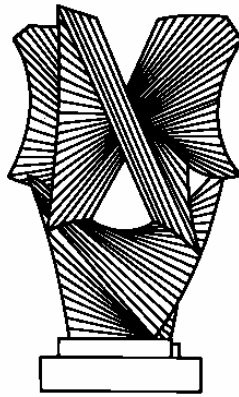


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Public Use in a Post-*Kelo* World

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Public Use in a Post-*Kelo* World

Richard A. Epstein *

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Abstract

The aftermath of *Kelo* gives rise to urgent land use issues, both theoretical and historical. On the former, I argue that the analysts should be aware of the close and positive connection between restrictive land use policies on the one hand and a willingness to condemn parcels for private development on the other. The inability to overcome local opposition with private development forces developers to get in essence, pre-acquisition approval through public condemnation. One way, therefore, to ease the pressure on public use is to retreat from aggressive land use regulation to a scheme that more closely approximates that of the common law rules on nuisance and restrictive covenants, which will be hard to achieve since local systems of voting give little weight to the interest of potential buyers who live outside the governance area. Historically, this opportunity was lost when the United States Supreme Court in *Berman v. Parker* distanced itself from the thoughtful decision of Judge Prettyman below in *Schneider v. District of Columbia*, which sought to cabin in the ends for which the eminent domain power could be used, even if it gave too much deference to local governments on any means/ends connections.

Key words: *Kelo*, just compensation, land use planning, nuisance, public use, restrictive covenants, zoning.

I. *Kelo*, Yet Again

The now (in)famous decision of the Supreme Court of the United States in *Kelo v. City of New London*¹ has spawned an immense literature on the proper role for government in regulating land use.² One shortfall in much of the current analysis is that it tends to partition the public use dispute—when should the state take land outright from private owners—from the general questions of zoning—how should it regulate the use of land left in the possession of its owners—with which it is closely allied. One overarching

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¹ 545 U.S. 469 (2005).

² See, e.g., Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, George Mason Law & Economics Research Paper No. 07-14 Available at SSRN: <http://ssrn.com/abstract=976298>. See also, David Dana, The Law and Expressive Meaning of Condemning the Poor After *Kelo*, 101 Nw. U. L. Rev. 365 (2007) (claiming the post-*Kelo* reforms have had a disparate impact on the poor); Ilya Somin, Is Post-*Kelo* Eminent Domain Reform Bad for the Poor?, 101 Nw. U. L. Rev. 1931 (2007) (answering in the negative).

lesson that one learns from the entire sorry episode is the importance of thinking about the two elements together, as part of the comprehensive strategies that are available for land use regulation. In this short article, I address both the practical and constitutional sides of this issue. Part I examines two different paradigms for land use regulation. The first of these builds on the need to regulate common nuisances and provide access to common facilities, which gives relatively little discretion to public figures. The second—and current—model vests extensive powers in government planning boards and officials to restrict private land development, which in turn invites extensive use of the public use power. In essence, the culture of deference toward government zoning that originated in the Supreme Court’s 1926 decision in *Euclid v. Ambler Realty*³ has unfortunately done still further harm now that it has spread to the public use issues raised in *Kelo*.

The second portion of this paper examines the constitutional justifications for awarding extensive discretion to government officials, paying some attention to a much neglected source of wisdom on this question, the decision of Judge E. Barrett Prettyman, in *Schneider v. District of Columbia*.⁴ That decision upheld on a relatively narrow interpretation of the public use language Washington D.C.’s comprehensive redevelopment pursuant to the District of Columbia Redevelopment Act of 1945.⁵ That result was affirmed by the Supreme Court in *Berman v. Parker*, albeit on far broader grounds.⁶ Why did two opinions written in wholly different voices reach the same outcome? Because Judge Prettyman blinked at the last moment. After taking thoughtfully tough positions on most of the hard questions in *Schneider*, he retreated to the rational basis test at the eleventh hour by refusing to examine whether the means chosen in the Washington D.C. redevelopment plan served the limited ends allowed under the public use doctrine. The normative implication mirrors the descriptive subtext. All questions involving land use regulation need to be governed by the same test. Let the rational basis

³ 272 U.S. 365 (1926).

⁴ 117 F. Supp. 705 (D.D.C. 1953), affirmed on very different grounds in *Berman v. Parker*, 348 U.S. 26 (1954). The Prettyman decision was called to my attention in D. Benjamin Barros, Nothing “Errant” About It: The *Berman* and *Midkiff* Conference Notes and How the Supreme Court Got to *Kelo* with Its Eyes Wide Open, in *Private Property, Community Development, and Eminent Domain* 57 (2008). Barros uses Prettyman’s opinion as a foil to Justice Douglas’s decision in the Supreme Court, but makes no attempt do defend any part of it on the merits, which I shall do.

⁵ 60 Stat. 790, Ch. 7 § 5-701.

⁶ 348 U.S. 26 (1954).

test form any part of the analysis, and the legislative act will routinely pass muster except in rare cases of overt personal misconduct.

Let us turn first to the descriptive, and then to the normative issues.

II. The Destructive Synergies between Land Use Regulation and the Public Use Doctrine

Both at the administrative and constitutional level, it is important at the outset to realize that there is no “laissez-faire” solution to land use planning, if by that term it is meant that the state has no role whatsoever to play in regulating the behavior of land owners and occupiers.⁷ Nor is this exceptional. When that term “laissez-faire” is used to describe freedom of contract, its detractors often mock the doctrine on the supposed ground that it imposes no limitations on how contracting parties may behave toward each other or to third parties.⁸ But no responsible critic or advocate of the position takes that extreme view.⁹ Rather, the doctrine is properly hedged in with limitations that deal first with the defects in the contracting process, which requires the extensive development of rules that deal with duress, misrepresentation, concealment, incompetence and undue influence. It also has to develop rules that deal with the imposition of external harms, both from conspiracies to commit violence or, with more difficulty, contracts in restraint of trade. Yet at the same time the full complement of rules must take exquisite care to see that any rules intended to prevent socially destructive activities are not used to suppress competition itself, which is a constant risk in the application the antitrust laws, for example.¹⁰

The same observation applies to land use regulation. Any decent system of land use law must address the wide range of externalities, both between adjacent landowners and between private and public property. All the while it is critical to distinguish between

⁷ See, for the inaccurate use of the term, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681 (1973), in an article that is sensitive to nuisance-like externalities.

⁸ See, e.g., Grant Gilmore, *The Death of Contract*, The Ohio State University Press (1974).

⁹ See Jacob Viner, *An Intellectual History of Laissez-Faire*, 3 J. L & Econ. 45, 45 (1960).

¹⁰ For one instance of the risk, see the discussion of predation in *Matshushita v. Zenith Corp.*, 475 U.S. 574 (1986).

those land uses which are socially harmful and those which are socially productive. As with freedom of contract, the undesirable externalities include nuisances and similar behaviors, while the beneficial activities include economic competition between neighbors. Accordingly, one key question asks what system of social control best distinguishes between productive and destructive forms of land use. On this question, it is unlikely that private rights of action will provide the only solution, given the risk that some nuisance-like activities create diffuse harms to many individuals, and these public nuisances have for nearly 500 years have been subject to administrative sanctions.¹¹ In grappling with these issues, the success of government regulation is likely to depend on the choice of institutional arrangements, which can follow one of two paths. The first of these builds on the common law of nuisance while the second adopts a more ambitious program to advance more extensive objectives through the system of land use regulation, which go beyond the achievement of some competitive equilibrium.

Let us start with the former. The common law rules of nuisance essentially allow individual landowners to build what they please on their own property. That body of law will enjoin a wide range of physical invasions of nearby property, and on some limited occasions will restrict certain noninvasive use of property between neighbors, as in cases of lateral support.¹² Under these tests the routine private development of land can rarely be prohibited. Even restrictions on development are hard to come by except in dense neighborhoods. The key issues in these urban settings concern the public/private interfaces involving such critical issues as vehicular and pedestrian entrance and egress from property, the additional burdens that private development places on streets, parking, sewers, utility connections and other facilities. These recurrent disputes arise because of the inescapable question of whether the owner of a private facility near public property has engaged in activities that impose disproportionate burdens on the common resource.

¹¹ See, Anon. Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536). Fitzherbert, J. "I agree well that each nuisance done in the King's highway is punishable in the Leet and not by an action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt." The quotation only deals with interactions on public roads, but the class of public nuisances clearly cuts more broadly.

¹² For a discussion of the framework, see Richard A. Epstein, Nuisance Law: Corrective Justice and its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979).

Some government measures therefore have to be taken to adjust the use rights between earlier and later comers, to make sure that neither group is guilty of this practice. The solutions in question could require off-street parking for apartment houses or additional payments for hookups to key public services.¹³ But these ubiquitous issues should be typically handled by intensive but low-level interactions between the property owner and the public authorities. In this regime, state administrators generally do not have to worry about nuisance issues, because few residences and businesses impose this risk, which could, should the need arise, be handled after construction is complete. The threat of injunctive relief should be so strong that there will be little or no nuisance-like behavior. I am not aware of any modern zoning litigation in which the question of enjoining a nuisance even formed part of the discussion.

Within this traditional framework, *Kelo* falls into a slightly different pattern because most of the land slated for development was already in the hands of the City, having acquired it from both federal and state parties.¹⁴ In these circumstances, the preferred approach is to sell off the land subject to the highest bidder, which insures the maximum amount of cash for all citizens. The only limitation on sale is to subject the buyer to the same planning restrictions, no more and no less, as they would have faced if the land had always been in private hands. In these circumstances, development could take place at a far more rapid pace, which would allow for the more sensible business coordination between activities within the same parcel or with other nearby facilities, a point of much importance in *Kelo*, as nearby towns quickly developed facilities to satisfy the very market niche that New London had hoped to reserve for itself.

The second path is the one that dominates in New London and under all too many other local governments in the United States. Here, the dominant paradigm affords extensive government discretion both in the regulation of private land and in the

¹³ For an example of the protection of latecomers, see *State ex rel. Wood v. Consumers' Gas Trust Co.*, 61 N.E. 674 (Ind. 1901), (rejecting preferences to established gas customers over new arrivals to the district). “[T]here can be no such thing as priority or superiority of right among those who possess the right in common.” *Id.* at 677.

¹⁴ The various homes in question occupied only about 2 acres of the total plot, the bulk of which was not acquired by eminent domain. The site thus “includes the presently closed United States Naval Undersea Warfare Center, which is thirty-two acres, and also the regional water pollution control facility.” *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004)

disposition of public lands. The former now routinely takes the regrettable course typical of the modern administrative state. No individual landowner is allowed to build simply by showing conformity to the law of nuisance, subject to needed adjustments at the public/private interface. Modern law recognizes that the owner is the only party who can develop the parcel. Yet by the same token, it lodges in state or local officials, or both, a broad permit power to veto any construction, often in response to heavy pressure from other residents. That ability to enjoin with only the weakest showing of cause always sets up a powerful hold-up situation, which tempts the local government to exact its pound of flesh from the landowner as a condition for issuing the needed permits. It is common to find cases where local governments seek to condition the arrival of new entrants on their willingness to fund local improvements which offer extensive benefits to current residents, such as current parks and schools to which they have extensive access.¹⁵ In dealing with these issues, there are no instances of extra charges being imposed on early arrivals. All the charges are imposed on the late comers, regardless of the relative burdens they impose on the common facilities or on the benefits received from the public improvements.

The explanation lies in a simple point of public choice theory. The early comers are all voters within the community whereas the late arrival is not. Voter self-interest is a risk that is never curtailed by public deliberation, which has the unfortunate consequence of amplifying the existing biases in the community, given what has been termed the endemic risk of discourse failure.¹⁶ Here this failure does not result from any form of rational ignorance, whereby members of the community do not find it in their interest to learn of the relative issues at hand.¹⁷ That response may well apply to votes on general legislation that impacts a large portion of the population. But key zoning battles often elicit excesses of participation given their highly targeted impacts.¹⁸ In these cases,

¹⁵ See, for the futile effort to rein in these abuses, *Dolan v. City of Tigard*, 512 U.S. 374 (1994). And for successful demands to allow for special charges to fund art museums chiefly benefiting existing residents, see *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996).

¹⁶ See, Guido Pincione & Fernando R. Teson, *Rational Choice and Democratic Deliberation: A Theory of Discourse Failure*, Cambridge University Press (2006).

¹⁷ See, Somin, *supra* note 2, at 37.

¹⁸ See, for example, just a small sampler of cases from Michigan (which in fact narrowed the reading of public use). See, e.g., *Paragon Properties Co. v. City of Novi*, 550 N.W.2d 772 (Mich. 1996) (requiring a variance before allowing a challenge on the denial of a permit); *Conlin v. Scio Township*, 686 N.W.2d 16,

deliberation often has the unhappy consequence of allowing a blocking coalition to form against the claims of outsiders who are not represented in the local political process.

The entire modern administrative process builds off the intrinsic skew in political forces to create the distinct possibility for endless amounts of confusion and delay. It also puts, as noted, greater pressure on the need for coercive government action to condemn land for various forms of development. In some cases, the interactive ironies are great. In their Supreme Court brief in *Kelo*, for example, Thomas Merrill and John Echeverria, insisted that the power to condemn property for development was necessary to deal with the question of urban sprawl, which could easily tax local infrastructure.¹⁹ But the more salient point is that much of the urban sprawl develops precisely because local landowners have had little or no success in challenging a variety of local conditions or large-lot acreage decisions which help bring about the very sprawl that is so widely derided. The use of extensive government powers in both directions therefore operate in an unfortunate synergistic fashion, creating a political landscape which is ripe of all sorts of political intrigue, which in some instances could result in legal proceedings going too slowly, when landowners want to approve, and too fast when local governments decide to condemn land in order to carry out their own political schemes.²⁰

It would be a mistake, however, to think that every set of local land use decisions follows the self-destructive path of New London, where the homes are gone, the tax base eroded, and nothing has been built in its place.²¹ Local governments operate to some

24 (Mich. App. 2004), which rejected the application for a development of a 136-acre plot on this standard: “the challenger must negative every conceivable basis which might support the legislation,” or must show that it “is based solely on reasons totally unrelated to the pursuit of the State’s goals.” *Id.* at 24 (internal citations omitted); *SBS Builders v. City of Madison Heights*, 206 N.W.2d 437 (Mich. 1973) (invalidating ordinance that allowed one neighbor to build on a nonconforming lot, in a special zoning situation that affected only a “minute” portion of the overall city).

¹⁹ John D. Echeverria, Thomas W. Merrill, Brief of the American Planning Association, the Connecticut Chapter of the American Planning Association, and the National Congress for Community Economic Development as Amici Curiae in Support of Respondents (Jan. 21, 2005), 2005 WL 166929, at 18, (criticizing the narrower test in *Hathcock*, *infra* note 50, on the ground that its “limitations could severely restrict government efforts to combat urban sprawl”).

²⁰ See *Didden v. Village of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006).

²¹ See, the New London Day, November 27, 2007, Elaine Stoll Fort Trumbull Developer Asks For More Time, Misses Deadline,. [Professor, the link you had here is to a file on your own computer. I couldn’t find the link to this article online because I think it requires a subscription.—KBN] Her story lead is as follows: “Preferred developer Corcoran Jennison missed an important deadline Monday for its Fort

extent in competition with each other,²² and the knowledge that developers can go elsewhere places some imperfect constraint on the aggressive use of the zoning and permit powers. This exit right is critical to the success of any scheme of federalism.²³ But its protection is incomplete and haphazard. Thus the exit right has no constitutional pedigree, and does not protect the capital values of the landowner, which remain vulnerable to expropriation. Nor does it offer complete protection to developers who may be forced to withdraw only after they have made extensive site-specific investments. No one should spurn the value of exit.

Nonetheless, the key feature to note about any bilateral monopoly situation is that, thankfully, no one can identify a single dominant legal strategy that all local governments will follow. As is the case with labor union officials (who enjoy a similar monopoly power under the labor acts), some local officials will adapt a risky strategy that could kill the goose that lays the golden egg. Other public officials will opt for a strategy that demands less in the individual case, but which has the long-term advantage of securing some degree of stability in interactions. Whether a local government armed with the monopoly power decides to take a high risk/high return strategy or a low risk/ low return strategy is never clear. If the first course is taken, we multiply a small chance of success by a large gain. If the second, we multiply a large chance of success by a smaller gain. No a priori calculations determine which of the two products is the larger, and therefore no dominant strategy emerges. That said, the particular course of action in any individual case is subject to high variance. The relevant determinants include the temperament of key officials, their perceptions of the temperament and strategies of opposition parties, the composition of the various coalitions, and the (different) estimates of the four key parameters: chances of success or failure, and the gains or losses that follow from each of the many possible outcomes. It is easy to see how even rational parties could move in

Trumbull peninsula housing development, whose groundbreaking will almost certainly be postponed again.” If, and when the development takes place, it will bear scant resemblance to the original plan.

²² Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

²³ See, e.g., Richard A. Epstein, *Exit Rights Under Federalism*, 55 Law & Contemp. Probs. 147 (Winter, 1992); for an application of the theory to insurance companies held hostage by state regulation, see Richard A. Epstein, *Exit Rights and Insurance Regulation: From Federalism to Takings*, 7 Geo. Mason L. Rev. 293 (1998-1999). For a more optimistic view of exit rights, see, Vicki Been, 91 Colum. L. Rev. 473 (1991).

opposite directions, given even small differences in the actual or perceived condition of the key players and the relevant factual and legal environment.

One strong condemnation therefore of the modern system and its extensive reliance on administrative deliberation is that it multiplies strategic options, without increasing social gain. The situation in New London is not all that dissimilar to that which is found in other communities that have diverse populations, pockets of prosperity, working class neighborhoods, and decaying infrastructure. An account of it was given to me by Glenn T. Carberry, who represented Corcoran Jennison Company, the developer selected by the New London Development Corporation to execute key portions of the master plan that the City and its various agencies approved.²⁴ The New London township has a powerful zoning establishment, which is clearly evidenced by its own expansive statement of its zoning mission.²⁵ The implementation of that policy in New London is clearly less strict than it is in many exclusive towns on Long Island Sound and is about average for other communities with a similar demographic. For smallish projects that involve single parcels, it is possible to get projects through, but success depends on building relationships with public officials, and not on showing up with a site plan coupled with an immediate demand for approval. Large projects of the sort involved in *Kelo* cannot get through this way as the planning commissions are ill-equipped to handle them, so that the political solution used in *Kelo* offers the only possible path for gaining approval. In *Kelo*, the design of the plan was completed before Corcoran Jennison was selected as the developer, and the large projects in which it had an interest were to be located almost entirely on a former military base that was already in government hands. The condemnation of the houses on or near the development site was solely the decision of the NLDC, which might have, but did not adopt other proposals that could have involved, for example, tax incentives that would allow current residents to approve their own homes. As matters now stand, Corcoran Jennison has not backed out of site development. It is currently renovating an 80,00 square foot office building on one of the

²⁴ Phone call, April 8, 2008 with Glenn T. Carberry, of Tobin, Carberry, O'Malley, Riley & Selinger. I did not know of his role in the case until I made the phone call.

²⁵ This point is very difficult to pin down. But New London does have a full range of zoning activities under its Planning, Zoning & Wetlands Division, whose opening sentence gives little hope on this question: "The Planning and Zoning Division is responsible for an increasingly broad range of regulatory functions, project management and planning projects."

development parcels. It has also received land use approvals to construct a hotel and an 80 unit rental housing project on the site. None of these projects is located on any land on which the homes were located. Those lots still remain vacant with no development plans in sight.

In my judgment, the pattern of development here is typical of that in many zoned communities, which helps explain why the public use issue looms so large. Private assembly and approval is just not possible. The urgency of the situation is most apparent in towns like New London with its flagging local economy, which is doubtless under strong pressures to adopt a condemnation strategy. No developer would take the risk, or incur the costs, of seeking the public approvals for land on a project without having an inside track, which is why the solicitation process takes place after the plan is completed. In New London as elsewhere a restrictive zoning program, especially for large projects, leads to an aggressive condemnation program. In my view, local governments that are comfortable with strong interventionist behaviors simply shift their legal power from one target to another.

There is of course one crucial difference between the politics of zoning and the politics of eminent domain. In the former, the targets of regulation are often outsiders who do not have the vote or the clout in local communities. In condemnation cases, the targets of local power are persons who are by definition already in the community. At this point any use of this power generates a strong division of sentiment between those who see the use of the condemnation power as a threat to their own homes, and those who see in it some advantage from improving the quality of the neighborhood, or increasing tax revenues. Local groups and individuals therefore have mixed perceptions on this question because virtually all can peek out from behind the veil of ignorance to see whether they will more likely occupy the role of the condemner or the condemned. It seems highly likely that the uniform surveys that show opposition to *Kelo* in every demographic group, whether determined by party affiliation, income, race, sex or age,²⁶ stem in large part from the insecurity that people sense in their own property once the power of eminent domain is unleashed. It would, of course, be a mistake to think that this is the only ground

²⁶ For review of these figures, see Somin, *supra* note 2, at 7.

for public opposition, for there are many people, including many renters, who are simply appalled on moral grounds at the thought that government can use its muscle to displace one person for the direct benefit of another. These displays of public power are not the equivalent of incarceration, but it is right for people to be concerned that local governments can by condemning the property of certain select individuals exile them from the local community while keeping all the public gains for themselves. The zoning regulations do not cut so deeply because their dominant trope is exclusion not dispossession, and exclusion of outsiders only. The referenda on this issue, to the extent that they gain traction, show a stronger support for restrictions on taking for public use than they do for limiting zoning (whose negative effects are often lodged on outsiders).²⁷ The public outcry on *Kelo* was in all likelihood an uneasy amalgam of moral indignation and personal uneasiness. The inability of these two emotions to carry the day on significant legislative reforms is in part because of the built-in working advantage that long-entrenched planners have within the political powers. They will resist the imposition of any restriction on their powers, and they form a coherent group which is well-positioned in the political process.

III. Kelo's Constitutional Morass

This general pattern of behavior of local governments before and after *Kelo* gives little reason to trust the political processes to get the right kind of result. There is in any political setting the inherent risk of majority rule, namely that one faction will seek to gain partisan advantage at the expense of a rival. That set of difficulties is compounded because the persons who have a stake in local government decisions often do not have anything close to equal representation or access to the political process. In these cases, the risks of judicial deference of the sort followed by the Supreme Court are great. Nor is this problem in any sense allayed by the huge level of political uproar that followed the decision. To be sure, notables such as Richard Posner have taken the view that judicial deference in this setting was defensible precisely because “the strong aversive public and legislative reactions to the *Kelo* decision” should be viewed as justifying the court on, as

²⁷ See, e.g., Somin, *supra* at 2 at 29, note 148, noting that the California and Idaho initiatives went down in defeat because the *Kelo* reforms were tied to controversial measures that limited government discretion in connection with regulatory takings.

usual, undefined “pragmatic” grounds,²⁸ which in this instance is a repackaged version of Holmesian skepticism on the wisdom of Supreme Court interventions on matters of economic liberty or property rights.

Why the political aftermath of *Kelo* counts as a vindication of the Supreme Court’s decision remains something of a deep mystery on both process and substantive grounds. Outrageous decisions of all sorts give rise to strong political protests, some of which succeed and many of which are futile. Any rationale that notes there is a political response to an unpopular decision always cuts too broadly to be of any assistance, for it always points in the same direction: never strike down any legislation. Broadly stated, this all-purpose argument could justify restrictions on all sorts of freedoms, and in the hands of Posner, the judge, it has resulted in decisions that have tolerated genuine administrative abuse in the land use context for no good reason.²⁹ Applied to its limit, this pragmatic approach would eviscerate all the structural safeguards of federalism. In one fell swoop it would make vulnerable to judicial rejection of the current dormant commerce clause jurisprudence whose procompetitive bias has done so much to make the United States a large free trade zone.³⁰ In these cases, the doctrine survives precisely because the Supreme Court has been willing to enforce the key line between health

²⁸ See, Richard A. Posner, Foreword: A Political Court, 119 Harv. L. Rev. 31 (2005).

²⁹ See, e.g., *Coniston Corp v. Village of Hoffman Hills*, 844 F.2d 461 (7th Cir. 1988); Richard A. Epstein, How to Make Procedural Due Process Disappear, 74 U. Chi. L. Rev. 1689 (2007). The vices of the Posner opinion were numerous. Two of the most glaring are these. He first equates the decision of a Town Counsel that doubles as a zoning appeals board as that of a “legislative body” even though only a single application was at stake. See *Coniston*, 844 F.2d at 469, critiqued in Epstein, How to Make Due Process Disappear, at 1697. Second, he badly twists the language of *Creative Environments, Inc v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) to make it appear that it is perfectly legitimate for local governments to veto land use decisions for purely anticompetitive reasons. On the contrary, *Estabrook* held the exact opposite on that point, noting that it was permissible to prohibit development on the ground that it was inconsistent with the “character” of the neighborhood, which, to be sure, is a far broader standard than the restriction of common law nuisances. See Epstein, How to Make Due Process Disappear, at 1699-1700.

³⁰ See, e.g., *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1953). See, e.g., *Coniston Corp v. Village of Hoffman Hills*, 844 F.2d 461 (7th Cir. 1988); Richard A. Epstein, How to Make Procedural Due Process Disappear, 74 U. Chi. L. Rev. 1689 (2007). The vices of the Posner opinion were numerous. Two of the most glaring are these. He first equates the decision of a Town Counsel that doubles as a zoning appeals board as that of a “legislative body” even though only a single application was at stake. See *Coniston*, 844 F.2d at 469, critiqued in Epstein, How to Make Due Process Disappear, at 1697. Second, he badly twists the language of *Creative Environments, Inc v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) to make it appear that it is perfectly legitimate for local governments to veto land use decisions for purely anticompetitive reasons. On the contrary, *Estabrook* held the exact opposite on that point, noting that it was permissible to prohibit development on the ground that it was inconsistent with the “character” of the neighborhood, which, to be sure, is a far broader standard than the restriction of common law nuisances. See Epstein, How to Make Due Process Disappear, at 1699-1700.

regulations on the one hand and anticompetitive regulation on the other, even though the overlap between the two can in some cases be palpable.³¹ And the outrage over the ban on school prayers or school segregation hardly shows that it would have been right to leave these issues to the political process, which would generate other protests of its own.³² Protest can occur not only for staying out, as in *Kelo*, but getting in, as in the school prayer and segregation cases.

The indictment of this pragmatic effort to guess, or game, the political system rests on one simple count: It is lawless. At its root, the pragmatic objections reverse the order of constitutional interpretation by inserting a huge institutional trump card that displaces any serious discussion of any issues fairly raised by the relevant constitutional text. To be sure, no one should be in favor of a wooden literalism that ignores constitutional context, structure and tradition. But even when these are taken into account, it hardly follows that explicit constitutional guarantees should be allowed to wither away as a matter of course because deliberative institutions have to be held in awe. In some instances, the tools of constitutional construction, like those of statutory and contract interpretation, should be used to prevent the *circumvention* of a basic constitutional guarantee.³³ Thus in the takings area the protection against the taking of property has to be read to cover instances where the state engages in the systematic destruction of property without taking title to it.³⁴ Yet by the same token, the entire realm of police power limitations on constitutional guarantees has arisen solely by judicial construction.³⁵ The interplay of these canons of construction does not point to a jurisprudence that denatures broad constitutional guarantees, such as the takings clause, based on an overly optimistic prodemocratic bias that is itself nowhere reflected in the Constitution. The Takings Clause says in so many words: “nor shall private property be taken for public use, without just compensation.” The prohibition on taking for public use

³¹ “[By] thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people.” 340 U.S. at 354.

³² *Engel v. Vitali*, 370 U.S. 421 (1962).

³³ For a discussion of these twin themes, see Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* 34-50 (2008).

³⁴ See, e.g., *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

³⁵ See, e.g., *Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

is categorical, not squishy. On this point, the Takings Clause does not say, and it could be conceivably read to mean, “nor shall private property be taken for anything that the legislature might put forward in bad faith as a conceivable public use, purpose or benefit, without just compensation.”

The nub of the difficulty is this. Any constitutional system has to balance the risks of misbehavior by unelected judges against the risk of misbehavior by elected political officials. The hardest question to ask in a second-best world is which set of imperfections do we fear more, those of unelected judges or those of partisan legislatures. Without question, both risks are large and material, so that no solution on the question of relative risks can be error free. That task, therefore, requires some assessment of the performance of both institutions. So long as we have a system of judicial review that balance has to be drawn by courts. In dealing with the takings situation, the mistake of the Supreme Court was to invoke a norm of extreme deference that departs from the text of the Constitution without identifying any strong reason to trust local land use authorities whose own mission is seriously compromised by political pressures. The intervention, moreover, does not duplicate the legislative function even on the most expansive interpretation of public use. It does not allow, for example, courts to initiate any taking for an admitted public use, nor to raise the taxes in order to pay for it. These remain quintessential legislative functions. Judicial invalidation only provides a check on one form of action which leaves political bodies a second opportunity to cure the defects of its initial action. The view of checks and balances tracks well a world view that sees flaws at every level of government, for it gives no body an exclusive and final say-so over what happens. Strike down the plan in *Kelo*, and the next time round we should get a higher level of government performance.

In light of these institutional observations, there is much to criticize in the subsequent defenses of *Kelo*. Of course, there is little doubt that the decision is *consistent* with the broad language that was consciously adopted in the two earlier Supreme Court cases on this issue, *Berman v. Parker*³⁶ and *Hawaii Housing Authority v. Midkiff*.³⁷ In

³⁶ 348 U.S. 26 (1954).

³⁷ 467 U.S. 229 (1984).

both these unfortunate unanimous decisions, the Supreme Court said what it meant and meant what it said, notwithstanding Justice O'Connor's later protestations to the contrary, ironically about her ill-conceived decision in *Midkiff*.³⁸ Yet at the same time, these two decisions did not in any sense *compel* the decision in *Kelo*, which could have been distinguished on four respectable grounds. The first is that *Berman* turns out to be a blight case and *Midkiff* an "oligopoly" case given the high concentration of land ownership in the hands of a few key Hawaiian parties.³⁹ [Neither issue was relevant to *Kelo*. Surely, therefore, the state interest is weaker in *Kelo* than it was in the relevant precedents, because the simple assertion (false in this case, as it now appears) that tax revenues will increase from the condemnation should not be accepted, precisely because it is arguably true in every instance.

The second ground is that neither *Berman* nor *Midkiff* involved the displacement of ordinary people in possession of their own homes for economic development by other private parties—which is precisely what upset most ordinary people. The point here is that most people have some attachment to their homes, and the forced dislocation counts as a major disruption of their personal lives. *Berman* involved only a business (which was bad enough), but *Midkiff* veered in the opposite direction. Far from forcing parties out of their homes, it allowed holders in on finite leases to acquire the fee simple with the assistance of state coercion, at a time when many of the property holders were looking to dispose of their assets in the voluntary market in order to diversify their portfolios against sovereign risk.

Third, the Supreme Court could have followed the lead of the trial court in Connecticut, which found that those homes located near the center of the site could be

³⁸ For discussion of the relevant conference papers, see D. Benjamin Barros, Nothing "Errant" About It: The *Berman* and *Midkiff* Conference Notes and How the Supreme Court Got to *Kelo* with Its Eyes Wide Open, in *Private Property, Community Development, and Eminent Domain* 57 (2008). The term errant refers to the passage in Justice O'Connor's dissent where she parses her own (misguided) opinion in *Midkiff* to indicate that it did not reach the *Kelo* situation. See *Kelo*, 545 U.S. at 500, 125 S.Ct. at 2675.

³⁹ Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts proved largely unsuccessful, however, and the land remained in the hands of a few. In the mid-1960's, after extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners.

Midkiff, 467 U.S. at 231.

taken to allow for coordination of building efforts while those at the periphery could not be so taken.⁴⁰ In effect, it asked the question whether the private homes blocked the possible assembly of land for some future project. The correlations here were not exact because the condemnation plan allowed for the continued operation of the Italian Dramatic Club, a favorite place for local political figures.⁴¹ But, even if wrong on this particular, it represented at least some effort to impose limitations on state development in ways that did not hamstring the state. Yet the Connecticut Supreme Court held that deference allowed the state to determine the boundaries of the condemnation program as well as its permissible objectives, under a standard of extreme deference.

Finally, *Kelo* could have been disposed of on narrow grounds if the Supreme Court found that the takings proposed by the New London authorities were premature, given that no one in New London had yet figured out what to do with the land which, for the record, remains vacant and unproductive nearly three years after the Supreme Court's decisions.⁴² On this last point, moreover, *Kelo* reveals a subtle but vital difference between the invocation of public use as opposed to a public benefit test, with the phrase public purpose somewhere in the middle. The former is something that can be determined by an inspection of the property. Is it open to the public in some form? Does it resolve, in some few cases, a genuine holdout or assembly problem? But public benefit cannot be so observed. Therefore that benefit is presumed from the decision of the local body or it has to be demonstrated by showing the tangible gains from the project in question. But in this case the Supreme Court's deference led them to develop a blind eye to the underlying situation, which was even apparent in 2005 when the entire New London redevelopment project had stalled for want of agreement over what kinds of structures should be built. No matter how widely the net is cast for nonmonetizable communal benefits, the *Kelo* condemnations generated no net social benefits, either for the City of New London or anyone else. The condemned land remains vacant now that the homes have been razed or removed. The properties have been removed from the tax rolls, but the condemned land still remains eerily vacant, surrounded by elaborate walkways created by public funds to

⁴⁰ *Kelo v. City of New London*, 2002 Conn. Super. LEXIS 789 (Conn. Super. Ct. March 13, 2002) ("*Kelo I*"), *rev'd* on this point in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) ("*Kelo II*").

⁴¹ *Kelo II*, 843 A.2d at 509.

⁴² See, *supra* note 20.

serve unspecified ambitious developments which have as yet to break ground. Deference has its costs, given the political forces that are always in play.

How then should the public use be interpreted? One constant trope in this debate is that neither *Berman* nor *Midkiff* nor *Kelo* represent a break from earlier decisions, all of which had repudiated the narrow and literal view that public use meant use only for the public.⁴³ That result is usually defended by looking at a line of cases in which takings were allowed to secure an irrigation ditch “absolutely necessary” to bring water to arid land,⁴⁴ or any aerial tram to allow the movement of ore from a mine to a railway, under a principle that required courts to exercise “great caution” by restricting the practice to “exceptional times and places.”⁴⁵ The difference between these early cases and the modern trilogy should be evident. None of the early decisions involved any sort of deference to local planning decisions, and all of them involved situations where the private holdout risk was enormous, but the loss of subjective value to the landowner was negligible—the two key considerations that were instrumental in Merrill’s earlier academic formulation of the public use test.⁴⁶ None of these early cases have anything to do with urban planning, let alone with the adoption of a low rational basis standard that would allow any “conceivable” rationalization to deal with a public use. The simple economics of *Kelo* were that the entire project involved no holdout risk and high subjective value, the opposite of the early twentieth century cases.

The Supreme Court’s decision to abandon the field of public use has, as noted, opened up a veritable onslaught of different political responses on how best to cabin the use of the eminent domain power. I regard these endless machinations as a cost, not a benefit, of the system of rational basis review, for the political system has yet to come up with any coherent standard which is better than that which could be obtained by a careful constitutional analysis, which would have extended the public use language to cover not

⁴³ See, *Kelo*, 545 U.S. at 479; Echeverria & Merrill, *supra* note 19, at 12 .

⁴⁴ *Clark v. Nash*, 198 U.S. 361, 370 (1905).

⁴⁵ *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906).

⁴⁶ Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 67 (1986), which was not cited on this point in his joint brief with Echeverria, cited *supra* note 19. The brief’s only references to the Merrill article refers to the stability of the law on public use from at least *Berman* forward, Brief, *supra* note 19, at 12. For my earlier analysis of this problem along similar lines, see, Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* ch. 12 (1985).

only cases where property is occupied for public use, but those in which some holdout or assembly issue calls for some public form of intervention. Yet doctrinally, would it have been possible to stick with the older view? And to that question the answer is yes, at least for those who do not have the strong Progressive mindset that good government is big government, and vice versa.

The question here is not wholly hypothetical, because there are conspicuous and important cases where the limited view of government power has held its ground. The dormant commerce clause cases mentioned above offer one prime illustration of how the process might operate. In those cases, the key test is to draw the line between competitive activities that should be allowed to go forward and hazards to health and safety that should be prevented.⁴⁷ . A similar line between the control of nuisances and the coordination of public projects could be drawn here as well. In this regard, it is instructive to look again at the last credible effort to draw this line, the opinion of Prettyman, J. in *Schneider*, which provoked such angst in the Supreme Court for its interventionist leanings. The key point in favor of Prettyman's approach is that he regarded this as a harm problem of how to balance interests that required some close attention to what the legislation proposed. In the end, he was willing to uphold the plan, even though the arguments that he developed should have led him in the opposite direction. But for these purposes, it is useful to run through them quickly because they reveal this feature: the discredited views on laissez-faire had much to do with the cogency of his decision.

The first point was that he consciously sought to give a limited definition of state power in line with the classical liberal efforts to restrict the government use of the police power. He was obviously troubled with the possibility that the City of New York could condemn Trinity Church because it sat on a narrow street.⁴⁸ It is not an accident that he reverted back to the classical language of the police power which deals with the public health, safety, morals and welfare,⁴⁹ which of course is the same language (with a general

⁴⁷ See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (noting that overbroad health justifications could not be used to suppress interstate competition).

⁴⁸ *Schneider*, 117 F. Supp. at 714.

⁴⁹ *Id.* at 710.

before the welfare) that motivated many of the decisions on economic liberties such as *Lochner v. New York*. Consistent with the *Lochner* approach, Prettyman made it clear that he did not think that the public use question was one that should be left solely to the legislature, but was subject to serious oversight: “It is the duty of the courts, when a legislative act is challenged as violative of the Constitution, to determine that issue,” i.e. whether “taking a certain piece of property is necessary for a certain public use.”⁵⁰

Once he adopted this approach, he then reviewed the grounds for public intervention, taking a critical view on whether the control of “blight” counted as a reason to condemn private property. The modern argument is of course that blight counts as a form of public use that allows the state to take property. The precedents in Michigan, for example, on slum clearance were so strong that nothing in the recent *Hathcock* decision sought to displace them.⁵¹ But this argument is incorrect for two important reasons. The first is that if property is blighted, then it counts as a public nuisance, which could be enjoined without paying any compensation at all. There is therefore no need to invoke the public use doctrine to deal with matters that are properly handled under the traditional police power without compensation. Indeed, the conscious equation of the police power with the public use in *Midkiff* by calling them “coterminous” shows a complete unawareness of the difference between the requirements to take property with compensation and the right to regulate its use without compensation.⁵²

The second point builds on the first. If there is a public nuisance the proper remedy is to end the blight, not to take possession of the property for other uses. The usual rule on injunctive relief is that it is tailored narrowly to the risk at hand, which can be done by requiring the owner to repair the structure, or by ripping it down if he does not. But it does not require, except in the most bizarre circumstance, letting the state claim ownership of the property, given that its nuisance prevention tasks are discharged. Prettyman did not adopt this categorical position, but he was rightly uneasy about the use of blight to take over property for urban planning, especially in dealing with the future

⁵⁰ *Id.* at 718.

⁵¹ *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), citing *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951).

⁵² *Midkiff*, 467 U.S. at 240.

decay of property that was currently in adequate shape. And he surely hearkened back to traditional principles when he wrote:

Regulations affecting the use of property, designed to prevent the breeding and spread of disease and crime, are within the police power and, when reasonable, are clearly valid. And it seems to us that the prevention of such conditions is a public purpose which would sustain the validity of seizure by eminent domain where the seizure is necessary for the purpose. But that conclusion poses problems. Among these problems are: Is the seizure necessary to the prevention of slums? Does the proposed disposition of the property after seizure reasonably serve the purpose of prevention? . . . Why is such a drastic step by the Government necessary or appropriate to prevent a future slum on a certain parcel of land? Will the proposed disposition of the property prevent slum conditions from occurring on it? The buildings, appurtenances, etc., which constitute the slum itself are usually simply destroyed. The puzzling questions relating to slum prevention, therefore, relate more directly to the title to the land than they do to the ownership of the improvements.⁵³

This nuanced passage shows more sense than anything on public use written by the Supreme Court in the past 50 years or more because it represents a bona fide attempt to work out the implications of a difficult doctrine in circumstances where the trade-offs are serious. Prettyman then concluded that the 1945 Act passed muster because it served these limited ends.⁵⁴ On the question of what means could be used to achieve these ends, however, he punted, saying only:

We hold that the necessity for the seizure of the title to a parcel of real estate involves facts and judgment, that these are essentially for the administrators, and that the function of the courts is limited to determining whether the conclusions of the administrators are within reason upon the record and within the congressional delegation of authority.⁵⁵

In essence, he blinked at the last minute, because he held that the question of means was necessarily left to the administrators of the program, and was largely immunized from Constitutional review. And so there is a clear lesson here. The effort to create a mixed constitutional regime, in which some questions under the Takings Clause are to be resolved under a standard of intermediate scrutiny while other questions are evaluated under a rational basis standard leads in the end to a large breakdown of the

⁵³ *Schneider*, 117 F. Supp. at 715.

⁵⁴ *Id.* at 719.

⁵⁵ *Id.*

system itself. Prettyman should have at least looked at the question of why it was necessary to knock down sound buildings in order to control the blight created by others. And if he had done so, I doubt that he would have sustained the decision of the planning agencies.

Conclusion:

The huge and continuing struggle over the proper interpretation of the words “for public use” as they appear in the Takings Clause offers a microcosm of many of the larger struggles over the proper reading of the doctrine. At stake is nothing less than a choice between two visions. The first of these seeks to make good on the classical conception of limited government with its strong stress on individual property rights that must be shielded against the excesses of majority votes in democratic institutions. The second of these is the modern conception of the administrative state that tends to degrade to “rational basis” status any systematic efforts to beef up the constitutional protection of property rights (and, of course, economic liberties), by choosing to rely on the complex rules for participation and decisionmaking developed in the modern administrative state.

On the general question, I make no bones of my belief that over broad ranges of its activities, especially insofar as it deals with the permitting process, the administrative state is *inconsistent* with the rule of law values that animate our constitutional system.⁵⁶ Our system of the division of powers is one that is built on both the respect and fear of political institutions, and cannot survive if the dread is suppressed at any point in the analysis. The current system of land use regulation is far too permissive to the uses of state power in dealing with both condemnation and regulation. And there is good reason to believe that the two are interconnected insofar as strong state restrictions on private development create greater pressures on state and local governments to offer pre-packaged deals to developers who do not wish to brave the political hailstorm that is likely to come their way when they proceed on their own. Courts could therefore do much to ease the strain on the public use doctrine if they decided to extend greater

⁵⁶ See, Richard A. Epstein, Why the Modern Administrative State is Inconsistent with the Rule of Law, forthcoming N.Y.J. of Law & Liberty (2008).

scrutiny over local government zoning decisions. The ability to exercise greater scrutiny is not conceptually beyond the power of modern courts. Indeed, except for his regrettable capitulation of the means/end question in *Schneider* (which before the Supreme Court morphed into *Berman v. Parker*), Judge Prettyman's decision offered a thoughtful roadmap as to how that might best be done. But in the end the villain of the piece remains the rational basis test, which credits too much probity to the decisions of local governments. The one lesson that should be learned from *Kelo*, not once but always, is that some level of scrutiny is appropriate to all government land use decisions. The political processes alone are ill-suited to protect the property rights of ordinary individuals and the peace and prosperity of a nation.

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