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Thesis Statement:
The U.S. Supreme Court's 2005 Ruling on Eminent Domain was Wrong

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Introduction – Scope of the Paper

In 2005 the United States Supreme Court ruled, in a 5 to 4 decision, that the City of New London, Connecticut, had the legal right to use the city's power of eminent domain to take the home of Susette Kelo and give it to another private entity. That ruling was wrong.

This paper will present arguments demonstrating why the majority opinion of the Supreme Court was mistaken, and why the counter-arguments of those who support the majority opinion are outweighed by reason and fairness. The Fifth Amendment to the Constitution provides the primary argument for opposing the ruling since it is crystal clear in its wording that the power of eminent domain is to be for "public use", and any other purpose is unconstitutional. Yet supporters of the ruling argue that "public purpose" is the same as public use.

Additional arguments supporting the thesis that the 2005 Supreme Court ruling was wrong will be explored. Concerns of favoritism for the politically connected, victimization of our more vulnerable citizens and companies, and the threat of the infinite expansion of the ruling thereby placing all private property at risk of being confiscated by all levels of government, will be reviewed. Court rulings will be presented to document why this wayward ruling of our Supreme Court was wrong.

Background Information

Majority Opinion on Kelo v. City of New London (545 U.S., June 23, 2005, No. 04-108) (FN 1)

The United States Supreme Court granted certiorari to hear an appeal by homeowners of a ruling against them by the Supreme Court of the State of Connecticut. The crux of the dispute was whether a city can exercise their power of eminent domain by taking one person's private property and transferring its ownership to another private person or entity, in the name of the seizure being done for a public purpose. The Connecticut Supreme Court had ruled that the city could use the "taking power" granted in the Connecticut Constitution when the end result achieved a public "purpose". In the Kelo case, that public purpose was the economic development of an area of the City of New London, with the main benefactor being the giant pharmaceutical company Pfizer, who wanted to place a research facility on the property.

Kelo's appeal to the U.S. Supreme Court hinged on the question if the city's taking of her property was within the meaning of "public use" as set forth in the "Taking Clause" of the Fifth Amendment to the Constitution. As with the narrowly split ruling by the

Connecticut Supreme Court, 5 of the U.S. Supreme Court Justices (Justices Kennedy, Souter, Ginsburg, Breyer, and Stevens) ruled to affirm the lower court's ruling.

Dissenting Opinions on Kelo v. City of New London

Four of the U.S. Supreme Court Justices (Justices O'Connor, Thomas, Scalia, and Chief Justice Rehnquist) dissented from the majority opinion, with Justices O'Connor and Thomas writing vehement arguments opposing the Court's ruling. The minority justices argued that the ruling was a violation of a strict interpretation of the Fifth Amendment and its meaning of the term "public use". Additional arguments against the ruling were presented, with even a portion of the concurring majority opinion of Justice Kennedy adding fuel to the minority opinion's challenge to the ruling.

Primary Arguments in Support of Thesis Statement:

The Fifth Amendment to the U.S. Constitution: Relevant Analysis

The last portion of the 5th Amendment is known as the Taking Clause. It states "…; nor shall private property be taken for **public use**, without just compensation." (FN 2) It is this clause that provides the authority for government to exercise the power of eminent domain, and it is the term "public use" that is the source of the controversy over the Court's ruling.

A common sense interpretation dictates that the term "public use" means just that, a use that is specifically for the public, such as a public road, public school, or a public park. Extending the definition beyond its obvious meaning is way beyond any conceivable goal of the writers of the Constitution. The majority of the justices stepped outside of the reasonable definition of "public use", and expanded it to include any "public purpose".

Kohl v. United States: Relevant Analysis

Justice Thomas argued that "the Taking Clause is a prohibition, not a grant of power…"(FN 3) and that there is no grant of power for the government to confiscate personal property for any public purpose. In Kohl v. United States, it was argued that the Necessary and Proper Clause (FN 4) stated the government's power to take personal property was to be for needed "forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses" (FN 5). In the 1876 Kohl case, the U.S. Supreme Court clearly defined what was meant by the term "public use" as used in the Fifth Amendment.

Fairness and Justice / Tahoe-Sierra v. Tahoe Regional: Relevant Analysis

In the 2002 case of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, it was stated by the Supreme Court that the foundation of the Taking Clause was

"the concepts of fairness and justice" (FN 6). Confiscating personal property, even with just compensation, and transferring that property to another private person or entity violates that concept of fairness and justice that is self-evident in a logical interpretation of the Fifth Amendment.

Objections to Primary Arguments:

Berman v. Parker: Relevant Analysis

Those who argue in favor of the majority ruling can view legal precedents that support the 2005 Supreme Court ruling. In the case of Berman v. Parker (FN 7), a Washington, D.C. neighborhood that was deemed so dilapidated, it was confiscated through eminent domain from the private owners (including Mr. Berman, who was a department store owner in the neighborhood), and a portion of the land was transferred to private developers. The U.S. Supreme Court affirmed the lower court's ruling that the forced transfer of private property from one party to another private party was justified due to the unsanitary conditions of the entire neighborhood.

Hawaii Housing Authority v. Midkiff: Relevant Analysis

In the U.S. Supreme Court case of Hawaii Housing Authority v. Midkiff, the high court affirmed a Hawaiian state law that allowed for the confiscation of private property and transfer of it to other private parties based on the reasoning that the state law's intention of breaking apart a land monopoly justified the action. The Supreme Court Justices in that case determined that the goal of eradicating the "social and economic evils of a land oligopoly" (FN 8) qualified the taking as a public use, despite the final recipients of the distribution being private citizens.

Reply to Objections:

Misinterpretation of 5th Amendment

The opposition's arguments that Berman v. Parker and Hawaii Housing Authority v. Midkiff provide justification in the 2005 Kelo v. City of New London ruling have used two unique cases that are not comparable to the Supreme Court appeal by Susette Kelo. In the Kelo case, the goal of the City of New London's eminent domain action was to transfer the property to another private entity that would help the city to generate greater tax revenues. In addition to Susette Kelo, 8 other individuals were content with their ownership of the homes, which does not portray a community of unsanitary dilapidated houses as in the Berman case, nor a community living under the thumb of a giant monopolistic landowner as in the Hawaii Housing case. The 2005 Supreme Court majority used the two prior rulings to extend the Fifth Amendment meaning of "public use" to include the term "public purpose", a direct misinterpretation of the Fifth Amendment's Taking Clause.

Reason and Justice / Calder v. Bull: Relevant Analysis

More than 200 years before the Kelo case was presented to the U.S. Supreme Court Justices, another U.S. Supreme Court Justice, Samuel Chase, wrote in the 1798 case of Calder v. Bull that "A law that takes property from A and gives it to B … is against all reason and justice …" (FN 9). Perhaps because he was alive when the Fifth Amendment was written, Justice Chase had a clearer sense of what was meant by the term "public use". Unlike the majority of justices in the Kelo case, Chase did not confuse "public use" with "public purpose", but applied common sense in reasoning that the government's taking of private property to transfer it to another private person, was unjust. It is this straight forward reasoning that dismisses the extension of the rulings on Berman and Hawaii Housing to the Kelo case.

Secondary Arguments in Support of Thesis Statement:

Risk of Favoritism / Eastern Enterprises v. Apfel: Relevant Analysis

In the Kelo case, Justice Kennedy, in his concurring opinion, ironically raised the concern of favoritism occurring as a result of the majority opinion. Justice Kennedy wrote "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." (FN 10). Justice Kennedy cited the case of Eastern Enterprises v. Apfel, where it was implied that Congress had passed legislation that favored a coal miner's union, resulting in the unjust taking of the mine owner's private property. That case stated "… Congress' solution to what it perceived as a grave problem in the funding of retired miners' health care benefits singled out certain employers, such as the company, to bear a substantial financial burden on the basis of conduct that was far in the past and unrelated to any commitment which the employers had made or to any injury which the employers had caused…" (FN 11).

As we have seen so often, government has a tendency to favor certain parties or ideologies over other parties and beliefs, something that has occurred since the days of tribal chieftains, and that will continue to occur in the future. The majority ruling in the Kelo case provides more ammunition to those who seek favoritism from those who are in political power. Vested interests and their lobbyist can use the Kelo case to pursue further transfers of desired property from one private owner to another private owner under the guise of a misinterpretation of the Fifth Amendment's Taking Clause as was done in the Kelo case.

Infinite Expansion of Eminent Domain / Ruckelshaus v. Monsanto: Relevant Analysis

The Kelo decision was wrong because it added fuel to the errant belief by some that the government has nearly unlimited power to confiscate private property and transfer it to another private party. In the Ruckelshaus v. Monsanto case of 1984, the U.S. Supreme laid the groundwork that the Taking Clause of the 5th Amendment applies not only to real

estate as originally envisioned by the authors of the Constitution, but applied it to intellectual property. In Ruckelshaus, the majority of Justices determined that research information (including trade secrets) developed by the Monsanto Corporation for their herbicide called "Roundup", could be shared with competitors in the interest of minimizing research costs for those competitors.

In Ruckelshaus, the U.S. Supreme Court held that "To the extent that appellee (Monsanto) has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment. Despite their intangible nature, trade secrets have many of the characteristics of more traditional forms of property. Moreover, this Court has found other kinds of intangible interests to be property for purposes of the Clause." (FN 12) While the Supreme Court correctly ruled that if the intellectual property is going to be taken from Monsanto, they were entitled to just compensation, however the ruling erred in granting competitors the right to utilize the research results of Monsanto, in essence making Monsanto the research and development department of those competitors. Using both the Kelo ruling and the Ruckelshaus ruling, virtually all private property, both physical and intangible, is now subject to confiscation and transfer from one private owner to another private owner. Once again the 215 year old words of Supreme Court Justice Samuel Chase ring true that "A law that takes property from A and gives it to B … is against all reason and justice …" (FN 13). Using the concept of "public purpose" rather than the correct term and interpretation of "public use", Kelo and Ruckelshaus can be used to eliminate the distinction between private and public property whenever it suits the needs of government, influential special interests, and favored political cronies.

Objections to Secondary Arguments:

Constitution is a Living Document

Those in agreement with the Kelo decision may view our Constitution as a living document that permits the interpretation of the Taking Clause based on the ever changing needs of our society and new situations that had never been imagined by the writers of the 5th Amendment. Hawaii v. Midkiff and Berman v. Parker can be cited as prime examples of why the interpretation of the Taking Clause must view "public use" as also meaning "public purpose". For without extending the definition of public use to include public purpose, the government's ability to correct the social and economic ills in those cases would have been severely hampered.

Public "Use" Equals Public "Purpose" / Fallbrook and Strickley Cases: Analysis

In the 1896 case of Fallbrook Irrigation District v. Bradley, the U.S. Supreme Court ruled in favor of the taking of private land and its transfer to a private corporation, being one of the first examples of the court extending the term "public use" to include a "public purpose" where the end result was allegedly a public benefit. In that case the Justices wrote "The irrigation of really arid lands is a public purpose, and the water thus used is

put to a public use; and the statutes providing for such irrigation are valid exercises of legislative power." (FN 14). The U.S. Supreme Court, in the 1906 case of Strickley v. Highland Boy Gold Mining Company, the Justices concluded that a test of eminent domain requiring "public use" as a test was inadequate. In that case, the justices determined that the definition of public use should be extended to include if the use serves the public good. In Strickley, the Court found that a mine's aerial tramway carrying ore over another person's property was for the public good, and therefore was a "public use". The Justices wrote "In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land." (FN 15) These two cases provide credence to the majority ruling in the Kelo case that "public use" can be extended to include "public purpose, good, and/or benefit".

Reply to Objections of Secondary Arguments:

"Stepping Stone" Logic that Misconstrues the Takings Clause

The arguments that our Constitution's "living document" status permits an extended interpretation of public use in order to combat social injustices or economic ills as was the case with Hawaii v. Midkiff and Berman v. Parker is a "stepping stone" procedure that violates the true meaning of public use. At least in those two cases there were genuine public ills that deserved attention, however in the Fallbrook and Strickley cases, the U.S. Supreme Court truly extended the term public use when they confiscated private property and handed it over to another private owner/corporation. In response to the argument that "public use" can be derived by the extension of its meaning to include "public purpose", two cases need to be examined to refute the opposition's arguments.

99 Cents Only Stores v. Lancaster: Relevant Analysis

In the case of 99 Cents Only Stores v. Lancaster Redevelopment Authority (FN 16), the City of Lancaster had attempted to use the power of eminent domain to force the confiscation of a 99 Cents Only Store so that a Costco Store could expand into its place. The City of Lancaster argued that their eminent domain action would increase the city's tax base, thereby creating a public purpose that justified the use of the eminent domain powers. Thanks to the wise judgment of the District Court, Lancaster's attempt to displace the 99 Cents Only Store was foiled based on the City of Lancaster's inability to demonstrate that the taking would be within the scope of California's Constitution. The Federal District Court concluded that "the Court grants 99 Cents' motion for summary judgment and, accordingly, issues an injunction as described herein." (FN 17) An attempt by the City of Lancaster in Federal Appeals Court to have the district court's injunction against Lancaster dismissed was also rebuffed (FN 18), providing a victory for those who believe the Taking Clause must be limited to actions that result in "public use" of the confiscated property and should not be extended to "public purpose" unless so defined by law.

Missouri Pacific v. Nebraska: Relevant Analysis

The Missouri Pacific Railway Company v. Nebraska case determined that the confiscation of property that is transferred from one private party to another private party is a violation of the Fourteenth Amendment to the Constitution (FN 19), which adds another response to those who argue the Fallbrook and Strickley cases help to justify the Kelo decision. In the Missouri Pacific Railway case, the State of Nebraska attempted to force the railroad company to allow a grain cooperative to build a grain elevator on the railroad's land. The U.S. Supreme Court wisely ruled more than a hundred years ago against the State of Nebraska and that "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." (FN 20)

Challenges Must be Made / 14th Amendment: Relevant Analysis

The 99 Cents Only Stores case demonstrated that "public use" must be the sole determinant of the government's right to take private property. While the Berman v. Parker case and the Hawaii v. Midkiff case had at least some rationale for public good, the Fallbrook and Strickley cases took a leap in logic to consider those courts' rulings were in the true meaning of "public use". The Missouri Pacific case documented that a government's use of the Taking Clause in the Fifth Amendment can result in being overruled by the applicable portion of Section One of the Fourteenth Amendment ("…nor shall any State deprive any person of life, liberty, or property, without due process of law:"). (FN 21) Confiscation of private property that is transferred to another private party can always have a hypothetical public benefit, albeit sometimes a farfetched one. The 99 Cents Only Stores case and the Missouri Pacific case demonstrated that misuse of the Fifth Amendment's Takings Clause must be challenged, and that such opposition can be successful with the application of common sense and the applicable portion of the Fourteenth Amendment.

Conclusion

The cases of Kelo, 99 Cents Only Stores, Berman, and even Ruckelshaus (i.e., the U.S. Government) have one underlying common denominator, the targets of the eminent domain power were the "little guys". In the Kelo case, Susette Kelo and her neighbors were the "David" versus the tandem "Goliaths" of the government of the City of New London and Pfizer. The small by comparison 99 Cents Only Stores took on the city government and the retail Goliath Costco. In Berman, it was a retail store owner and the predominantly lower income residents who took on the city government of Washington, D.C. In Ruckelshaus, the then chief of the U.S. government's Environmental Protection Agency, Ruckelshaus and the other chemical companies were the giant adversaries attempting to take the intellectual property of a smaller giant, the Monsanto Corporation.

In the Kelo case, the majority ruling erred in their interpretation of the Fifth Amendment's Taking Clause. The language in the Taking Clause is simple English that needs no explanation or high court ruling as to what it says. The term "public use" does not mean "public purpose, public good, or public benefit". Arguments in support of the ruling all depend on an unintended expansion of the Taking Clause, something that nearly always depends upon a hypothetical goal being contrived. The Fifth clearly intends that the taking of a private person's property must be put to a public use, such as a road, park, or government building, as was noted in the Kohl case. Even in his Opinion of the Court on the Kelo case, Justice Stevens alluded to an understanding of the unfairness in taking private property and giving it to another private person or entity, and the ability of State governments to pass legislation that would prevent such injustices. Justice Stevens wrote "In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." (FN 22)

As Supreme Court Justice Chase stated in the Calder case, taking a property from A and giving it to B "… is against all reason and justice…". (FN 23). Those words, "reason and justice", are ample explanations as to why the Kelo decision was wrong. When coupled with the risks of favoritism as discussed by Justice Kennedy in his concurring opinion to the Kelo case, it is evident that the Kelo case has essentially eliminated the gap between what the government can and cannot confiscate from private citizens and give to other private entities, violating the sanctity of private property and our rights under the Fifth Amendment.

Endnotes

1. Kelo v. City of New London (545 U.S., June 23, 2005, No. 04-108)
2. "Taking Clause", Fifth Amendment to the Constitution of the United States
3. Kelo v. City of New London (545 U.S., June 23, 2005, No. 04-108)
4. "Necessary and Proper Clause", Article One, Section 8 of the Constitution of the United States
5. Kohl v. United States (91 U.S. 367, 1876)
6. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (535 U.S. 302, 2002)
7. Berman v. Parker (348 U.S. 26, 1954)
8. Hawaii Housing Authority v. Midkiff (463 U.S. 1323, 1983)
9. Calder v. Bull (3 U.S. 386, 1798)
10. Kelo v. City of New London (545 U.S., June 23, 2005, No. 04-108)
11. Eastern Enterprises v. Apfel (524 U.S. 498, 1998)
12. Ruckelshaus v. Monsanto (467 U.S. 986, 1984)
13. Calder v. Bull (3 U.S. 386, 1798)
14. Fallbrook Irrigation District v. Bradley (164 U.S. 112, 1896)
15. Strickley v. Highland Boy Gold Mining Company (200 U.S. 527, 1906)

16. 99 Cents Only Stores v. Lancaster Redevelopment Agency (U.S. District Court, 237, 1123, 2001)
17. Ibid.
18. 99 Cents Only Stores v. Lancaster Redevelopment Agency (U.S. Court of Appeals 60 Fed. Appx., 123, 2003)
19. "Due Process Clause", 14th Amendment to the Constitution of the United States
20. Missouri Pacific Railway Company v. Nebraska (164 U.S. 403, 1896)
21. "Due Process Clause", 14th Amendment to the Constitution of the United States
22. Kelo v. City of New London (545 U.S., June 23, 2005, No. 04-108)
23. Calder v. Bull (3 U.S. 386, 1798)