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**Eminent Domain and Private Property Rights:  
Significant Legislation,  
Administrative Actions, and  
Court Cases**

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## Introduction

The first recognition of personal property rights in the contemporary western world was the Magna Carta. It is generally regarded as the first property deed. In the Magna Carta, the king deeded over to individuals land tracks complete with assurances that no future king could

reverse the deed. This deed contained a bundle of rights of ownership that included the rights to possess, use, occupy, transfer and encumber.

By the time of America's founding, personal property rights became recognized as the primary right without which all other rights will fail. People with personal property rights are not only allowed the use their reason, labor and talents, but are entitled to the benefits that their reason, labor, and talents produce.

In America, for the first time in history, individuals possessed rights; Rights to their reason, talents, work and to the fruits of their reason, talents and work. Government was instructed to preserve individual rights, the people delegated powers to the Government, not the reverse.

The basic right of personal property is what undergirds the other rights. Without personal property rights, all others soon fail. The right of personal property is the right of an individual to pursue his own goals, voluntarily, by whatever legal means he deems best to further those goals. The right to property means that man has the right to take actions to achieve property ownership. It does not mean man is guaranteed property ownership via confiscation or devaluation of other's property.

The right to own property is not just a right to own an object, but more importantly includes the right to take actions regarding that object. The bundle of rights includes the right to possession, the right to occupy/use, the right to transfer, the right to encumber, and the right to exclude others.

A key ingredient to using personal property rights is the ability to voluntarily enter into contracts and transactions. The individual is free to construct and enter into a legal agreement with a party of his choice. The individual parties to that agreement are entitled to enjoy the provisions of that contract, whether others agree with those terms or not. Individuals have the right to their decisions and are entitled to the proceeds or losses thereof.

## SUMMARY OF ACTIONS

### **DARTMOUTH COLLEGE V. WOODWARD (1819)**

The Constitution forbids states to pass laws impairing contract obligations (contracts clause), at the time it was understood to pertain to contracts between natural people. The founders included this provision having witnessed contracts being interfered with by the enactment of stay laws, legal tender laws and other legislation for the benefit of insolvent debtors. In *Fletcher v. Peck* (1810) the court held the Granting of land, even if under government scandal, is a contract and cannot be rescinded by the state after the land has passed into the hands of an innocent buyer.

In the Dartmouth College case the court held that a corporation is an individual entity protected by the Constitution and its contracts may not be impaired by legislative action. The economic outcome of this holding was to confirm and assure people who invested money in corporate enterprises that the corporation would be free from legislative interference. It ended up encouraging the expansion of business in railroad construction, insurance, industry and commerce.

**BARRON V. BALTIMORE (1833)** After the passing of the Bill of Rights it became argued that the guarantees embedded in the Bill of Rights should be considered as restricting both the Federal and State governments. This was the first court case to address this argument.

The City of Baltimore had diverted natural streams during the paving of its streets. Because of this, sand and gravel were deposited at and near Barron's wharf leading to waters too shallow for ships to enter and dock. The wharf had the deepest waters in the harbor until this happened. The shallow waters rendered the wharf essentially useless. Initially, Barron won and was awarded \$4500, but the state appealed and won in the appellate court and a writ of error was sent to the US Supreme Court.

Mr. Barron maintained that the 5<sup>th</sup> Amendment to the Constitution against taking of private property for public use without just compensation should pertain to the Federal and State Government. Chief Justice Marshall delivered the opinion of the court. The court

maintained that the US Constitution was written by the people to restrain the Federal Government. It did not pertain to the States because the people reserved the right to construct state constitutions; therefore the 5<sup>th</sup> Amendment of the US Constitution was a restraint on the Federal Government only. The court declared that the people of a state may add a similar provision to their state constitution if they so choose. The court held they had no jurisdiction and dismissed the case.

**HOMESTEAD ACT OF (1862)** Provided that any person 18 years of age or older, who had never taken up arms against the US, could claim a homestead. Once a person claimed their homestead they had to work the land for 5 years and build a structure. Once they had met this provision they could file for title and own the land. The Homestead Act was only available to persons who were not slave owners and did not owe allegiance to a foreign power.

*"You make the settler on the domain, a better citizen of the community. He becomes better qualified to Discharge the duties of freeman. He is, in fact, the representative of his own homestead, and is a man in the enlarged and proper sense of the term. He comes to the ballot-box and votes without the fear or the restraint of some landlord. After the hurry and bustle of election day are over, he mounts his own horse, returns to his own domicile, goes to his own barn, feeds his own stock. His wife turns out and milks their own cows, churns their own butter; and when the rural repast is ready, he and his wife and their children sit down at the same table together to enjoy the sweet product of their own hands, with hearts thankful to God for having cast their lots in this country where the land is made free under the protecting and fostering care of a beneficent Government."*

Andrew Johnson

US Senator 1856-1862

US Vice President 1864-1865

US President 1865-1869

**EUCLID V. AMBLER REALTY COMPANY (1926)** – Municipal zoning was fairly new in the US, only about 25 years old. The village of Euclid passed a zoning ordinance establishing 6 classes of use. Ambler Realty Company owned property in several of the use districts. Ambler Realty had anticipated using the property for industrial purposes at a market value of \$10,000 per acre. The zoning ordinance restricted industrial uses to the 6<sup>th</sup> use district only. Most of Ambler Realty's land was in the residential zoned areas reducing the land value to \$2500 per acre. The company sued the village of Euclid alleging that their property was being taken without due process as required under the 14<sup>th</sup> Amendment.

The lower court found in favor of Ambler Realty stating that the zoning ordinance did in fact constitute a taking. The village of Euclid appealed to the Supreme Court and the Supreme Court held in favor of Euclid. The court held that the village had the right to effect use districts under their police powers and that the zoning was not arbitrary and therefore was not unconstitutional. The Court noted that Ambler Realty had brought the case under the 14<sup>th</sup> Amendment's due process clause. In order to win their case, Ambler Realty would have to prove the ordinance was discriminatory and had no rational basis. The court held the ordinance was neither discriminatory nor irrational.

**FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE V. COUNTY OF LOS ANGELES AND NOLLAN V. CALIFORNIA COASTAL COMMISSION (1987)** Supreme Court ruled that when property is so excessively regulated that it suffers a loss in value or the state cannot prove a legitimate public purpose, the property owner must be compensated as this action constitutes a taking.

**Mesa v. Bailey Brake Shop (2001)** The City of Mesa, AZ wanted to condemn and seize Bailey brake shop, a family run brake shop that had been in the same location for over 30 years. The City had been approached by a hardware store who wished to locate to the brake shop location. The City agreed to condemn the brake shop and give the land to the hardware as a better use in the City's development plan. Bailey took the City to court charging the City with violating the Arizona Constitution which prohibits the use of eminent domain in condemning property for private use. The Arizona Court of Appeals found against the City of Mesa and sighted the inability to find a public benefit.

**KELO V NEW LONDON (2005)** This case centered around the use of eminent domain to transfer private property from one owner to another owner in order to promote economic development. The court held that the general public benefits from economic growth qualified private redevelopment as a public use under the Connecticut constitution.

Pfeizer approached the town of New London, Connecticut and requested the town condemn a

specific neighborhood next to their building so that a parking lot could be built. Pfizer also promised to build offices, a small shopping area, hotel and an urban village overlooking the water thereby increasing the town's revenue from new taxes. The town agreed to waive taxes to Pfizer for 10 years and condemned the neighborhood in the name of the public good.

Previous to KELO there had been similar rulings from the courts, but they had been within the context of eliminating a social harm such as crime ridden, blighted areas. In KELO there was no public harm asserted. The town wanted to increase its tax revenues and attracted a wealthier class instead of the existing lower middle class homeowners.

#### **City of Tempe v McGregor (2005)**

Desert Composite and other manufactures had businesses on a County Island next to Tempe. A local private developer spoke with the City of Tempe officials and proposed the City create a redevelopment agency, annex the county island, condemn the property, install infrastructure such as streets and sewers so that the developer could build a shopping center. The City agreed and sought bids for the re-development area, the private developer's bid won and condemnation proceeded. The property owners went to court, sued and won in Superior Court based on the precedent of Bailey Brake Shop. The City appealed to the Arizona Supreme Court who declined to hear the case.

**SACKETTS V EPA (2005)** - In 2005 the Sacketts purchased a residential lot in a residential lake neighborhood for \$23,000. Several area residents had built and were living in their houses. The Sacketts wanted to build a house similar to and consistent with the other homes in the area. Their lot was separated from the lake by a road and another house. They obtained a permit and began building their house. At the time of foundation completion, the EPA notified the Sacketts their land was now considered a wetlands. The Sacketts were ordered by the EPA to return the property to its original condition and levied million of dollars in fines.

The Sacketts sued, but the 9<sup>th</sup> Circuit Court ruled the Sacketts were not entitled to have a trial until they went through the approval process for wetlands and got rejected, which the court admitted was the likely outcome.

The Sacketts appealed to the US Supreme Court and in an unanimous decision, the court ruled in favor of the Sacketts. The ruling stated that land owners have a right to a meaningful judicial review when land is taken by the EPA through a declaration. The court further

held that the fines levied by the EPA of \$75,000 per day was not legitimate.

**Proposition 207 Arizona – Private Property Rights Protection Act (2006)** – In response to Kelo v. New London, Mesa v. Bailey’s Brake Shop, Tempe v. McGregor, numerous other court cases and the increasing tendency of Government entities to form redevelopment agencies in order to declare properties “blighted” for the purposes of eminent domain proceedings leading to the property seized being given to another private party for development so the government entity would realize increased tax receipts, Proposition 207 tightened the definition of “blight” and outlawed eminent domain being used solely for economic development.

*A. The people of Arizona find and declare:*

*1. Article 2, section 17 of our State Constitution declares in no uncertain terms that private property shall not be taken for private use.*

*2. Our Constitution further provides that no person shall be deprived of property without due process of law.*

*3. Finally, our Constitution does not permit property to be taken or damaged without just compensation having first been made.*

*4. Notwithstanding these clear constitutional rights, the state and municipal governments of Arizona consistently encroach on the rights of private citizens to own and use their property, requiring the people of this State to seek redress in our state and federal courts which have not always adequately protected private property rights as demanded by the State and Federal Constitutions. For example: (Court cases and actions sighted)...*

*B. Having made the above findings, the people of Arizona declare that all property rights are fundamental rights and that all people have inalienable rights including the right to acquire, possess, control and protect property.*

*Therefore the citizens of the State of Arizona hereby adopt the Private Property Rights Protection Act to ensure*

*that Arizona citizens do not lose their home or property or lose the value of their home or property without just compensation. Whenever state and local governments take or diminish the value of private property, it is the intent of this act that the owner will receive just compensation, either by negotiation or by an efficient and fair judicial process...*

## **JOINT REPORT OF THE CLEVELAND FED AND THE US TREASURY (2010) -**

In a joint meeting, a report was issued with suggestions for alleviating the foreclosure and distressed real estate supply. Fannie Mae, Freddie Mac and HUD all faced large numbers of foreclosures contributing to a loss in property values. The purpose of the meeting was to come up with ideas to stabilize neighborhood real estate values. There were three programs proposed: bulk sales of foreclosed properties to investment groups, entity run rental programs and NSP (Neighborhood Stabilization Programs).

The problem identified by the committee was the inability of the government entities to pre-select the best foreclosure properties for their inventories. Because foreclosure laws are state specific, the federal entities were forced to wait for the foreclosure process to conclude before they took possession of properties. This led to some of the best properties being purchases by individuals.

The committee determined that if government entities were able to seize the best properties prior to the completion of foreclosure, the entity’s programs would have the best inventory making their portfolios more valuable. In order to accomplish this, the Federal Reserve requested HUD redefine the words “abandoned” and “foreclosed”. The redefinition meant that “abandoned” now means a property owner is 90 days or more late paying property taxes and “foreclosed” means the property owner is 90 days or more late in paying his loan payment. This redefinition now allows Fannie Mae, Freddie Mac, HUD and local government agencies participating in NSP programs to strategically shop for houses, declare them abandoned or foreclosed, and seize them.

## **COMMUNITY REDEVELOPMENT AGENCIES (CALIFORNIA 2011)**

Community redevelopment agencies throughout California had been declaring “blighted” areas, seizing properties and giving the properties to private

developers. One of the most egregious cases was in National City. National City declared 2/3 of its City blighted for purposes of its redevelopment agency. In 2011 the State passed a law eliminating redevelopment agencies. Redevelopment agencies took the State to court saying it was unconstitutional for the State to eliminate the agencies. The Court ruled against the agencies holding that if the legislature has the ability to create an agency, then they have the ability to eliminate it as well.