The Public Use, Public Trust & Public Benefit

Could Both Cooley & *Kelo* Be Wrong?

Richard A. Epstein

The Supreme Court's ill-considered decision in *Kelo v. City of New London*[1] has had at least two welcome, if unintended, consequences. The first, and most notable, of these has been the public outcry against a judicial outcome that makes a mockery of the public use limitation found in the takings clause.[2] Political forces have already generated legislation that seeks to curb the use of the eminent domain power. Second, *Kelo* has also prodded scholars to think more systematically about the role of government in the economy, both in modern and historical times. Paul Carrington's elegant short article on this question bears the provocative title *Using Public Funds for Corporate Welfare: A Nineteenth-Century View of* Kelo.[3] His purpose is a lofty one: to invoke the justly venerated Thomas McIntyre Cooley[4] to show why doubting *Kelo* should expand our constitutional inquiry to confront a larger question. How should state wealth (whether in cash or kind) be used, if at all, to fund private enterprises?

Stated in its most general form, our constitutions, both federal and state, give explicit textual provision to only one side of the issue. Thus the takings clause tells us when and how states may *take* private property: only for public use, and only on the payment of just compensation. *Kelo* foolishly overrides the first of these two limitations. In so doing, it forces individuals to sacrifice their

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1 125 S. Ct. 2655 (2005).

2 "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

3 9 Green Bag 2d 121 (2006), written in response to Richard A. Epstein, Kelo: *An American Original*, 8 Green Bag 2d 355 (2005).

4 See Thomas M. Cooley, Constitutional Limitations (1st ed. 1868), for evidence of his genuine command of constitutional issues.

property in ways that the Constitution does not allow, in return for (in practice) compensation that is far less than just. Second, it distorts the operation of public processes by giving state legislators, and the people who lobby them, too many degrees of freedom to engage in public mischief. New London's ill-considered urban renewal plan counts as exhibit A for this proposition.

The second side of the problem is every bit as insistent as the first, and harder to solve. It arises when the state wants to *give* state resources to private parties. This problem can arise in two different ways. First the state may use public funds to make payments to or for the benefit of private businesses, or release or reduce private obligations otherwise payable to the state. Second, the state may transfer property held in public hands to private parties, sometimes for payment and sometimes not. The obvious constitutional imperative is that any coherent theory of limited government has to address both sides of the public/private relationship.

Although the takings clause explicitly addresses the first of these questions, no similar provision tackles this second set of problems. Instead the proper response to that issue has to be pieced together from other constitutional provisions, chiefly dealing with the power of the state to tax, to borrow money, and to dispose of its own resources into private hands. The public trust doctrine, which under the federal constitution has no clear textual home, is a key part of the mix as well.[5] It appears to be incorporated into most state constitutions as well.[6]

Cooley in *People v. Salem*

In sorting through this ticklish problem, Carrington turns to Cooley's inventive 1870 decision in *People v. Salem*,[7] which purports to place one clear limit on the power of local governments to help private firms: municipal bonds backed by tax revenues may not be used to support private enterprises, period. The full story is more complex. The town of Salem, along with several nearby townships, entered into this deal with the Detroit & Howell Railroad. The railroad was to build a line that ran from Detroit through these towns. The towns for their part were to issue bonds to help defray the costs of the road, which bonds would then be funded from future tax revenues. When Salem refused to issue the bonds, D&H sued.

Judge Cooley, in passages quoted by Carrington, nixed this suit by concluding that it was beyond the power of the local government to pledge its future tax revenues to aid construction of a privately-owned railroad, many of whose operations would take place beyond its borders. In his view, the railroad's "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."[8] Rather he thought that the railroad was no different from other private businesses such as "the opening of a hotel, the establishment of a line of stages, or the putting in operation of a grist-mill."[9]

Much as I admire Cooley and Carrington,

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5 *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892). For an exhaustive account of its history, see Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. Chi. L. Rev. 799 (2004).

6 *People ex rel. Scott v. Chicago Park District*, 360 N.E.2d 773 (1976).

7 20 Mich. 452 (1870).

8 Id at 478.

9 Id at 479.

I am unhappy with this categorical approach. Let me see if I can explain why D&H might have been entitled to get their bonds, just as Susette Kelo and her neighbors were definitely entitled to keep their houses. One basic problem for the town of Salem was to forge transportation links to the rest of the world. How is this best to be done? One way is to build the railroad from public moneys raised by taxation, which the state could own and operate, either by itself, or in conjunction with neighboring townships along the line.

The obvious objection to this scheme is that no township, which faces enough difficulty in building and maintaining highways, has the foggiest idea of how to run a railroad. Worse still, even if it did, that road would have to run outside town limits to be of any value. So cooperation with other townships would prove imperative. By allowing the bonds to be issued only for government owned and operated railroads, Cooley commits Michigan townships to a larger public government and to an inefficient form of business management – unless of course this constraint is evaded by a sweetheart deal on taxation. Contracting out this function might make some sense if we think it proper for local governments to support railroads as well as roads. The bonds could do this, as could a favorable tax assessment.

Why can't this be done? Cooley recognizes that the term "public" (as in public purpose or public trust) should not be construed in any "narrow or illiberal sense."[10] Indeed, I have long urged that the idea of public *use* extends to cover some cases of property taken for private ownership, at the very least in cases where private land is given to common carriers.[11] Grist mills subject to common carrier obligations were uncontroversially accorded the same treatment. The key element in these cases was that the takings power was necessary to prevent a single private owner from holding out against a joint venture that required every owner along the right of way, or every owner whose farmlands would be flooded, to sacrifice his rights to the venture that produces benefits open to all.[12] The hotel case, which requires an ordinary plot of land, does not meet that rationale. Cooley has lumped together two types of cases with very different characteristics.

The next step in the argument runs as follows. Once railroads count as public operations for the purposes of the takings clause, why are they out of bounds on the funding side of the equation? One explanation is that the funding of railroads does not raise any of the assembly problems needed to put together a right of way. No doubt that this makes the case for public intervention weaker for financing. But the same could be said of public highways. Here too use the state to assemble the land but not to finance their operations through public funds. But again the response is not quite perfect. Access to railroads is closed, and requires tickets. Access to public roads does not. But there are good reasons for this difference, as open access to railroads is a recipe for safety disasters. And of course the distinction is not black and white anyhow: toll roads and turnpikes also count as public highways.

Perhaps the best way to look at this question in *Salem* is to ask whether the desirable

10 Id at 475.

11 See Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161–81 (1985). For the articulation of those views in the *Kelo* litigation, see Richard Epstein, Timothy Lynch, Robert Levy & Mark K. Moller, Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Kelo v. City of New London*, 2004 U.S. S. Ct. Briefs Lexis 788.

12 For cases that take this line, see *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) (grist mill); *Olmstead v. Camp*, 33 Conn. 532 (1866) (same, even when no duty of universal service).

social conditions for sound public subsidies had been met. Here that question reduces to this inquiry: were the citizens of Salem better off on average with the deal than without it? Perhaps they were. First off, Cooley did not give sufficient weight to the coordination of the various towns along the line. Their joint efforts are needed to fund the line, so it now counts as a point in *favor* of this venture that some of the pooled revenues expended are outside the township. It may well be objected, of course, that here the town expenditures for the railroad may work for the benefit of some citizens but not for others. The point is true, but it is also too powerful for its own good. The same observation applies to public highways. In principle, we should like all expenditures on admitted public goods to serve each person equally, so that all are proportionate gainers from taxation. Yet in a world of practical affairs that condition is *not* met even with core cases of proper public expenditures. It is proper to lavish billions on wars that many citizens bitterly oppose. But for these deep-seated political differences, there is, regrettably, only a political response.

The Just Compensation Solution

So does this mean that if we back off Cooley's tough legal regime, local governments get carte blanche on their dealings, thereby exposing ordinary citizens to petty abuses of which Cooley so eloquently complains? I don't think that we have to acquiesce to that grim conclusion. In writing about this subject nearly twenty years ago, I argued that we should think about various contributions that governments make to private parties under an inverse to the takings clause. In order to encapsulate the best of the public use and public trust doctrines, my mythical constitution contains this inverse takings clause: "Nor should public property be given to private use, without just compensation."[13]

It is important to see how this principle differs from the approach that Cooley championed long ago, or which is embedded in the public trust doctrine that renders certain property, most notably submerged lands, inalienable. The common thread between the Cooley position in *Salem* and the public trust doctrine is that both insist that the only way to cabin public abuse is to rule out of bounds all revenue support from the state to private enterprise. The parallel logic of the public trust doctrine is that the state cannot alienate its property to private parties as well.

My alternative approach rejects this per se ban on both types of transactions. Instead it explicitly attacks the endemic problem of self-dealing by asking, as Cooley should have done, whether the town of Salem received a benefit from the transaction that was equal to or greater than the subsidy that it supplied through the bonds. The analogous question applies in public trust doctrine, which at root raises the same constellation of issues: what benefit came back to the public from the transfer of the property into private hands? That "fair value" calculation is not all that different from the same kind of "fairness opinions" that are issued by corporations in self-dealing cases. Some third person has to make an assessment of the terms of the transaction, which will go forward only if the aggregate benefits for the public entity exceed its costs. In this connection, the common carrier status of the D&H really does matter because it offers some evidence that all persons within the town will benefit from the operation of the railroad, just as they benefit in the same uneven way from open access to the public highways. In dealing with this transaction, it is also permissible to ask whether there are any constraints built into the deal on the con-

13 See Richard A. Epstein, *The Public Trust Doctrine*, 7 Cato J. 411 (1987).

ditions of service and the rates to be charged, and to assess the impact on real estate values within the town.

Two Modern Examples

I am not altogether happy with this approach, given the factual issues it injects into constitutional law. But all in all, it has some real bite. To give some examples of how it might work, consider two modern Illinois cases that ignore this principle. The first of these is *Lake Michigan Federation v. United States Army Corps of Engineers*,[14] where Judge Marvin E. Aspen struck down an outright transfer of 18.5 acres of submerged Lake Michigan land to Loyola University. The Illinois legislature had approved the conveyance of this land to Loyola for no cash consideration. Judge Aspen described the project design as follows:

> The plans developed by Loyola called for a lakefill of about 18.5 acres. Along the perimeter of the lakefill, Loyola intended to construct a stone revetment, as well as bike and walking paths, a seawall, and lawn areas. The public would have unrestricted access to these areas, which comprise about 2.1 acres of lakefill. In the interior portion of the lakefill, Loyola plans to build athletic facilities, including a running track, a women's softball field, and multi-purpose athletic fields. The public would have access to these areas, but subject to Loyola's right of ownership. In addition, Loyola proposed restoration and improvements to Hartigan Park Beach, which borders the proposed lakefill.[15]

No dice for this deal, said Judge Aspen. My question is why. In his view, the conclusion followed from the fundamental proposition that all such transactions should be closely scrutinized and invalidated, because "the public trust is violated when the primary purpose of a legislative grant is to benefit a private interest."[16] But this test is plainly incorrect under any sensible view of the matter. It is neither here nor there that this particular transaction supposedly works primarily for a private interest. It is hard to look at the overall Loyola transaction on the merits and see anything other than a win/win outcome. The control of erosion and the creation of the revetments, seawalls, and foot and bike paths are more valuable to the public than the eroded beachfront. All the better that Loyola gains as well. One could see some argument that asks whether the gain to Loyola dwarfs that to the state, but if that doubtful premise rings true, modification not invalidation of the deal is appropriate. Yet by the same token, if the deal fundamentals are sound, it would be most unwise to invalidate this transaction if the state issued bonds to underwrite the full deal. A flat prohibition on state transfers dooms this transaction. The inverse just compensation clause I proposed would validate it.

The second deal concerns the recent lease that the Chicago Park District entered into with the Chicago Bears for the renovation and use of Soldier Field, which was upheld unanimously in *Friends of the Park v. Chicago Park District*.[17] The financing deal called for $399 million in bonds to support the new Soldier Field project, about whose architectural merit the less said the better. The lease divided authority between the Park District and the Bears and, on a close examination

14 742 F. Supp. 441 (N.D. Ill. 1990).

15 Id at 443.

16 Id at 444.

17 786 N.E.2d 161 (Ill. 2003). In the interests of full disclosure I should mention that I worked with the Landmarks Preservation Council of Illinois, a co-plaintiff in the case.

of its terms, gave the Bears critical control over the facility during the football season. The question was whether this transfer of a limited interest in private property should be allowed. The case did not look like *Lake Michigan Federation* (because there were no submerged lands), but it did look like *Salem* because of its large bond issue, supplemented by a variety of taxes (*e.g.*, business travelers at downtown hotels) that did not benefit in any obvious way from the renovation of Soldier Field.[18]

One way to attack that lease was to argue that the state should never allow its facilities to be leased or used by private parties. But that approach, which extends the inalienability doctrine to short-term leases of park land, is far too restrictive because it would call into question whether we could ever allow private firms to operate concessions on public property. No, the better approach asks whether the deal was fair to the Park District. That approach in turn requires that one look at the financials of the case. The opponents of the deal had offered the affidavit of Allan Henderson, a sports economist from the University of Chicago, who concluded that the deal would take up around $600 million in public revenues in order to increase the value of the Bears franchise by $300 million.[19] But the affidavit was not admitted at trial to contradict the boilerplate statutory findings of the indirect public benefits that would come from the construction of the stadium.[20]

Instead, the entire opinion was organized around the strong presumption of constitutionality that required judicial deference in legislative matters – the exact opposite approach to the one taken in the treatment of submerged lands in *Lake Michigan Federation*. At this point the difference between takings and givings loomed large, because the Illinois Supreme Court refused to use the same level of increased scrutiny that it had adopted one year earlier in a takings case, *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, striking down a proposed condemnation on the ground that it was for private use only.[21] The decisive distinction was that takings of private property required a higher level of scrutiny than the financial transaction in that case. Similarly, the court distinguished *Illinois Central* by noting that it dealt with an outright conveyance of submerged lands while the long term lease to the Bears left the Park District with all the residual rights of the landlord.[22] Finally, in its most mighty leap of fancy, the court relied heavily on its own precedent in *In re Marriage of Lappe*,[23] one of the few times in recorded legal history where the *name* of a case offers conclusive proof of its irrelevance. That case called for deference in evaluating an Illinois statute that sorted out rights between divorcing spouses. It simply does not touch on those cases where the case involves an interested party whose conduct should be subject to higher scrutiny. *Friends of the Park* thus came out the exact opposite way of *Lake Michigan Federation*, which was never discussed. Both cases are dead wrong.

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18 Id at 164.

19 Copy on file with the *Green Bag*.

20 786 N.E.2d at 165. The court carefully did not include the financial conclusions in its account of the case.

21 768 N.E.2d 1 (Ill. 2002). The concurrence in *Friends of the Park* acknowledged the inconsistency but urged that *Southwestern* be overruled. *Friends of the Park*, 786 N.E.2d at 173–74.

22 *Friends of the Park*, 786 N.E.2d at 170.

23 680 N.E.2d 380 (Ill. 1997).

When the dust settles, we have three types of situations that call for some constitutional scrutiny: the taking of private property for public use; the taxation of ordinary activities for the benefit of private institutions, as in *Salem* and *Friends of the Park*; and the transfer of public property to private parties under the public trust doctrine, as in *Lake Michigan Federation*. At present we have a bewildering array of standards in dealing with the twin questions: when can these transactions take place, and how should they be evaluated? Yet there is no need for this confusion. The takings cases require the dual analysis of public use and just compensation. The public benefit and public trust cases require answering these same questions. Is the transaction just a giveaway to a private party, or is there some just compensation to the state which gives it an appropriate public purpose?

In light of what is said here, here is how our cases line up.

First, the *Kelo* case remains incorrect. It flunks any sensible account of the public use requirement, even if we allow the doctrine to be used to overcome various kinds of holdout problems that occur in the assembling of land for beneficial social purposes. The taking of those homes was devoid of any public purpose, yet it inflicted huge subjective (and uncompensated) losses on their owners.

Second, *Salem* needed a remand. Judge Cooley is right to be suspicious of the deal, but wrong to void it without some evaluation of its intrinsic fairness. There is enough in this record to think that the taxpayers got some benefit for their money, so the court should not have just voided the transaction on the ground that all types of public subsidies are necessarily improper. The state has to have a fighting chance to prove up its case. We can worry about burdens of proof later.

Third, *Lake Michigan Federation* was plain wrong because it was too tough on the deal. The overall transaction had large components of return in public value that met the just compensation standard for the public at large.

Fourth, *Friends of the Park* was plain wrong because it was too soft on the deal. The state can transfer wealth to private parties by long leases with divided control just as it can do so by outright grants. The strong presumption of constitutionality undercuts serious analysis because it keeps out all evidence that tends to show state giveaways of the sort that Cooley and Carrington rightly decry.

So in the end, let us pray that *Kelo* is not the last word on public use, public trust, or public benefit. There is no substitute for taking a careful look at the relevant deals. Constitutional doctrine works best by relying on strong principle at the wholesale level, and solid appreciation of the facts at the retail level. Cooley was wrong, I think, but principled. The modern cases have no glimpse of the problems he struggled with. The consequence is the doctrinal chaos that leads to *Kelo* and beyond.