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Column: Brent Connett: Texas supremes jeopardize our right to own property

AUSTIN - While the Texas Supreme Court is generally perceived to be conservative, the state's highest court literally has hit property owners where they live and work, making it too easy for the government to forcibly take homes and businesses through the power of eminent domain.

Eminent domain is government power in its rawest. Under no other doctrine - and where no crime has been committed - can government so directly limit or take away such an important individual liberty as the right to own property.

With two decisions, however, the Court has made eminent domain a cheaper and faster option for governments to choose.

In 1993, the Court ruled in the State vs. Schmidt case that "adequate compensation" required by the Texas Constitution in the eminent domain process does not include certain objective factors. The case centered on an Austin business property, a portion of which was being condemned for the expansion of Research Boulevard into a raised highway.

The Court, overturning 57 years of precedent, ruled that the owner, Robert Schmidt, was entitled to compensation only for the portion of the physical property he lost to the condemnation.

The Court said that Schmidt and other business owners are "not entitled to compensation for ... diversion of traffic, increased circuitry of travel to property, lessened visibility to passersby, or inconvenience of construction activities."

The expansion of Highway 183 negatively impacted Schmidt's property in each of those four ways, but he was not compensated for those factors, which would be considered in a fair market transaction between two private parties. Schmidt's compensation was so grossly *inadequate* that he ultimately lost his commercial tenants.

In State vs. Schmidt, the Supreme Court incorrectly valued fiscal conservatism over private property rights in an effort to make highway construction cheaper for governments, and ultimately, the taxpayers. When certain factors are excluded from "adequate compensation," however, the costs of a highway are no less. Instead, they are disproportionately borne by individuals such as Schmidt, who owned a business, contributed to the economy and paid taxes.

The Texas Department of Transportation took property on the cheap, but at a great expense to Robert Schmidt.

In 2004, the Court's Hubenak vs. San Jacinto Gas Transmission Company decision further damaged property rights by making eminent domain easier for governments.

State law, according to the Hubenak ruling, authorizes the initiation of condemnation proceedings only if the two parties are "unable to agree" on a purchase price.

Accordingly, the Court found that any offer by a political subdivision satisfied the law's intent.

If the landowner ignored or rejected the government's first offer, then the standard of "unable to agree" was met, thereby triggering condemnation proceedings.

Although untested in the courts, a government theoretically could offer to purchase a property for an absurdly low amount and then commence condemnation once the owner rejected that offer.

By removing the requirement for good faith negotiations with its Hubenak decision, the Texas Supreme Court tipped the balance further away from property rights to the benefit of government. In light of Hubenak, property owners are forced to fight condemnation in court instead of at the bargaining table.

The Schmidt decision made condemnation cheaper for governments, while Hubenak made fighting condemnation more expensive for property owners.

The arbitrary exclusion of certain measurable factors in "adequate compensation," per the Schmidt case, should be reversed by legislators.

Furthermore, truly adequate compensation demands that property owners be given a fair offer and the opportunity to negotiate, as would be the case in the private market.

These reforms would discourage units of government from making frivolous decisions about condemnations. In correcting these abuses of private property rights by the Texas Supreme Court, legislators can make eminent domain an expensive and arduous option for governments - to the benefit of all property owners.

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