Texas Institute for Property Rights

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The Enemies of Property Rights: Eminent Domain

The term "eminent domain" was taken from a legal treatise written by the Dutch jurist Hugo Grotius in 1625. He used the term *dominium eminens* (Latin for *supreme lordship*) and described the power as follows:

> The property of subjects is under the eminent domain of the state, so that the state or those who act for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But, when this is done, the state is bound to make good the loss to those who lose their property.

Prior to the 17th century, the concept of private property did not exist. Property was either owned by the king or owned in common. Both enclosure and the creation of large businesses gave rise to the concept of private property. Prior to the recognition of private property, the government pretty much took what it wanted. Private property made this more difficult to do. Eminent domain became a part of English common law, and it provided government with a tool to legally acquire property when it was needed for certain purposes.

Eminent domain became a part of the United States Constitution. The Fifth Amendment states that "No person shall be … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This has been a source of controversy ever since.

The U.S. Supreme Court first examined federal eminent domain power in 1875 in *Kohl v. United States*. This case presented a landowner's challenge to the power of the United States to condemn land in Cincinnati, Ohio for use as a custom house and post office building. Justice William Strong called the authority of the federal government to appropriate property for public uses "essential to its independent existence and perpetuity."[1] In other words, according to the Court, if the federal government could not seize private property, then it could not exist.

Four years later, the Court held that eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."[2]

This marked a radical shift from the view of the Founding Fathers. The Founders held that the individual is sovereign, that the individual possesses certain unalienable rights, including the right to property. In 1879, the Court ruled that the federal government is the sovereign. And if the government is sovereign, then the individual (and his property) is subordinate to the government. This is the principle that underlies eminent domain, and it is no different than the premise that the

[1] *Kohl v. United States*, 91 U.S. 367, 371 (1875).

[2] *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879).

King owns everything. Within a few decades the government began to expand the application of that principle.

During the New Deal Era, eminent domain was used to seize land for a wide range of purposes:

> The 1930s brought a flurry of land acquisition cases in support of New Deal policies that aimed to resettle impoverished farmers, build large-scale irrigation projects, and establish new national parks. Condemnation [eminent domain] was used to acquire lands for the Shenandoah, Mammoth Cave, and Great Smoky Mountains National Parks. See *Morton Butler Timber Co. v. United States*, 91 F.2d 884 (6th Cir. 1937)). Thousands of smaller land and natural resources projects were undertaken by Congress and facilitated by the Division's land acquisition lawyers during the New Deal era. For example, condemnation in *United States v. Eighty Acres of Land in Williamson County*, 26 F. Supp. 315 (E.D. Ill. 1939), acquired forestland around a stream in Illinois to prevent erosion and silting, while *Barnidge v. United States*, 101 F.2d 295 (8th Cir. 1939), allowed property acquisition for and designation of a historic site in St. Louis associated with the Louisiana Purchase and the Oregon Trail.
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> During World War II, the Assistant Attorney General called the Lands Division "the biggest real estate office of any time or any place." It oversaw the acquisition of more than 20 million acres of land. Property was transformed into airports and naval stations (e.g., *Cameron Development Company v. United States* 145 F.2d 209 (5th Cir. 1944)), war materials manufacturing and storage (e.g., *General Motors Corporation v. United States*, 140 F.2d 873 (7th Cir. 1944)), proving grounds, and a number of other national defense installations.[3]

Repeatedly, the Court ruled in favor of the government when it wanted to seize private property. If the government wanted land and declared that it was for a "public use," the Court sanctioned the seizure. And this raises the question, what is a "public use"?

For decades the Court danced around the issue, but in *Kelo v. City of New London* it provided a clear answer.

Suzette Kelo purchased her dream house in New London, Connecticut in 1997. But her dream soon became a nightmare. The following year, the city of New London gave eminent domain powers to the New London Development Corporation (NLDC), a private organization that wanted to condemn Kelo's neighborhood to make way for a private development. The NLDC argued that the new development would bring in more tax money and create economic opportunities for the community, and thus qualified as the "public use" that eminent domain can be used for.

Kelo sued, and the case eventually reached the Supreme Court. The following is an excerpt from the Court's ruling. For ease of reading, citations of previous rulings have been omitted.

> Though the city could not take petitioners' land simply to confer a private benefit on a particular private party, the takings at issue here would be executed pursuant to a carefully considered development plan, which was not adopted "to benefit a particular class of identifiable individuals." Moreover, while the city is not planning to open the condemned land–at least not in its entirety–to use by the general public, this "Court long ago rejected any literal requirement that condemned property be put into use for the … public." Rather, it has embraced the broader and more natural interpretation of public use as "public purpose." Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power.

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[3] "History of the Federal Use of Eminent Domain," The United States Department of Justice, https://www.justice.gov/enrd/history-federal-use-eminent-domain, accessed October 15, 2018.

In short, the Court ruled, and admitted that it had long ruled, that "public use" is whatever legislators declare it to be. Rather than safeguard individual rights, including property rights, the Court declared that it will defer to the legislature.

The Court has consistently rejected principles. And so, it is unable to identify clear rules to guide its findings. Instead, it judges each issue on a case-by-case basis, with deference given to legislators. According to the Court, if legislators think a particular law is appropriate, who is the Court to question it? As Justice Oliver Wendel Holmes Jr. famously wrote, "If my fellow citizens want to go to Hell, I will help them." He added, "It's my job."

More recently, in *National Federation of Independent Business v. Sebelius* (which upheld the constitutionality of ObamaCare), Chief Justice John Roberts wrote, "It is not our job to protect the people from the consequences of their political choices."

Questioning legislators and applying principles is the fundamental purpose of the courts. The United States Constitution established a system of checks and balances, and the judicial branch is supposed to serve as a check on the power of the legislative and executive branches. The Court has done this many times throughout its history, declaring legislative or executive actions to be unconstitutional. In doing so, they certainly aren't deferring to legislators. They are actually doing their job.

But over the past century, the Court has increasingly deferred to legislators, particularly in regard to property rights issues. This is the ultimate result of democracy—unlimited majority rule. If the majority wants to lead the nation to hell, the Court won't stand in the way.

Eminent domain allows the majority to seize private property for any purpose it deems beneficial to "the public." The individual must subordinate his flourishing to the alleged well-being of the majority—"the public."

Too often, property owners support eminent domain when it happens to the other guy, but they are outraged when it happens to them. They don't challenge the premise underlying eminent domain, only it's application. But if they want to defeat particular applications of eminent domain, then they must challenge the premise that the individual must sacrifice his flourishing for "the public."

The Texas Institute for Property Rights provides analysis, training, and resources for legislators, businesses, organizations, and property owners.

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