

Historically, equal protection suits required that the plaintiff define a class based on certain inherent conditions, such as race, nationality, or gender. Under the class of one approach, a single person can present himself as a class irrespective of these characteristics. Despite the recency and prominence of Olech, the scholarly literature has largely overlooked this significant ruling, having underestimated its ability and propensity to implement a fundamental revolution in modern equal protection jurisprudence. This Article seeks to shed light on this powerful but largely neglected precedent.

Prior to Olech, plaintiffs arguably could only establish classes based on inherent characteristics, such as race or religion. However, after Olech, homeowners can establish a class of one (i.e., the person whose home the government takes) if their property is singled out for eminent domain while other similarly situated properties are not. The singled-out homeowner or homeowners can bring suit to challenge the arbitrariness of the decision to take the property.

While many plaintiffs have used Olech to challenge zoning and other land use restrictions, none to date have proposed using the Olech rule to challenge an eminent domain taking for private development. This Article argues that an Olech claim is an essential mechanism to enable homeowners—especially the poor, uneducated, or minority citizens whose participation in the political process is more difficult and less effective than political insiders—to challenge the different treatment and rationality of an eminent domain taking for private development.

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(26)
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(102)
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Courts
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Constitution
in 2020
\(2\)
Czars
\(4\)
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Clause
\(8\)
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Courts
Sniff
Out
Purpose?
\(1\)
Legal
Fiction
\(1\)
Legislative
History
\(1\)
Lemon
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COMMENTS (6)**TRACKBACKS (1)**#1 written by **steve rappoport**

April 6, 2010 - 2:07 pm

Josh, I have downloaded the article but have not yet read it. But I did look at Olech and at your last paragraph, and I am wondering whether your argument would support lawsuits predicated on a theory of "environmental justice."

When I read your article, I will be looking to see how your arguments would apply to that sort of claim.

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#2 written by **Josh Blackman**

April 6, 2010 - 3:23 pm

I did some research on environmental justice, and I think I may have a footnote or two addressing that point, but this argument could be used by all sorts of takings claims.

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#3 written by **Mike**

April 6, 2010 - 4:08 pm

Josh,

I find myself incurably curious now, because I've never heard of Olech before this. We're coming up on Kelo in my Property class and I just did a quick check of the casebook's exhaustive Table of Cases and Olech is nowhere to be found. Of course, I naturally rushed to do the same in my ConLaw casebook-Prof. Barnett's book actually-and nothing there either. Perhaps if I found my old CivPro book I might find a quick excerpt, based on what I know from your post above.

But I will definitely defer sleep for yet another night so I can read your article. The idea of a single-person class asserting an equal protection claim is

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(33)

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(1)

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(3)

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(38)

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intriguing and something I'll have to raise with my professor. So thanks (1) for the work you've done, and (2) for bringing it to my attention.

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#4 written by Josh Blackman

April 6, 2010 - 7:25 pm

Usually my articles put people to sleep, so I'm somewhat confused that my article is keep you up 😊 Good luck and keep me posted what your prof says.

Rating: 0.0/5 (0 votes cast)

Rating: 0 (from 0 votes)



#5 written by Phil

April 7, 2010 - 1:52 pm

I haven't had an opportunity to read the whole thing yet, but I appreciate your description of the conflict between a "comprehensive development plan" and the Engquist "discretionary decisionmaker" exception.

Rating: 0.0/5 (0 votes cast)

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#6 written by MikeB

April 14, 2010 - 6:11 am

Fascinating. As a law clerk for Judge Kim R. Gibson of the US District for the Western District of Pennsylvania (Johnstown, PA), you are in a position to examine first hand how judges handle eminent domain cases. And to confirm that property owners do not stand on a level playing field legally or economically.

On Sept. 19, 2008, Gibson granted the \$5 billion Spectra Energy the right to take "immediate possession of and entry onto the [five] properties owned by the Defendants."

The irony, as property owners can attest, is that Spectra Energy was already doing construction work on these properties. Apparently, they were not afraid

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(6)

First
Amendment
(1)

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Studies (10)

Health Care
(19)

Instant
Analysis (8)

Institute for
Justice (3)

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(36)

JoshCasts
(18)

JoshVlogs
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(1)

Law School
(6)

Liveblog
(18)

McDonald v.
Chicago (39)

Polls (1)

Predictions
(5)

of offending the court prior to its decision.

More significant is the “Irreparable Harm to Steckman” section (p. 30 of the decision). Gibson’s decision appears to hinge on financial harm to Spectra Energy because the company won’t meet its commercial deadlines for making money by selling gas storage to customers.

Since when is it the “public’s” responsibility to ensure a company’s commercial success?

Gibson’s thoughts on “harm to Steckman” run 3 pages while the “harm to defendants” is brushed away in less than a page (p. 33).

In the section titled, “Public Interest,” Judge Gibson emphasizes supplying gas for the “heating season,” as if there is presently no gas for the heating season:

“The Court finds that timely completion of the natural gas storage facility will assist to a reasonably significant degree in ensuring an adequate supply of natural gas for the public during the 2009-2010 heating season (November 2009-March 2010). Failure to complete this project could have an adverse effect on the supply of natural gas for the public or could adversely impact natural gas prices.” (p. 34)

For those who like to manage by facts, this is a significant assertion, yet it offers no facts in support of it – other than to cite three platitudes from the Federal Energy Regulatory Commission, which again offer no facts about an alleged heating season crisis or price stability.

This 12-billion cubic feet underground gas storage reservoir was said to be vital to the public interest. Apparently, however, Gibson was unaware of the fact that Pennsylvania has more underground gas storage fields than any other state in the continental US, according to the Energy Information Administration of the Department of Energy.

For easy access to a pdf file of the 36-page court decision, go to this link: <http://www.spectraenergywatch.com/blog/?p=18>

Note that there is a two-page difference between the original document and the pdf file. Thus page 33 of the document is page 35 of the pdf file.

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