

SAVING A CITY

Supreme Court should bless use of eminent domain to build local economy.

BY TIMOTHY J. DOWLING

The best welfare program is a job, conservatives like to say, and rightly so. But some conservatives and libertarians have allowed their property rights ideology to put them on the job-killing side of a critical case to be argued before the U.S. Supreme Court on Feb. 22, *Kelo v. City of New London*.

What's more, they have turned their backs on their professed commitment to the Constitution's original meaning, while ignoring more than five decades of precedent.

The New London case arises out of the Connecticut city's desire to bring thousands of desperately needed jobs to its 25,000 residents. A former whaling port and manufacturing hub—and longtime home of the U.S. Coast Guard Academy—New London is situated where the Thames River meets Long Island Sound. Established in 1646 by John Winthrop Jr., it is no longer the shining “city upon a hill” envisioned by Winthrop's father. Its economy has been in a downward spiral for decades, and in 1996 the U.S. Navy closed a major research facility, causing a loss of another 1,500 jobs for this troubled community.

To breathe new life into the local economy, city officials approved a plan to build a 90-acre waterfront development project. This decision came only after years of careful planning, public hearings, and community outreach. Inspired by similar waterfront development success stories like Baltimore's Inner Harbor, local leaders want to create a vibrant mix of retail, residential, and commercial space, a public “Riverwalk,” public marinas for boaters, and a hotel and conference center.

In addition to providing thousands of permanent new jobs, the project will be integrated into historic Fort Trumbull and the surrounding state park. Planners also hope to include a new U.S. Coast Guard museum at the site.

The city acquired nearly all of the land needed for the project through voluntary transactions. Above and beyond paying fair market value for the properties, the state has offered the owners significant relocation assistance.

Nonetheless, a small handful of owners are holding out, leaving city leaders no choice but to use the power of eminent domain—a government's legal ability to take private property—to rescue the project. The Fifth Amendment provides that governments can take private property for a “public use” (with just compensation). The dispute before the Supreme Court is

whether economic development that would benefit the local community qualifies.

MARKET FAILURES

New London illustrates why eminent domain is sometimes needed to pursue economic development. A range of market failures can tie the hands of private developers: They may find it impossible to assemble a critical mass of land in the face of holdouts. They may face legal risks associated with cleaning up contaminated “brownfield” sites. Absentee owners and clouded titles on key parcels may hinder purchases. And the need to improve streets and other infrastructure may require government involvement. Communities across the country have used eminent domain to overcome these hurdles and spark economic revitalization.

Some suggest that New London should just build around the holdouts. But the land in question is in the middle of a floodplain, which needs to be raised by adding about 10 feet of fill to allow for new development. Building around the holdouts would quite literally leave them below ground level.

More fundamentally, this myopic “build around them” view would encourage countless holdouts in future projects to exploit their monopoly position over land needed for economic development to obtain astronomical compensation or nix the project altogether.

To be sure, some holdouts have sympathetic stories to tell. And probing questions should be raised about any complex economic undertaking financed by the taxpayers. But gutting the eminent domain power to exclude economic development would condemn countless people across the nation to the hopelessness of unemployment and all the social pathologies that come with it.

COUNSEL FOR HOLDOUTS

Lawyers at the libertarian Institute for Justice are counsel for the holdouts in New London. The Institute for Justice argues that the New London development does not qualify as a “public use” under the Fifth Amendment because the land is being taken for development by private businesses—a reading that would prevent the condemnation of land to create jobs, no matter how compelling the public interest and no matter how fair the compensation.

Alternatively, the Institute for Justice argues that community

leaders must prove in court that to justify a government taking, a project's future financial success is adequately "certain." This is an unprecedented level of judicial scrutiny that would block some projects as effectively as an outright ban. In the Institute's world, land can be condemned to put up a public parking garage, but not to facilitate private waterfront redevelopment that will give thousands of desperate families a paycheck.

The Institute for Justice's opposition to the use of eminent domain to foster economic development projects both overprotects and underprotects sympathetic holdouts. A flat ban would overprotect by prohibiting the use of eminent domain for any development project, regardless of whether the holdouts are longtime elderly homeowners or corporate owners of empty warehouses. The Institute's position underprotects because it does nothing to help those sympathetic homeowners faced with condemnation for other acceptable public purposes.

Rather than imposing an unwieldy, one-size-fits-all approach through the Constitution, a more nuanced solution is to provide adequate safeguards to homeowners at the local level while allowing development projects to go forward in appropriate cases. Indeed, many states already have adopted safeguards that go beyond the federal constitutional minimum. For example, some communities have paid far more than just compensation by guaranteeing landowners 125 percent of fair market value. Others, like Connecticut, have made generous relocation assistance available and have adopted extensive public-participation requirements to ensure that condemnations are used only as a last resort.

For years, the Institute for Justice has spearheaded an unrelenting national media campaign against takings. It has attempted to portray redevelopment projects as little more than a sop to politically connected private developers—including in a *Legal Times* commentary (Dana Berliner, "You Can't Go Home Again," Oct. 11, 2004).

Hogwash. Local governments do not exist to enrich a select few, but to solve problems and provide services that all citizens need and demand. Economic development projects mean more jobs and more money for vital government services across the board, including more police officers and firefighters, better prenatal care, more teachers, and better-equipped schools.

Not everyone would make the same choices New London officials made. But if we are going to debate that choice, let's have an honest debate that plainly acknowledges the human misery that will result in cities across the country if job creation and economic development are no longer deemed to be a "public use." The caricature of local officials as corrupt money-grubbers disserves the public discussion.

CONSTITUTIONAL MEANING

Another well-circulated myth is that New London's position finds no support in the Constitution. The Institute for Justice asserts that the New London redevelopment is not a public use of the condemned land because the land will be owned by a city-created nonprofit development corporation, and because

the public will not have complete access to the entire area. But the term "public use" in the Fifth Amendment has been long understood to include not only publicly owned amenities, but also facilities and projects that benefit the public.

This reading is not a new-fangled "living Constitution" contrivance, but instead the original understanding of the Fifth Amendment. The 1828 Webster's Dictionary—the go-to source for the Supreme Court's originalists—expansively defines "use" to include benefit or advantage.

As early as 1837, the U.S. Supreme Court recognized that the power of eminent domain could be used for the "public interest and convenience." From the early years of our republic, federal and state courts have invoked this natural reading of "public use" to uphold the taking of property for the construction of private water mills, the establishment of irrigation easements for the exclusive benefit of private farms, and the facilitation of other privately owned projects that benefit the public by promoting economic growth. These practices make clear that encouraging private economic development for the public's benefit is a legitimate public use.

During the last 50 years, the Supreme Court has handed down no less than seven rulings reaffirming that public use under the Fifth Amendment extends as broadly as a government's general legislative power and that where a government objective is legitimate, "the right to realize it through the exercise of eminent domain is clear," as the Court stated in *Berman v. Parker* (1954).

In 1992, the Court again endorsed its entire line of public use jurisprudence in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, where the Court affirmed a required conveyance of railroad track to Amtrak. And just two years ago in *Brown v. Washington Legal Foundation*, it reaffirmed that, like the taxing power, the eminent domain power may be used for any legitimate public purpose.

These rulings are rooted in a broad rationale recognizing that even where a private actor stands to benefit from the use of eminent domain, courts should defer to a legislative finding of public use unless that finding lacks a rational basis. The Institute for Justice has denounced the unanimous *Berman* ruling as "radical," but justices across the jurisprudential spectrum have unanimously and repeatedly reaffirmed *Berman*, which goes to show who the radicals are in this debate.

Eminent domain is a momentous power, and like any government power, it should be used prudently. Fairness issues should be addressed in deciding the amount of just compensation and through other safeguards. But the Supreme Court should not handcuff our elected officials by removing an entire category of public projects from the scope of eminent domain authority. Countless jobs and much-needed hope hang in the balance.

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