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Eminent Domain, the Fifth Amendment Takings Clause, and the Rule of Law

The Supreme Court is taking aim at takings power abuse

Stephen S. Davis

America's founders imbued principles guarding the rule of law in the Fifth Amendment to the U.S. Constitution. Among these principles is the right to due process of the law and protections against government deprivation of a person's life, liberty, and property without due process. These principles are centuries old, but their meaning is still debated today. In fact, cases currently pending before the Supreme Court are testing how well the Constitution protects a citizen's right to own private property and whether the government can take that property. The real-life issues presented in these cases include: whether a police officer can confiscate a person's car during a traffic stop, even when that person has done nothing wrong; whether the government can take a homeowner's house if the homeowner falls behind in paying taxes, and then sell the house and keep all the sale proceeds, even if the house sells for far more than the amount of taxes due; and even whether a person can sue the government at all when the government takes the person's property without paying compensation. All of these are very accessible examples of the Takings Clause "in action" beyond the words in the Constitution.

The Fifth Amendment

Word for word, the Fifth Amendment may be the Bill of Rights' most powerful paragraph. It guarantees the right to "due process," so that when the government accuses a citizen of breaking the law, the government must provide a fair and open proceeding to adjudicate and prove that accusation, and the government must follow the established rules governing that process. Also secured in the Fifth Amendment is the protection from self-incrimination, the requirement of grand jury indictment for serious crimes, and the right not to be re-prosecuted for the same crime.

Finally, often overlooked, the Fifth Amendment protects individuals' property rights. Property rights are no less important than the other protections afforded by the Fifth Amendment or the other provisions of the Bill of Rights. As the Supreme Court explained, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.... That rights in property are basic civil rights has long been recognized."[1]

An essential protection of property rights is the Fifth Amendment's categorical requirement that when the government takes a person's private property—whether that property is real or personal—for the public good, the government *must* pay "just" compensation. The Takings Clause (also referred to as the

Just Compensation Clause) constitutes the capstone of the Fifth Amendment.

The Government's Power of Eminent Domain

Eminent domain is the government's sovereign power to take an individual's private property for the good of the community. The term was coined by Dutch philosopher, jurist, and statesman Hugo Grotius. In his epic treatise, *On the Law of War and Peace*, written in 1625, Grotius explained that all sovereign governments possessed the power of *dominium eminens* ("supreme lordship") in that the "property of subjects is so far under the eminent control of the state, that the state of the sovereign who represents it, can use that property, or destroy it, or alienate it, not only in cases of extreme necessity … but on all occasions, where the public good is concerned...."[2]

The Takings Clause and Applying the Bill of Rights to the States

The Fifth Amendment's prohibition against taking private property without compensation, like the other provisions of the Bill of Rights, initially only applied to takings by the federal government, not state governments. In fact, the Supreme Court's landmark 1833 decision clarifying this point—that the Bill of Rights only protected citizens from unconstitutional actions performed by the federal government, not actions by state or local authorities—was in Takings Clause case, *Barron v. Baltimore*.[3] And following ratification of the Fourteenth Amendment in 1868, when the Supreme Court began to apply the provisions of the Bill of Rights to state action, it was, appropriately, a Takings Clause case in which the Court first held that a provision in the Bill of Rights applied to the states.[4]

Eminent Domain Abuse and Racism

Both before and after the Civil War, local governments from Manhattan (New York) to Manhattan Beach (California) have employed eminent domain to perpetuate racial segregation and push a greater burden of community improvements upon African American landowners and neighborhoods.

Seneca Village, a small, mostly-Black community established in 1825, once thrived within the area of what is now New York City's Central Park.[5] Although slavery was abolished in New York in 1827, racial persecution persisted, especially in the central city, prompting African Americans to settle in Seneca Village, outside the city. Seneca Village's distance from downtown, and its access to the Hudson River, offered African American families a place of respite from 1825 until 1857.[6] From its "modest beginnings in 1825, the village had grown over three decades to include homes, gardens, a school, cemeteries and perhaps as many as 300 residents."[7]

In 1853, New York State's legislature condemned over 700 acres of land in Manhattan to create Central Park. The condemned land included Seneca Village. By 1857, all residents were forced out, and Seneca Village vanished. Displaced residents were ostensibly compensated for the taking of their property, but the amount of compensation was likely inadequate and far less than "just."

Nearly a century later, and on the opposite end of the country, Charles and Willa Bruce, who were African American, purchased two parcels of beachfront property in Manhattan Beach, California, and turned that property into a resort "that welcomed Black beachgoers from all over Los Angeles and beyond."[8] The successful resort, colloquially known as Bruce's Beach,[9] where patrons enjoyed recreation free of harassment, grew in popularity, enticing more African Americans to move to the area. But in 1924, "prompted by a petition from local white real estate agents and other citizens," the Manhattan Beach City Council voted to initiate eminent domain proceedings to condemn the Bruces' property, so that the city could build a park.[10] Bruce's Beach resort was demolished in 1927, but with Bruce's Beach now gone, the city's urgency for a new park disappeared as well. The land lay vacant for decades, until it was finally converted into a park in 1956.[11]

In 2021, Los Angeles County elected officials initiated a plan to transfer the park land to the heirs of the Bruce family, and

Brittany Murray/The Orange County Register via AP, File

A poster at an April 9, 2021, news conference traces the sequence of events until property taken from Willa and Charles Bruce was returned to their descendants, in Manhattan Beach, Calif.

the state legislature enacted a law lifting restrictions on transferring this government property to private ownership. In 2022, the county executed the transfer of property title to the Bruce family descendants. The Bruce family now leases the property to the county, and the lease agreement enables the Bruce family to require the county to purchase the property from the family for up to $20 million.[12]

The State of California is heralding this approach—reinstatement of title to the Bruce family's wrongfully-condemned property—as an exemplar of government reparations for past racial injustice. Indeed, "[m]any say Bruce's Beach could forge a path for those seeking ways to reckon with our country's history of violently dispossessing Indigenous people and blocking Black people, Japanese Americans, Latinos and many others from building generational wealth."[13]

Susette Kelo's "Little Pink House" and the Meaning of "Public Use"

In its controversial 2005 decision *Kelo v. City of New London, Connecticut*, the Supreme Court allowed government to expand its eminent domain power.[14] The Takings Clause limits the power of eminent domain to situations where the property is taken "for public use." But instead of condemning land for a road, school, or power plant, the City of New London sought to take 115 privately-owned properties, including Susette Kelo's house (which she had refurbished and painted pink), in a plan aimed at revitalizing the city's economically-distressed waterfront and downtown. Central to the plan was a $300 million research facility to be built by Pfizer, Inc., a private rather than public entity. The city expected the development plan to produce 1,000 jobs and generate additional tax revenue.

A divided Supreme Court ruled that the Takings Clause's "public use" requirement was satisfied if the city's economic development plan served a "public purpose," and the Court would defer to the legislature's judgment regarding whether that requirement was met. The Court added that the "public use" requirement is not necessarily violated when the government takes property for a private company because "the government's pursuit of a public purpose will often benefit individual private parties."

Justices O'Connor, Rehnquist, Scalia, and Thomas dissented, criticizing the Court's abdication of oversight of the government's use of eminent domain, stating, "were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff." Polls "showed that over 80% of the public disapproved of the ruling," and as "a result of this upsurge of popular anger, some 45 states have enacted eminent domain reform laws"—no other Supreme Court decision "in all of American history has generated so much state legislation."[15] Five years after the *Kelo* decision was issued, Pfizer pulled out of New London, and the land where Susette Kelo's pink

house once stood was never developed.

Civil Asset Forfeiture and *Culley v. Marshall*

Yes, the police can pull you over and take your car, even if you did nothing wrong. Civil asset forfeiture is a legal mechanism, originating in English common law and codified in the United States, that allows the government (typically law enforcement officers) to seize property (such as a car) that was used in the alleged commission of a crime and to keep that property unless and until the owner can prove the property was unrelated to the crime. Asset forfeiture was employed effectively during Prohibition and became prominent again with the onset of the War on Drugs. Asset forfeiture is especially controversial because the property seized is often not owned by the person committing the crime but is owned by an innocent third party. When the practice of asset forfeiture has been challenged through the years, the Supreme Court explained that the practice only violates the Constitution if the value of the seized asset is "grossly disproportional to the gravity of a defendant's offense."[16]

The Supreme Court is now reviewing a case of asset forfeiture, *Culley v. Marshall*, where two cars were seized by the police. Halima Culley's son was driving her car when he was pulled over and arrested by police for possession of marijuana and drug paraphernalia. The police seized the car during the arrest and filed a civil forfeiture action in state court. It took Ms. Culley 20 months to get her car back through court proceedings, even though her son was never charged with a crime and she was not involved in any way. As her lawyers argued, "[t]his case shows why our Constitution mandates that no state shall deprive any person of property without due process." This case is not seeking to have the Court declare the practice of asset forfeiture unconstitutional; it seeks to impose procedural safeguards, such as expeditious post-seizure retention hearings, to ensure that innocent third parties are not overly harmed by the conduct of others using their property.

Taxes, Takings, and *Tyler v. Hennepin County*

Can the state take your house if you don't pay your taxes? Until the Supreme Court decided *Tyler v. Hennepin County, Minnesota* last year, the answer was yes.[17] In fact, a few states passed laws saying that if a homeowner is delinquent in paying property taxes, the state can foreclose on the house, sell it, and keep all of the sale proceeds, even if the proceeds far outweigh the tax debt.

Geraldine Tyler owned a condominium but owed $15,000 in taxes, penalties, costs, and interest. The county foreclosed on her property and sold it for $40,000. Since Minnesota's delinquent-property-tax statute deemed a taxpayer's entire

property forfeited when the homeowner became delinquent in paying property taxes, the government kept not only the $15,000 to satisfy the tax debt but also the $25,000 in surplus proceeds from the sale. Tyler sued the county, claiming the state's confiscation of the entire value of her property (including her equity in her condo in excess of her tax debt) was an unconstitutional taking that violated the Takings Clause.

A unanimous Supreme Court agreed. The Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," and Tyler, who lost $25,000 more than her tax debt, "made a far greater contribution to the public fisc than she owed."[18] The Court declared, "[t]he taxpayer must render unto Caesar what is Caesar's, but no more."

Devillier v. Texas

Can the government legitimately claim that it is immune from suit under the Fifth Amendment when it takes private property? Sometimes government action invades or burdens, and even destroys, private property, and, not only does the government not offer to pay the property owner for the confiscation of or damage to the property, the government claims it is immune from suit when the property owner sues for "just compensation" under the Fifth Amendment. As this article went to press, the Supreme Court was slated to hear a case in January 2024 brought by over 40 landowners with property on the north side of Interstate 10 in a rural area east of Houston, Texas. In an effort to make I-10 a flood-evacuation route, the Texas Department of Transportation rebuilt the highway by elevating and widening it and "install[ing] a 32-inch impenetrable, solid concrete traffic barrier on the highway's centerline."[19] This essentially converted the interstate into a dam that protected the south side of the median-barrier from flooding by impeding the flow of rainwater across the highway. The result was a devastating flooding of privately-owned property north of the highway, a foreseeable invasion of the property causing significant damage. The landowners sued the State of Texas under the Fifth Amendment (and a similar provision in the state's constitution). The landowners claimed that the burden of being "forced to store the retained waters on their property without their consent or compensation" was an unconstitutional taking of their property.

The state asked the court to dismiss the lawsuit, arguing that a property-taking claim seeking just compensation cannot be brought under the Fifth Amendment because the Fifth Amendment is not self-executing, meaning that in order to be sued, Congress must have passed a statute providing for such a lawsuit to be brought under the Just Compensation Clause. The state further argued that 42 U.S.C. § 1983 (which provides a civil cause of action against a person "who, under color of" state law, deprives a person of a constitutional right) is the only statute by which the landowners could bring a taking claim against the government. And finally, the state argued that because states are not subject to suit under § 1983, the landowners' claims must be dismissed.

The trial judge described the state's argument as "a classic Catch-22" in that it asserts that the landowners "must bring their federal takings claim against the State under § 1983, but such claims are dead on arrival because [the landowners] cannot bring their federal constitutional claims against the State under § 1983." The judge denied the state's motion to dismiss, viewing it as "incredibly myopic," but the court of appeals reversed, agreeing with the state that the Fifth Amendment is not self-executing and holding "that the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state...."[20] Whether or not the Supreme Court will foreclose the landowners' right to sue under the Fifth Amendment, or instead, hold that the Fifth Amendment is, indeed, self-executing, as it has held in prior cases, remains to be seen.[21]

As demonstrated by these cases awaiting decision by the Supreme Court, and cases in recent years, the Fifth

Amendment's protection of private property rights is an indispensable component of the rule of law. As James Madison declared, "[g]overnment is instituted to protect property of every sort.... This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[22] The Fifth Amendment's essential constraints on the government's extraordinary and easily-abused power of eminent domain remains as important today as it has over centuries–truly a fundamental piece of our understanding about the rule of law.

Notes

1. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).
2. Hugo Grotius, *On the Law of War and Peace* (1625) (1901 ed. A.C. Campbell transl.), Book 3, ch. 20 ¶ 7, pp. 387-88, **https://oll.libertyfund.org/title/grotius-the-rights-of-war-and-peace-1901-ed**.
3. 32 U.S. 243 (1833).
4. See *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 258 (1897).
5. See *Before Central Park: The Story of Seneca Village, Central Park Conservancy Magazine* (Jan. 18, 2018).
6. See id.
7. Brent Staples, "The Death of the Black Utopia," *New York Times* (Nov. 28, 2019).
8. Los Angeles County Chief Executive Office, *History of Bruce's Beach*, **https://ceo.lacounty.gov/ardi/bruces-beach.**
9. *Id.*
10. *Id.*
11. See *id.*
12. See *id.*
13. Rosanna Xia, "Bruce's Beach can Return to Descendants of Black Family in Landmark Move Signed by Newsom," *Washington Post* (Sept. 30, 2021).
14. 545 U.S. 469 (2005).
15. Ilya Somin, "The Political and Judicial Reaction to Kelo," *Washington Post* (June 4, 2015).
16. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).
17. *Tyler v. Hennepin County, Minn.*, 598 U.S. 631, 647 (2023).
18. Id. (internal quotation omitted; quoting *Armstrong v. United States*, 364 U.S. 40, 49 [1960]).
19. *Devillier v. Texas*, No. 3:20CV223, 2021 WL 3889487, at *2 (S.D. Tex. July 30, 2021), vacated and remanded, 53 F.4th 904 (5th Cir. 2023), *cert. granted*, No. 22–913, 2023 WL 6319651 (U.S. Sept. 29, 2023).
20. *Devillier v. State*, 53 F.4th 904 (5th Cir. 2023), cert. granted, No. 22-913, 2023 WL 6319651 (U.S. Sept. 29, 2023).
21. See, e.g., *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987) (landowners are "entitled to bring an action in inverse condemnation as a result of the 'self-executing character of the constitutional provision with respect to compensation'...").
22. Saul K. Padover, ed., *The Complete Madison* (1953), pp. 267–68 (published in *National Gazette* (March 29, 1792)) (emphasis in original).

Stephen S. Davis is a partner with True North Law LLC, specializing in Fifth Amendment takings litigation and election law in trial and appellate courts.Prior to private practice, Steve served as an Assistant U.S. Attorney for the Eastern District of Missouri and the Chief Clerk and Administrator of the Missouri House of Representatives.Having a deep interest in Missouri legal history, Steve was selected as a member of the Missouri Humanities Council and State Historical Society of Missouri's "Show-Me Missouri Speakers Bureau," where he speaks across the state to various groups and organizations on Missouri legal history and Missouri election law.

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