Using Public Funds for Corporate Welfare

A Nineteenth-Century View of *Kelo*

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There is a 19th century tone to Richard Epstein's persuasive negative assessment[1] of *Kelo v. City of New London*,[2] the recent decision upholding the use of the power of eminent domain to advance private real estate development. Epstein's reaction brings to mind a similar screed by Thomas McIntyre Cooley, the premier constitutionalist of the 19th century. It came in the form of an opinion of the Supreme Court of Michigan, of which he was Chief Justice. The case involved public financial assistance to privately owned railroads, or what today might be denoted "corporate welfare."

Cooley's opinion was rendered in 1870 and was widely heralded by the people of Michigan. As we post-moderns contemplate the use of our tax money to subsidize agribusiness and diverse other private enterprises, we might see the issue presented in his case in a light favorable to Cooley. So might those who have lost their jobs as a result of plant closings caused by subsidies paid by distant foreign, state and local governments to employers as inducements to relocate. Or fans of major league teams that were relocated to secure the benefits of a public subsidy provided in a different venue. The issue presented to Cooley might be seen to resemble the problem raised by *Kelo*. Losing one's job or one's favorite team is not the same as losing one's home, but there are similarities.

Cooley's case involved the town of Salem, Michigan, which had pledged its credit to aid construction of the Detroit & Howell Railroad in consideration of a promise by the railroad to provide service to the town. The railroad was constructed in reliance upon that and other such pledges. Many towns in Michigan, indeed thousands in the United States, had made such pledges under the duress of being informed that a failure to make the commitment would result in a denial of rail service and the almost certain atrophy of their local economies. In 1864, the Michigan legislature, at the insistence of the railroads and after a sustained dispute signaling wide-

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1 Kelo: *An American Original*, 8 Green Bag 2d 355 (2005).

2 129 S. Ct. 2655 (2005).

spread popular opposition,[3] had authorized municipalities such as Salem to levy taxes to aid railroads. And so Salem had promised to do.

In 1870, the Detroit & Howell Railroad sued the town of Salem to compel it to honor that promise by issuing bonds to be retired from the town's future tax revenues. The Supreme Court of Michigan in an opinion by Cooley denied relief, holding the 1864 legislation unconstitutional on the ground that any payment of interest or principal on such bonds would entail the use of public revenue for a private purpose; and since Salem was unable to pay interest or principal with funds obtained from any other source, it would be fraudulent to issue the bonds as demanded by the railroad.[4]

The opinion of Cooley's court did distinguish such public subsidies from the exercise of the power of eminent domain that was involved in *Kelo*. "It is true," Chief Justice Cooley wrote,

> that a railroad in the hands of a private corporation is often spoken of as a public highway, and that it has been recognized as so far a public object as to justify the appropriation of private property for its construction; but this fact does not conclusively determine the right to employ taxation in aid of the road in the like case. Reasoning by analogy from one of the sovereign powers of the government to another, is exceedingly liable to deceive and mislead. An object may be *public* in one sense and for one purpose, when in a general sense and for other purposes, it would be idle and misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest. …
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> [The railroads'] resemblance to the highways which belong to the public, which the people make and keep in repair, and which are open to the whole public to be used at will, and with such means of locomotion as taste, pleasure, or convenience may dictate, is rather fanciful. … [Railroads] are not, when in private hands, the *people's highways*; but they are private property, whose owners make it their business to transport persons and merchandise in their own carriages, over their own land, for such pecuniary compensation as may be stipulated. … [Their] business … has indeed its public aspect inasmuch as it accommodates a public want. … But it is not such a purpose [so different from] the opening of a hotel, the establishment of a line of stages, or the putting into operation of a grist mill.[5]

The court then proceeded, with restraint, to give expression to the received doctrine of Equal Rights embodied in the Michigan Constitution of 1850:

> We concede … that religion is essential … yet we prohibit the state from burdening the citizen with its support. … Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them.[6] …
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> However great the need in the direction of any particular calling, the interference of the Government is not

3 A Republican governor had vetoed such legislation in 1866 and 1867. Constitutional revision was proposed in 1868 to authorize such aid and the revision was defeated by vote of the people. Alan R. Jones, The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas 174 (1987).

4 *People v. Salem*, 20 Mich. 452 (1870).

5 *Id.*, 477–79.

6 *Id.*, 483–84.

> tolerated because, though it may be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise.[7] …
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> [T]he discrimination between different classes or occupations, and the favoring of one at the expense of the rest, whether that one be farming, or banking, or merchandising, or milling, or printing, or railroading is not legitimate legislation, and is a violation of that equality of right which is a maxim of state government. … [W]hen the state once enters upon the business of subsidies, we shall not fail to discover that the strong and the powerful interests are those most likely to control the legislation, and that the weaker will be taxed to enhance the profits of the stronger.[8]

This decision was said to be "the great news of the summer" of 1870.[9] The governor heatedly reported that it destroyed the value of millions of dollars of bonds already issued by Michigan towns other than Salem, some of them in the hands of third parties, and asked the legislature to do something to protect the innocent investors. Railroad men were apoplectic. The decision was criticized as contrary to the great weight of precedent,[10] which it was, and lacking footing in any explicit constitutional text, which it was,[11] but defended as a prudent application of established principle to restrain the savaging of the public fisc by titans of industry extorting payments of public money as a precondition to the provision of a private service to private citizens. The decision proved to be popular among Michigan voters, and every member of the court rendering it was considered a candidate for higher public office.[12]

There is no reason to doubt that Cooley knew precisely how shocking the decision would be, and that he intended it as a rallying cry against what he regarded as widespread knavery. The *New York World* crowed:

> [I]t is a pleasing reflection that, mocked and disregarded as it has been as effete, illiberal, and unprogressive, [the old doctrine's] sound sense and old fashioned honesty are bringing it once more into prominence, approved and vindicated. … [I]f now reaffirmed in other courts … and maintained in the press and in the ballot box, many spoliations may be averted.[13]

But too few rallied to the cry for it to have its intended consequence. While the railroads never succeeded in effecting any change in the Michigan law to reverse the holding of the Cooley court, they did succeed in preventing the spread of the doctrine so damaging to their interests.[14] Had Cooley's doctrine been recognized in postmodern times, state and federal supreme courts might have forbidden cities and states to compete in giving public funds, even in the form of "tax incentives," to private investors in the expectation of creating new jobs stimulating to their local econo-

7 *Id.*, 485.

8 *Id.*, 486–87.

9 A. Jones, note 3, at 181, n. 41.

10 There was a somewhat similar holding in *Hansen v. Iowa*, 27 Iowa 18 (1869).

11 See, for example, C. Kent, *Municipal Subscription*, 7 Am. L. Rev. 126 (1870). The Supreme Judicial Court of Maine reached a similar result relying upon the explicit language of the Maine Constitution forbidding takings without compensation. *Allen v. Jay*, 60 Me. 124 (1872).

12 A. Jones, note 3, at 183.

13 Quoted in *id.*, 180.

14 See, for example, *Township of Pine Grove v. Talcott*, 86 U.S. 666 (1874) (holding that state subsidization of railroad construction is not a violation of the Fourteenth Amendment).

mies, or of attracting major league franchises away from other cities. Readers who share Epstein's assessment of *Kelo* might join me in celebrating the wisdom of Chief Justice Cooley. GB