The Volokh Conspiracy

Our Amicus Brief Urging the Supreme Court to hear the Columbia University "Blight" Takings Case

Ilya Somin • October 28, 2010 10:58 am

I recently wrote an amicus brief urging the Supreme Court to hear the Columbia University blight takings case, on behalf of the Institute for Justice (the public interest law firm that litigated *Kelo v. City of New London*, among many other important property rights cases), The Becket Fund for Religious Liberty, and the Cato Institute. The brief is available here. As I explained in this post, the New York Court of Appeals' decision in the Columbia case is an extreme example of a very common problem: the use of dubious "blight" condemnations to transfer property from the politically weak to the locally powerful interest groups — in this case a major university.

The case also represents an important opportunity for the Court to address a major unresolved issue in eminent domain law. In *Kelo*, the majority ruled that "economic development" counts as a public use that justifies the use of eminent domain to transfer property to private parties. But the Court also noted that "pretextual" takings — condemnations where the official rationale is "a mere pretext.... when [the] actual purpose was to bestow a private benefit" — are unconstitutional. Unfortunately, the Court was extremely unclear about what qualifies as a pretextual taking. As we explain in Part I of the brief, lower federal courts and state supreme courts have been all over the map in trying to develop rules for what counts as a pretext. The New York Court of Appeals decision in the Columbia case is at an extreme end of a continuum, defining pretext so narrowly that it is almost impossible to imagine a successful pretext case. Other courts —

including the supreme courts of Pennsylvania, Hawaii, Rhode Island, and the District of Columbia, and the federal Ninth Circuit — have defined pretext more broadly. But they disagree among themselves about what kind of evidence matters.

The Columbia case is particularly notable because it features all four of the factors that the Supreme Court and various lower courts have said might prove the presence of a pretextual taking: evidence of pretextual motive, benefits that flow primarily to a private party, an identifiable private interest that benefited from the taking whose identity was clear in advance, and the absence of a thorough and unbiased planning process. For details, see pp. 12–18 of the brief. For this reason, it's a great opportunity for the Supreme Court to determine how important each factor is, and establish a clear rule for lower courts to follow.

Legal journalist Damon Root, who has written several articles about the case, has a good discussion of its connection to the pretext issue here (though he errs slightly in regarding Justice Kennedy's concurring opinion in *Kelo* as binding, since Kennedy also joined the majority opinion; regardless Kennedy is certainly a key swing voter on property rights issues).

Ilya Shapiro (no relation), who helped out with the brief on behalf of Cato, has a post about it here.

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

2 Comments

1. ***AJK* says:**

   Why we think Ilya Shapiro was your relation? (Quote)

   October 28, 2010, 11:24 am

2. ***greg* says:**

   I enjoy these blogs because most lawyers and most cases I research are well reasoned. Why these cases reach the level they do is baffling to me, until I realize that the lower courts seem to kick things upstairs, allowing flawed basis to get traction. But more importantly lower legislative bodies, cities, counties, states should know better than to seize property for a "non-public" use. Do the lawyers that advise them not know better? (Quote)

   October 28, 2010, 11:50 am