intent of those who drafted it. Thomas adds, "The public use clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from taking property from A. and giving it to B."

Relevance of Eminent Domain Abuse in 2008

Controversy revolving around eminent domain is as strong today as it was over 200 years ago – and for good reason. What is crucial now is to stop this slippery slope of abuse before it goes any further. What started off as one man losing his property under the misinterpretation of the Public Use clause in the *Berman* case, eventually led to fifteen property owners losing their property simply to make room for private real-estate development; not a public use. Following the *Kelo* decision, a public outcry led dozens of state legislatures to draft bills that would further limit the ability of the government to appropriate private property. However, on a federal level, since it is abundantly clear from the cases of *Berman*, *Midkiff*, and *Kelo* that the Supreme Court will defer to the Congress to define “public use,” a constitutional remedy needs to take place in the form of an amendment to the Constitution. It would be essential that an amendment to the Public Use Clause would specify the guidelines and standards of a “public use” to preserve the original intent of the legislative authors, and prevent this slippery slope of property rights abuse from continuing.

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