FALLBROOK IRRIGATION DISTRICT

v.

BRADLEY

SUPREME COURT OF THE UNITED STATES

164 U.S. 112

November 16, 1896

JUSTICE PECKHAM...The decision of this case involves the validity of the Irrigation Act... of... California...It is admitted by all that very large tracts of land in California are..."arid lands," which require artificial irrigation in order to produce anything of value. There are different degrees, however, in which irrigation is necessary, from a point where, without its use, the land is absolutely uncultivable, to where, if not irrigated artificially, it may yet produce some return for the labor of the husbandman in the shape of a puny and unreliable crop, but nothing like what it could and would do if water were used upon it. There are again other lands which, if not irrigated, will still produce the ordinary cereal crops to a more or less uncertain extent, but which, if water be used artificially upon them at appropriate times, are thereby fitted to and will produce much more certain and larger crops than without it, and will be also rendered capable of producing fruit and grapes of all kinds, of first-rate quality and in very large quantities. What is termed the "arid" belt is said...to extend from Colorado to the Pacific Ocean and to include over 600,000,000 acres of land.

Of this enormous total, artificial irrigation has thus far been used only upon about three and a half million acres, of which slightly over a million acres lie in the State of California...Something over thirty irrigation districts had been organized in California under the act in question, and that a total bonded indebtedness of more than $16,000,000 had been authorized by the various districts under the provisions of the act, and that more than $8,000,000 of the bonds had been sold and the money used for the acquisition of property and water rights and for the construction of works necessary for the irrigation of the lands contained in the various districts...All these moneys, if the act be valid, must eventually be repaid from assessments levied upon the lands embraced within the respective districts...The future prosperity of these States, it was claimed, depended upon the validity of this act as furnishing the only means practicable for obtaining artificial irrigation, **without the aid of which millions and millions of acres would be condemned to lie idle and worthless**, which

otherwise would furnish enormous quantities of agricultural products and increase the material wealth and prosperity of that whole section of country. On the other hand, it has been assured with equal earnestness, that the whole scheme of the act will, if carried out to the end, result in the practical confiscation of lands like those belonging to the appellees herein for the benefit of those owning different kinds of land upon which the assessments for the water would be comparatively light, and the benefits resulting from its use far in excess of those otherwise situated. **Such results, it is said, are nothing more than taking by legislation the property of one person or class of persons and giving it to another, which is an arbitrary act of pure spoliation, from which the citizen is protected...[by the Federal Constitution]**...

It appears to me that Ms. Bradley could not pay the "Irrigation District Assessment" on her ground and, pursuant to this statute, California is selling her ground "for taxes." She protests that this Act amounts to "taking without due process of law."

The form in which the question comes before the court in this case is by appeal from a decree of the United States Circuit Court for the Southern District of California, perpetually enjoining the collector of the irrigation district from executing a deed conveying the land of the plaintiff, Maria King Bradley, under a sale made of such land pursuant to the provisions of the act under consideration. The grounds upon which relief was sought were that the act was in violation of the Federal Constitution and also of the constitution of the State of California. The decree is based upon the sole ground that the act violates the Federal Constitution in that it in substance authorizes the taking of the land of the appellee "without due process of law."...**The assertion that [this Act violates the Federal Constitution] is based upon that part of the Fourteenth Amendment to the Constitution, which reads as follows: "Nor shall any <u>State</u> deprive any person of life, liberty or <u>property</u> without <u>due process</u> of law, nor deny to any person within its jurisdiction the equal protection of the laws."**

So far (from this and previous cases), the attorney for Ms. Bradley knows that the Court has not used the 14th Amendment to "incorporate" and apply the 5th Amendment to the States. Since she cannot use the 5th Amendment, she makes a purely 14th Amendment argument. Pretty clever.

...The appellees herein urge several objections to this act. They say:

1. The use for which the water is to be procured is not in any sense a public one, because it is limited to the landowners who may be such at the time when the water is to be apportioned, and the interest of the public is nothing more than that indirect and collateral benefit that it derives from every improvement of a useful character that is made in the State.

2. They assert that...the irrigation of lands need not be limited to those which are in fact unproductive, but that by [the Act's] very terms it includes all lands which are susceptible of one mode of irrigation from a common source, etc., **no matter how fertile or productive**

they may already be, and it is denied that the furnishing of a fertilizer for lands of individual proprietors which are already productive, in order to make them more productive, is in any legal sense a public improvement.

3. It is also objected that under the act the landowner has no right to demand and no opportunity is given him for a hearing on the question whether his land is or can be benefitted by irrigation as proposed...

4. That the basis of assessment for the cost of construction is not in accordance with and in proportion to the benefits conferred by the improvement.

5. And, finally, that land which cannot, in fact, be benefitted may yet under the act be placed in one of the irrigation districts and assessed upon its value to pay the cost of construction of works which benefit others at his expense...

It has often been said to be extremely difficult to give any sufficient definition of what is embraced within the phrase "due process of law," as used in the constitutional amendment under discussion. None will be attempted here.

Here is a candid Court. Just what does the phrase "due process of law" embrace?

It was stated by Mr. Justice Miller in *Davidson v. New Orleans*...that there was "abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact it would seem...that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court...and of the merits of the legislation on which such a decision may be founded."

...[T]hat the water is not for a public use, is not well founded...

This double negative means, of course, that the Court believes the "water" <u>is</u> for a public use.

...**The Fifth Amendment which provides... that such property shall not be taken for public use without just compensation, applies only to the Federal government, as has many times been decided**...**In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to <u>its depriving any person of life, liberty or property, without due process of law</u>. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. <u>In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government</u>.**

In other words, even if the 5th Amendment is not to be incorporated into the 14th Amendment, one can get to this issue through the concept of "due process alone."

Is this assessment, for the non-payment of which the land of the plaintiff was to be sold, levied for a public purpose? The question has, in substance, been answered in the affirmative by the people of California, and by the legislative and judicial branches of the state government. The people of the State adopted a constitution which contains this provision:

> "The use of all water now appropriated or that many hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use and subject to the regulation and control of the State in the manner to be prescribed by law."

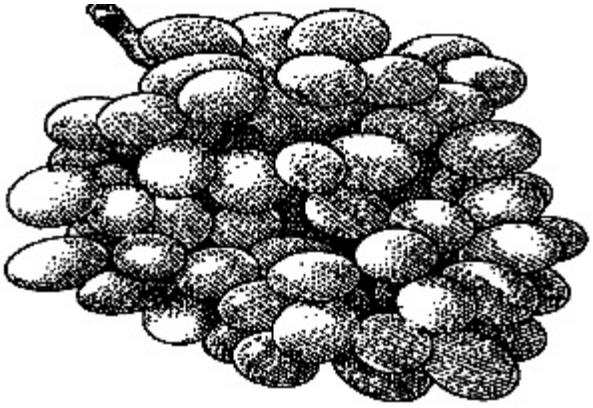
The latter part of §12 of the act now under consideration...reads as follows:

> "The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law."

To provide for the irrigation of lands in States where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as valid exercise of the legislative power. The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that State on this question.

Viewing the subject for ourselves and in the light of these considerations we have very little difficulty in coming to the same conclusion reached by the courts of California.

...In general, the water to be used must be carried for some distance and over or through private property which cannot be taken [against the will of a party] if the use to which it is to be put be not public, and if there be no power to take property by condemnation it may be impossible to acquire it at all. **The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation**...A private company or corporation without the power to acquire the land [against the will of a party] would be of no real benefit, and at any rate the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase, that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and main-tain water works and canals any better than private corporations or companies, and unless they had the power of eminent domain they could accomplish nothing. If that power could be conferred upon them it could only be upon the ground that the property they took was to be taken for a public purpose.



While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration.

Translation: "We do not take lightly the fact that if we hold this Act unconstitutional, the impact upon California will be very serious."

Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the State in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State. The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. **It is not essential that [a considerable portion of the community] should directly enjoy or participate in an improvement in order to constitute a public use.**

Remember these words when you reach *Kelo*. I can argue that *Kelo* was a retreat from governmental power and, therefore, favors private property interests more so than this case from 1896.

All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water...We think it clearly appears that all who by reason of their ownership of or connection with any portion of the lands would have occasion to use the water, would in truth have the opportunity to use it upon the same terms as all others similarly situated. In this way **the use**, so far as this point is concerned, **is public because all persons have the right to use the water under the same circumstances. This is sufficient...If it be essential or material for the prosperity of the community**, [that is sufficient.]

Again...this is 1896...The Court uses language such as "essential or material to the prosperity of the community." Was *Kelo* a surprise? Stay tuned!

...[W]e have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use.

Second. The second objection urged by the appellees herein is that the operations of this act need not be and are not limited to arid, unproductive lands but include within its possibilities all lands, no matter how fertile or productive, so long as they are susceptible "in their natural state" of one mode of irrigation from a common source.

...What is the limit of the power of the legislature in regard to providing for irrigation? Is it bounded by the absolutely worthless condition of the land without the artificial irrigation? Is it confined to land which cannot otherwise be made to yield the smallest particle of a return for the labor bestowed upon it? If not absolutely worthless and incapable of growing any valuable thing without the water, how valuable may the land be and to what beneficial use and to what extent may it be put before it reaches the point at which the legislature has no power to provide for its improvement by that means? The general power of the legislature over the subject of providing for the irrigation of certain kinds of lands must be admitted and assumed. The further questions of limitation, as above propounded, are somewhat legislative in their nature, although subject to the scrutiny and judgment of the courts to the extent that it must appear that the use intended is a public use as that expression has been defined relatively to this kind of legislation.

...[Judgment in favor of the District.]...