The Volokh Conspiracy

Supreme Court Refuses to Hear Columbia University Takings Case

Ilya Somin • December 15, 2010 1:02 am

Sadly, the Supreme Court has refused to hear the Columbia University blight takings case. This New York state supreme court decision was a particularly egregious instance of the abuse of "blight" condemnations to take property that was not blighted in any meaningful sense and transfer it to a powerful private interest group. I wrote an amicus brief on behalf of the Cato Institute, Institute for Justice, and the Becket Fund for Religious Liberty urging the Court to take the case. As we pointed out in the brief, the case represented a valuable opportunity for the Court to clear up the massive confusion in state and federal courts over the issue of what qualifies as an unconstitutional "pretextual taking" — a condemnation where the official rationale is a mere pretext for a scheme to benefit a private party. Even in *Kelo v. City of New London*, the Supreme Court emphasized that such pretextual takings are still forbidden by Public Use Clause of the Fifth Amendment. But it gave very little guidance on the question of what counts as "pretextual."

I share Megan McArdle's frustration about the Court's refusal to take the case. But I do quarrel somewhat with her lament that "this is an issue that only fires up libertarians." Among the amicus briefs urging the Court to take the case was this one, by liberal Democratic New York state Senator Bill Perkins, a prominent critic of eminent domain abuse in the state. The Becket Fund, one of my own clients in this case, is certainly not a libertarian organization. More broadly, among those strongly opposing the *Kelo* decision were such liberal groups and activists as the NAACP, the Southern Christian Leadership Conference, Ralph Nader, Howard Dean, and Representative Maxine Waters, as well as various conservatives. It is certainly true that libertarians have been the leaders in the

campaign to protect property rights against eminent domain. But concern about the issue is hardly limited to us, and it is not too late to form a broad cross-ideological coalition to address it.

Categories: Blight, Eminent Domain, Kelo, Post-Kelo Reform, Property Rights

17 Comments

1.

***Kevin P.* says:**

Will the broad cross-ideological coalition include the four liberals on the Supreme Court? (Quote)

December 15, 2010, 7:50 am

2.

***neurodoc* says:**

Boy, it is a strange group of bedfellows that includes both Ilya Somin and Maxine Waters. (Quote)

December 15, 2010, 9:13 am

3.

***OrenWithAnE* says:**

It's too soon after Kelo to start asking the Court to rework the standard. (Quote)

December 15, 2010, 9:49 am

4.

***A. Criminal* says:**

> OrenWithAnE: It's too soon after Kelo to start asking the Court to rework the standard.

They already decided that "public" actually means "private", and that the gov't owns all real property as long as the property is described with some popular buzzwords.

"Say something once, why say it again?" (Quote)

December 15, 2010, 10:29 am

5.

***Guy* says:**

> **A. Criminal**:
> They already decided that "public" actually means "private", and that the gov't owns all real property as long as the property is described with some

> popular buzzwords."Say something once, why say it again?"

What buzzwords are you talking about? Blight? I'm pretty sure they said that the property doesn't have to be blighted. The problem I have with the rule that "public use" means "owned by the state" is how easy it is to circumvent, the state could simply sell the property, so I'm guessing the alternative rule must additional prongs.

Of course, there's also the textual problem, namely that if the land isn't taken for a public use, then the Takings Clause doesn't apply by its own terms, so compensation isn't even required? It's hard for me to read the Clause as imposing special restrictions on the use of eminent domain beyond requiring just compensation, unless it's the Fifth Amendment itself that is the source of the eminent domain power for the federal government. (Quote)

December 15, 2010, 11:01 am

6.

***Joseph Slater* says:**

This isn't my area, but one could imagine two types of coalitions / opponents of a particular taking. The first argues "this taking, and most-all takings similar to it, are all *unconstitutional*." The second argues, "this taking may be constitutional, but it's bad policy, so let's try to convince policymakers not to do it." (Quote)

December 15, 2010, 11:03 am

7.

***mark* says:**

This comment is a bit tangential but I just read the annual Harv L Rev issue concerning the last Supreme Court term and the discussion of McDonald v City of Chicago advocates for overruling the Slaughterhouse Cases; reinvigorating the privileges and immunities clause to protect economic liberty and basically hearts Lochner. I was quite surprised to find that stance published in Harv L Rev, to put it mildly. (Quote)

December 15, 2010, 11:04 am

8.

***Guy* says:**

> **Guy**: Of course, there's also the textual problem, namely that if the land isn't taken for a public use, then the Takings Clause doesn't apply by its own terms, so compensation isn't even required? It's hard for me to read the Clause as imposing special restrictions on the use of eminent domain beyond requiring just compensation, unless it's the Fifth Amendment itself that is the source of the eminent domain power for the federal government.

To be clear, if it did impose such restrictions, the literal reading would be absurd, so we would have to assume that takings that aren't for a public use are prohibited. My

point is just that it seems like the words "public use" are describing or encompassing, rather than defining or limiting, the scope of eminent domain. (Quote)

December 15, 2010, 11:05 am

9. ***Wednesday round-up : SCOTUSblog*** **says:**

December 15, 2010, 11:13 am

10. ***fwb*** **says:**

Prior to progressives taking over, folks, including judges, in this country knew that public use was use by the public. It was agreed in many writings from the 19th century that it was flat out WRONG to take from one private party and give to another.

But we have progressed and everyone can be screwed. (Quote)

December 15, 2010, 11:36 am

11. ***Gordo*** **says:**

It seems to me that, for the Court to take this case, it would not only be revisiting Kelo, but would be expanding the reach of Kelo from takings to benefit private profit-making corporations to takings that benefit private non-profit entities that presumably serve a greater public good than the public good served by a profit-making corporation (although I know any good libertarian will disagree with that assumption). (Quote)

December 15, 2010, 11:39 am

12. ***rb1971*** **says:**

I'm far from a libertarian but I feel Kelo was wrongly decided and I get pretty fired up when I hear about these sort of taking that are clearly geared to benefit politically connected interests.

There is a good case for a constitutional amendment in this case that would be likely to gain widespread support — much more likely to be successful than repealing the 17th amendment or that (weird) proposal to allow 2/3 of states to annul federal laws. (Quote)

December 15, 2010, 12:58 pm

13. ***rb1971*** **says:**

I'm far from a libertarian but I feel Kelo was wrongly decided and I get pretty fired

up when I hear about these sort of taking that are clearly geared to benefit politically connected interests.

There is a good case for a constitutional amendment in this case that would be likely to gain widespread support — much more likely to be successful than repealing the 17th amendment or that (weird) proposal to allow 2/3 of states to annul federal laws. (Quote)

December 15, 2010, 12:58 pm

14.

***Dilan Esper* says:**

> **Guy**:
> What buzzwords are you talking about?Blight?I'm pretty sure they said that the property doesn't have to be blighted.The problem I have with the rule that "public use" means "owned by the state" is how easy it is to circumvent, the state could simply sell the property, so I'm guessing the alternative rule must additional prongs.Of course, there's also the textual problem, namely that if the land isn't taken for a public use, then the Takings Clause doesn't apply by its own terms, so compensation isn't even required?It's hard for me to read the Clause as imposing special restrictions on the use of eminent domain beyond requiring just compensation, unless it's the Fifth Amendment itself that is the source of the eminent domain power for the federal government.

I think the best reading of the Fifth Amendment is that eminent domain was always conceived as a sovereign power to take property for public use. There are OTHER powers (i.e., taxation and spending) that the government can use to take wealth and redistribute it to somebody else, but eminent domain is traditionally about things like infrastructure and federal buildings and military installations and the like. That's why the power is so important– you don't want some landowner to be able to hold out and prevent the construction of a fort that is necessary for the common defense or to be able to extort a ridiculous amount of money to buy him or her off. The landowner gets just compensation, no more, and has to sell.

The Fifth Amendment both recognizes the power (eminent domain comports with due process) and recognizes its limits (the government can only do it if the taking is for public use and just compensation is paid). If the limits are not respected, the taking would be a deprivation of property without due process of law.

Thus, the dissenters were right in Kelo. I probably wouldn't have gone quite as far as Thomas– Midkiff, for instance, strikes me as rightly decided given the pretty unusual facts of the case– but Kelo itself is an outrage. Under no reasonable understanding of the Constitution should the government have the power to kick people out of their homes so that it can make corrupt deals with local developers. In that situation, let the developers deal with the holdouts and get extorted. Or let the government build and operate the development itself. (Quote)

December 15, 2010, 2:05 pm

15.

***Guy* says:**

> **Dilan Esper**:
> I think the best reading of the Fifth Amendment is that eminent domain was always conceived as a sovereign power to take property for public use. There are OTHER powers (i.e., taxation and spending) that the government can use to take wealth and redistribute it to somebody else, but eminent domain is traditionally about things like infrastructure and federal buildings and military installations and the like. That's why the power is so important– you don't want some landowner to be able to hold out and prevent the construction of a fort that is necessary for the common defense or to be able to extort a ridiculous amount of money to buy him or her off. The landowner gets just compensation, no more, and has to sell.The Fifth Amendment both recognizes the power (eminent domain comports with due process) and recognizes its limits (the government can only do it if the taking is for public use and just compensation is paid). If the limits are not respected, the taking would be a deprivation of property without due process of law.Thus, the dissenters were right in Kelo. I probably wouldn't have gone quite as far as Thomas– Midkiff, for instance, strikes me as rightly decided given the pretty unusual facts of the case– but Kelo itself is an outrage. Under no reasonable understanding of the Constitution should the government have the power to kick people out of their homes so that it can make corrupt deals with local developers. In that situation, let the developers deal with the holdouts and get extorted. Or let the government build and operate the development itself.

As a policy matter, I don't think takings like the one at issue in Kelo are a good thing, but I'm less convinced about the Constitutional argument. Yes, eminent domain is traditionally for infrastructure and government property, but where is the line drawn? What about seizing property for a privately owned and operated hydroelectric dam? What about a federal hydroelectric dam, which is later privatized? Are you okay with condemning property that is "truly" blighted? Isn't that an inherently relative measure? I guess what I'm asking is, how would you articulate the test? Obviously a taking for no reason other than to benefit the recipient of the land is impermissible, I don't think anyone has suggested otherwise, but you seem to concede that a taking where the property reaches a private party can at least *sometimes* be justified.

I was also unconvinced by Justice Thomas' dissent, he had little authority to support his more narrow reading of "use", and the Clause seems to emphasize the compensation more than the use. Yes, it assumes the use will public, and if it were not, it would be a violation of SDP (even the proto-SDP that existed at the time of the framing), but the clause itself does not explicitly say that a taking *must* be for public use, which makes me think that the Clause was not intended to emphasize the narrowness of permissible uses. What would you say is the best authority discussing the substantive limits of the scope of eminent domain at common law?

Justice Thomas cites to Blackstone... who has little to say on the issue (and cites around some awkward language emphasizing that the authority to judge the common good is vested in the "legislature alone" and could not be trusted to any

"public tribunal" — that would have looked bad in his opinion!). This makes me think that there is no such authority, otherwise Justice Thomas would have found one. (Quote)

December 15, 2010, 2:49 pm

16. ***The Florida Eminent Domain Blog » Blog Archive » U.S. Supreme Court Declines to Hear Columbia University Eminent Domain Case* says:**

December 15, 2010, 3:02 pm

17. ***MDT* says:**

Guy,

Surely the reason the clause doesn't explicitly say that a taking *must* be for public use is that the surrounding language makes the intent obvious. Unless you want to read the text as saying that the government's confiscating A's property and giving it to B *without* compensation is totally cool unless B is the government, in which case it has to pay up ...

As to your examples, a commenter on Megan McArdle's blog offered a rule that seems to me to cover most of the nasty cases. It was something like this: If a government condemns a property, it should hold title to it; if it does subsequently sell it, any profits (apart from physical improvements) should be paid to the original owner(s) or heirs thereof.

Obviously, not a rule of constitutional interpretation, but something that would need to be enacted into law. But I like it. (Quote)

December 15, 2010, 3:04 pm