



Supreme Court of the United States

Shirley Roth Sandberg v. City of Burlington

By Evan O'Brien

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 08-011

SHIRLEY ROTH SANDBERG

Plaintiff-Appellee

v.

CITY OF BURLINGTON

Defendant-Appellant

Prior History: Appeal from the United States District Court for the Southern District of Vermont.

Before SONIA SOTOMAYOR, PETER W. HALL, and DEBRA ANN LIVINGSTON,
Circuit Judges

OPINION

PETER W. HALL, *Circuit Judge*, delivered the opinion of the Court:

This case comes to us from the United States District Court for the District of Vermont, based in Burlington.

It presents the following constitutional question: Does a government seizure of private property for the purposes of expanding the campus of a private college satisfy the "public use" requirement of the Takings Clause of the Fifth Amendment?

I.

Burlington (hereafter "the City") is the largest city in the state of Vermont, with a population of nearly 39,000. St. John's College (hereafter "the college") is located within the city limits, roughly one-half mile northwest of the city's downtown area. The college was founded by private charter in 1938 as an educational alternative to the state's most prominent public university, the University of Vermont, which is also located in Burlington. In 2004, the college had an enrollment of 2,300 undergraduate and graduate students and its campus spanned roughly 450 acres (~1.82 km²).

A.

That year, the college's Board of Trustees approved a campus-expansion plan, which aimed to incorporate 40 acres of abutting lands, located on Lake Champlain, to the school's campus. The purpose of this expansion, as far as the record shows, was to construct new classrooms, laboratories, and one more full-size dormitory for undergraduates. As a result of this expansion, the college predicted it could increase the undergraduate student population by roughly 10% (60 new students on top of the 2004 average of 600 per year.)

The Board targeted several square blocks on the banks of Lake Champlain for acquisition and began buying up the plots of land from willing sellers. By 2007, it had made arrangements with the owners of almost all of the plots of land without turning to the municipal government for assistance.

Petitioner Shirley Roth Sandberg was one holdout landowner, who refused to sell her property to the college despite its offers. She owned a two-story row-house on London Street, located squarely within the Board's target area, and a two-minute walk from the Lake. She lived in the second floor of the house, and

maintained a dry-cleaner business on the ground floor, of which she was the proprietor.

After Sandberg refused to sell to the college, the college appealed to the City to exercise its power of eminent domain to condemn Sandberg's property and force her to sell. The thirteen-member Burlington City Council voted 8-5 to condemn Sandberg's land, and submitted the dispute to an independent arbiter to determine the compensation she would receive. (At no point during this litigation did Sandberg challenge the arbiter's determination of the property value. For this reason, we defer to the District Court's conclusion that the "just compensation" requirement of the Takings Clause is not implicated in this case.)

After the City served its eviction notice to Sandberg, she filed a suit in Federal District Court, claiming that the City exceeded its authority in condemning her property for the purpose of expanding the campus of a private college. She claimed that the opportunities afforded by a private college did not constitute a sufficiently public use for the government to discharge its eminent domain power.

Relying on the United States Supreme Court's decision three years ago in *Kelo v. New London* (2005), the District Court held that such a taking did constitute public use within the meaning of the Fifth Amendment and thus upheld the taking. Sandberg appealed to this Court of Appeals.

After review of her appeal, we now reverse the judgment of the District Court and hold that the City's taking of Sandberg's property was unconstitutional.

II.

The Fifth Amendment to the federal Constitution provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall any private property be taken for public use, without just compensation.*" (Emphasis added)

Sandberg's claim implicates the last clause of this amendment, which is known as the "Takings Clause." This clause, as it has been interpreted by this Court and the Supreme Court over two centuries, has always guaranteed that individual property will not be taken away arbitrarily. Two of the most notable portions of this clause are the "public use" and "just compensation" requirements it involves; for the government to take private property, it must satisfy both of these requirements. Indeed, until recently, most eminent domain disputes concerned the "just compensation" requirement of the clause. It was only within the last half-century that the "public use" requirement generated controversy in the federal courts.

A.

Throughout the history of the early republic, the government's power of eminent domain was understood to be limited to public projects, such as the building of roads, railroad lines, and more recently, airports and interstate highways. Thus, private property could be seized if the land was to be converted into a public benefit, accessible by the citizenry. For example, the federal government used its takings power to connect the then-forty-eight states with an intricate highway system during the 1950s. After condemning private property owned by holdouts, the government cleared the land and paved roads, which then became accessible to all American motorists. The federal government still owns a substantial portion of the highways today. That the land would continue to be owned by the public and maintained with public funds and the input of public officials after the taking was a criterion for satisfying the "public use" standard.

In addition to the requirement that the land be maintained by the public, it was also understood that - subject to reasonable regulations - the land would then be available to be "used" by the same public. For instance, the resources of the newly created federal buildings and national parks would be enjoyed by the public.

B.

Beginning with the case of *Berman v. Parker* (1954), the Supreme Court began to alter its Takings Clause jurisprudence. In this important case, the Court unanimously held that private property could be seized for a public "purpose" with just compensation. The Court effectively set a more lenient standard by which to judge the government's taking by permitting takings for a public "purpose." The distinction was crucial.

i.

In *Berman*, the Supreme Court upheld the Congressional condemnation of private property located in an economically depressed area of the District of Columbia for the purpose of "community redevelopment." After putting some parcels of the seized lands to traditional public uses, the District of Columbia in *Berman* intended to "lease or sell the remainder as an entirety or in parts to a redevelopment company, individual, or partnership." [See *Berman v. Parker* 348 U.S. 26.]

Justice William O. Douglas wrote for a unanimous Court that such a redevelopment plan for a poor area was permissible even if the lands were to be immediately turned over to private developers. The ultimate purpose of the plan secured public welfare by reliving economic blight, creating more profitable businesses, and thus increasing general prosperity. Therefore, while the plan did not meet the original criteria of the Takings Clause, it did fulfill the less rigorous "public purpose" standard.

Justice Douglas further explained that ameliorating economic decay fell well within the traditional powers of the states: "We deal, in other words, with what traditionally has been known as the police power...The definition [of police power] is essentially

the product of legislative determinations addressed to the purposes of government...Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive."

Thirty years after *Berman*, the Supreme Court decided in *Hawaii Housing Authority v. Midkiff* (1984) that a state could condemn private property owned by few owners to distribute it to a larger number of residents. As Justice Sandra Day O'Connor explained for a unanimous Court, the state of Hawaii exercised its eminent domain power to take "title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State." [See *Hawaii Housing Authority v. Midkiff* 467 U.S. 229.] The Court upheld the Hawaii redistribution plan.

Here again, Justice O'Connor observed that the courts owed great deference to the legislature, citing the *Berman* precedent. She commented that although the Courts maintain judicial review over such takings, it is "extremely narrow."

ii.

Three terms ago, the Supreme Court reaffirmed the "public purpose" standard in *Kelo v. New London* by a 5-4 vote. The city of New London, Connecticut, promulgated an economic revitalization plan in the Fort Trumbull area of the city. It encouraged private companies, Pfizer among them, to build up business in a 90-acre area of the neighborhood. New London expected that increased private enterprise would stimulate the local economy and bring in larger property and business tax revenues to the city and state. New London condemned the land of fifteen holdouts, who contested the takings.

The Supreme Court narrowly upheld the taking and cited *Berman* and *Midkiff* as controlling precedents. Justice John Paul Stevens wrote that "The disposition of this case turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to

legislative judgments in this field." [See *Kelo v. City of New London*, 545 U.S. 469.]

The Court further held that alleviating economic blight through the transfer of private property to wealthier private owners was a rational and permissible public purpose.

C.

We do not disparage these developments in Takings Clause jurisprudence, and we recognize that we are bound by these precedents to the extent that they are applicable. We merely intend to acknowledge how much the "public purpose" standard has departed from the original meaning of the clause.

III.

Though we are bound by the precedents of *Berman*, *Midkiff*, and *Kelo*, Judge Livingston and I are persuaded that they do not compel us to rule in favor of the City in this litigation. There are a number of meaningful differences between the facts of this case and the circumstances of the three important precedents the City has cited to the Court. Even accepting the "public purpose" standard, as we must, the City's eminent domain fails even the more lenient standard. Furthermore, we decline the City's invitation today to extend the Supreme Court's reasoning in these precedents to this case.

A.

The prior eminent domain cases have all emerged out of a particular economic context that is absent from this case. In *Berman* and *Kelo*, the cities of Washington, DC, and New London, Connecticut, respectively, had been independently evaluated as areas plagued by economic "blight." Thus, in those instances, the government acted affirmatively to combat the economic blight through the transferring and rearrangement of private property. The Supreme Court, in its opinions, noted that the economic circumstances of the cities made the government's actions more reasonable in that its takings were rationally related to the goal of economic revitalization.

Likewise, in *Midkiff*, there was a unique historical context to Hawaii's takings. Dating back to the time of the Hawaiian kingdom in the 19th century, property ownership had become concentrated in the hands of few people, resulting in what Justice O'Connor referred to as a "land oligopoly." In *Midkiff*, the Court observed that Hawaii was within its rights to seek to break up this oligopoly through the use of eminent domain, and that its plan was rationally related to that goal.

The facts in this case are quite different. The District Court found no evidence of economic blight in Burlington, VT. Therefore, the public purpose that was the touchstone of *Berman* and *Kelo* does not apply as a precedent here. That being the case, we must independently evaluate whether the public purpose the City has proposed passes constitutional examination.

B.

Expansion of a private college cannot reasonably be considered a "public use" or a "public purpose." The College is privately financed. It offers admission to a narrower population than does the public university in Burlington. There is simply no evidence that the campus additions will be *used* by the *public*. It is true that more students will attend the college and use its resources, and the college is certainly entitled to try to expand and modernize its campus. However, using the machinery of government - eminent domain, in this case - to achieve this goal is an extraordinary step, considering that the only people who will be able to use the land will be those affiliated with the college.

These particular facts distinguish this case from earlier precedents, particularly *Kelo*. In *Kelo*, private property was taken so that developers could build businesses, such as a strip mall. Though still a privately owned entity, a strip mall is subject to public accommodations laws and cannot exclude people from entering and purchasing its goods and services. A private college, by contrast, has strict criteria to decide who will be the beneficiaries of its educational opportunities. The vast majority of residents in Burlington simply will not "use" the

college. If the City had condemned property to facilitate the expansion of a public university, our analysis may well have been different. That the college is a private institution makes this case an easier decision.

C.

While the state's police power is broad, as Justice Douglas recognized more than fifty years ago, its scope is still limited by the Constitution. As Justice O'Connor explained in *Midkiff*, "The Constitution forbids even a compensated taking of property when executed for no reason [other] than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."

The scenario Justice O'Connor described - not at issue in *Midkiff* - is the very scenario we are presented with here. It seems quite clear that this taking was a benefit for a "particular private party," namely St. John's College. The selling of the property was not subject to economic competition in the form of bidding. As far as the record shows, the property was transferred from Sandberg to the College, with the government acting solely as the intermediary. This is a clear-cut case of the government taking private property from one party and giving it to another, more eager party. If this kind of taking withstood constitutional scrutiny, we are persuaded that the "public use" requirement of the Takings Clause would be effectively erased. No taking would fall within the clause's reach; every lot of private property would be vulnerable to condemnation.

IV.

For the foregoing reasons, we believe that the City's stated interest constitutes neither a "public use" nor a "public purpose" within the meaning of the Fifth Amendment. The relevant precedents the City cited to us do not apply either. The City violated Shirley Sandberg's Fifth Amendment property rights.

We grant Sandberg relief from injunction and order that her property be returned to her. We also award her attorneys' fees. Accordingly, the judgment of the United States District Court for the District of Vermont is:

REVERSED.

* * *

SONIA SOTOMAYOR, *Circuit Judge*, dissenting:

Fifty-five years ago, Justice William O. Douglas observed in *Berman v. Parker* that "The concept of the public welfare is broad and inclusive." Today, this Court attempts to undo more than a half-century of Supreme Court case law by misconstruing controlling precedents and taking an unduly narrow view of government's eminent domain and police powers. Because I would affirm the judgment of the District Court, I respectfully dissent.

I.

My first area of disagreement with the majority concerns their view that the expansion of the campus of a private college is not a permissible "public purpose." In my judgment, the governmental interest of promoting educational opportunities is entirely reasonable and falls well within its power to secure the public welfare.

A.

The Court's analysis focuses largely on the college's status as a private organization, rather than as a publicly-funded and publicly-run entity. As the Supreme Court has recognized on more than one occasion, the important criterion for judging the constitutionality of a governmental taking is not whether the property falls into private hands. In her opinion for the Court *upholding* Hawaii's taking in *Midkiff*, Justice O'Connor wrote: "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does

not condemn that taking as having only a private purpose." That the college is privately run does not mean its expansion will be a private benefit. On the contrary, it was entirely rational for the City to conclude that the wider community would benefit from an expansion of the college, which would help it attract more students, scholars, visitors, and distinguished guests. One need only think of the Ivy League universities, which stimulate their surrounding communities both economically and intellectually, to be assured of the public services that universities routinely perform. All of these institutions are privately run; their contributions to the public welfare are beyond reproach.

B.

As the Court recognized in *Kelo*, the government may condemn private property and sell it to another private party for the purpose of increasing tax revenues. The transfer of property from Sandberg to the college is quite likely to yield similar results. Not only is the college likely to pay substantially more property tax, but it may well attract more tourism to the Burlington area and create more jobs. These are all valid state interests advanced by the City, and follow logically from the reasoning of *Kelo*.

II.

The majority goes out of its way to construe Supreme Court precedents so as to render this taking unconstitutional. The most natural reading of the precedents, however, would tend to support the upholding of the takings and affirmations of the District Court.

A.

The majority rightly quotes Justice Stevens' observation that the Supreme Court has "defined the concept [of public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field." It then refuses to extend the Supreme Court's reasoning in *Berman* and *Kelo* beyond the particular facts of those cases to the case before us today.

Berman comprised the Supreme Court's most expansive interpretation of government's police powers to improve society. Justice Douglas wrote during an era when this nation was undergoing a period of vast technological modernization that was conceived of and financed in part by government activism. When he described the concept of public welfare, Douglas further observed:

"The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them."

These comments support the proposition that the government may use its eminent domain power to do more than build highways and railroads. It may take bold action. The city of Burlington took such dramatic steps to expand the educational facilities within its jurisdiction. The City's actions fall well within the scope of permissible governmental actions articulated in Justice Douglas's opinion.

B.

The majority falls into further error when it conveys the impression that there *must* be a state of economic blight in order for the government to seize private property for a public purpose. This is not the case at all. It just so happens that governments have exercised eminent domain more vigorously in blighted communities, and in two of our crucial precedents - *Berman* and *Kelo* - this has been the case. That there be a blight, however, is not a constitutional requirement in the same way that there must be a "rebellion or invasion" for the Congress to suspend the writ of habeas corpus. [See Article I, Section 9, U.S. Const.]

Moreover, the economic circumstances in Washington, D.C., and New London, CT, were not essential features of the Supreme Court's opinions in those two decisions. Blight was only discussed to the extent that the Court commented that the takings were rationally approved by the legislature. That is not to say that alleviating economic blight is the *only* rational basis for a taking. There may well be other rational bases for takings, and I submit that under these precedents, Burlington's basis was rational as well.

There having been a public purpose to the taking, and the owner of the property having been compensated justly, I see no grounds to invalidate the taking. These are the only two requirements stated in the Takings Clause. Presence of economic blight is not an additional constitutional requirement.

III.

This Court of Appeals has improperly substituted its judgment for that of the City Council. Whether or not the City's policy is sound is a matter for that body and the residents of Burlington who elect their representatives to it. The proper standard of review for these cases is rational basis; the Supreme Court has never stated in the relevant precedents that strict scrutiny is to be applied. With that understanding, it is clear that the City had a rational basis for concluding that its condemnation of Sandberg's property to expand the college would benefit the citizenry.

If the residents of Burlington object to this legislative action, it is their responsibility to lobby the City to change the policy democratically. Instead, the Court takes it upon itself to achieve that result by judicial fiat. Thus does the majority fail to adopt the wise policy of judicial restraint. In *Kelo*, Justice Stevens stated that "The necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a 'public use.'" The Court's role is necessarily limited to resolving constitutional disputes.

This Court's responsibility is not to question the legislature when its judgments are constitutional. Our role is simply to redress unconstitutional condemnations, i.e. takings that either lack a rational basis or do not serve a public purpose. This condemnation satisfies the rational basis test, and in my humble opinion is consistent with the United States Constitution.

* * *

I would affirm the judgment of the District Court for the District of Vermont. I recognize the majority's concerns about the scope of government power to seize private property, for they are worth-while ones. Nonetheless, we are not free to ignore over a half-century of Supreme Court precedent that have eased restrictions on governmental takings.

Believing as I do that the City's taking constituted a public purpose consistent with these precedents, I respectfully **dissent.**