Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan

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It is both a great honor and sad duty to deliver the Keynote Address at the Bernard Siegan Memorial Conference on Economic Liberties, Property Rights, and the Original Meaning of the Constitution. It is, I think, not inappropriate to start with a few words of praise for Bernie both as a human being and as an influential scholar. I am pleased to say that Bernie received his law degree from the University of Chicago in 1949, after which he formed a law firm in Chicago with his lifelong friend, Herb Karlan. That firm specialized in land use issues and gave both Bernie and Herb a close-up view of how the system of land use regulation worked in one of the major urban centers in the United States. After they had been in business for many years, both Bernie and Herb developed a strong academic itch, which led them to liquidate their firm in order to enter the academy, with Herb going to Southwestern Law School and Bernie coming to the University of San Diego. What is remarkable about this venture was that Bernie did not enter the academic lists until he was close to fifty years of age. Notwithstanding his late start, Bernie quickly became a star as a result of his writings on the areas he knew so well: land use planning and economic liberties. Through his two best-known books, *Land Use Without Zoning*[1] and *Economic Liberties and the Constitution*,[2] Bernie opened a productive dialogue in areas in which the dominance of state power had long been unquestioned.[3]

Bernie's style of argumentation was more intuitive than technical. Bernie could not quite understand why the legislature should want, or be allowed, to interfere with the ordinary use of land rights, or to tell people that they could not engage in honest occupations without the prior approval of the state. To him, the defense of individual liberty was indeed a perfectly self-evident proposition, while the manifold schemes of regulation imposed upon it that limited its exercise were anything but. I can still vividly recall a conference on Economic Liberties and Property Rights that was held at the University of San Diego School of Law in early December 1983, where Bernie went to great lengths to present his own views. The tension between him and one of his major intellectual adversaries, Robert Bork, was quite evident. Bork's major theme was that constitutional law must be understood in light of its central objective to protect legislative and democratic institutions from constant oversight and nullification by unelected judges. At one point, he was driven to say

1. BERNARD H. SIEGAN, LAND USE WITHOUT ZONING (1972).

2. BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (2d ed. 2006). The distinctive break from the past came with the publication of the first edition of this book in 1980.

3. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (upholding zoning); Berman v. Parker, 348 U.S. 26, 32–36 (1954) (upholding broad powers of condemnation).

that courts should sustain any legislation that a government lawyer can defend with a straight face, even though he knew that the underlying arguments advanced in favor of that statute were false. That vivid formulation is not far removed from the dominant "rational basis" test that dominates so much of modern constitutional discourse: sustain a statute that has any tenuous connection to any conceivable social end. Bernie, of course, did not quite see matters in that fashion. For him, the courts were there to protect individuals from domination by political institutions that often showed scant respect for individual rights. Bernie was no doctrinaire libertarian. He only thought that the state should have to present justifications for regulation that were commensurate with the important property rights and economic liberties that it sought to abridge. For Bernie, this insight stemmed both from his extraordinary sense of personal decency and his deep knowledge of our constitutional history. To him, the Constitution was not an empty vessel into which scholars could pour whatever political vision they accepted. Its basic contours speak of the protection of private property and of contract. Although the Founders did not subscribe fully and uniformly to the classical liberal vision of limited government and strong property rights, those two phrases taken together offer the best guidance to our basic constitutional direction, at least in the absence of more specific textual or historical guidance.

My task in this essay is to show the wisdom of the Siegan position by stressing what happens when courts decide systematically to ignore it in favor of a constitutional view that is far closer to that of Robert Bork insofar as it gives the legislature free reign over both economic liberties and property rights. I cannot do this with respect to the full range of issues that crop up under these two capacious heads. But it is possible to show how a wide range of unsound judicial decisions have created a perfect storm in land use regulation that has done much to harm the vitality of land development in the United States. Part I of this essay identifies the confluence of factors that leads to the creation of this perfect storm. Part II then examines the key elements of the basic mixture, covering those which make private development more costly and those which reduce the cost of using the eminent domain power. Part III then looks at five recent decisions that illustrate how these elements work together in actual cases. Part IV concludes with a brief discussion of the connection between these modern developments and the inquiry into the original meaning of the Constitution.

I. WHY THE PERFECT STORM

It is instructive at the outset to explain why I have chosen to address this topic through the use of the term *The Perfect Storm*, the title of a well-known nonfiction book by Sebastian Junger that offers a riveting account of the 1991 Halloween Nor'easter which resulted in the sinking of the fishing boat *Andrea Gail* 575 miles out to sea in the North Atlantic with the loss of its crew.[4] That title brings to the fore the notion that devastating storms typically take place only with the confluence of multiple factors, each of which ordinarily has a low probability of occurrence. The key insight is that the combination of factors has a synergistic effect, here negative, whose combined force is greater than the simple sum of the constituent forces, each taken in isolation of each other.

The Perfect Storm offers an instructive metaphor in dealing with the law of takings. There is much to be said in praise of incremental decisionmaking that treats each case on its own merits. Small steps often mean that judges make fewer mistakes than they would if they sought to develop some grand theory on the basis of a limited set of facts drawn from a particular case. But there are also serious difficulties associated with that cautious approach precisely because it ignores the synergistic effects that arise from the interplay of different doctrines on the same set of social institutions and practices. Judges should be aware of these effects because their decisions rarely take place on a blank slate. Rather, all decisions in well-traveled areas are made against a context that includes adjacent doctrines, so that simple prudence asks judges to take account of how they interact. I believe that this is especially true in land use cases where all the pressure on procedural and substantive issues is used to give land use planning officials at all levels of government the maximum level of discretion in how they proceed. The pervasive influence of political factions allows these combined powers to be misused in many settings, yet there are virtually no tools in the landowner's litigation toolkit that offer strong resistance to them.

Is there still not a risk of judicial usurpation of the democratic process? I think that this risk is ever present, especially in cases when courts require state legislatures to tax and spend. But, in connection with the multiple forms of state regulation, it is generally overstated. A more alert and vigilant judiciary that scrutinized legislation need not run the risk of becoming a super legislature if it observes the usual limitations on judicial power that are routinely respected in other areas where courts bring higher levels of scrutiny to all manner of political decisions.

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4. SEBASTIAN JUNGER, THE PERFECT STORM 37, 135, 146 (1997).

Here are two examples: The greatness of our First Amendment law does not rest on the supine judicial position that all speech may be suppressed so long as there is some conceivable benefit that could result from its suppression. Rather, we have a set of rules that protect speech in accordance with the principles of limited government. The state can counter defamation and fraud; it can impose antitrust restrictions on newspapers and the like; it can stop various forms of child pornography and perhaps even obscenity. Go down the list and it is clear that virtually every sensible form of speech regulation is permissible under a First Amendment approach that is consciously informed by the classical liberal orientation. And where the First Amendment cases go off the rails, as they surely do in the campaign finance cases,[5] it is because they indulge wrongly in the good government assumption of the Progressive mindset that finds some ostensible public interest rationale for legislation that tends, inevitably, to skew political power to the haves—the incumbents—from the have nots—the challengers.

The same basic mindset applies with respect to the dormant Commerce Clause. Notwithstanding its somewhat shaky constitutional foundations, its rules offer a powerful counterexample against the Borkian fear that unelected judges will wreak havoc on the political process. This basic constitutional principle calls for economic competition across state borders and thus creates a common market within the United States that has proved a powerful engine for economic growth and social mobility. The principle, however, does not take the form of a universal prohibition against regulation. Rather, its central tenet calls for nondiscrimination that prevents local favoritism, subject to a police power exception, tightly watched, to allow the exclusion of noxious substances from the state.[6] Wholly apart from the textual objections to the doctrine, its detractors have been unable to point to any social or economic abuse that stems from its faithful enforcement. Quite the contrary, the doctrine has generated enormous social gains by helping to forge a strong domestic common market.

The legal position with the property rights so dear to Siegan's heart is today quite different, for now the rational basis test allows a latitude for political maneuvering that is unthinkable in areas to which closer

5. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 159–61 (2003) (upholding the Bipartisan Campaign Reform Act (BCRA), heavily regulating federal elections, against First Amendment challenges).

6. Maine v. Taylor, 477 U.S. 131, 137–38 (1986).

constitutional scrutiny has been applied. The point of the remainder of this essay is to explain the perfect storm that arises when these elements are taken in confluence in connection with state and local takings, ostensibly for public use. Just what are these elements? This list contains five that matter: strong zoning laws; the willingness to allow exactions as a condition for local approvals; procedural standards that are too rigid or too weak; systematic undercompensation for property taken; and, lastly, large state subsidies. This list is not in random order. The first two items discourage private development. The third will in some contexts discourage private development, but in others the expedited procedures will encourage the use of the eminent domain power. The last two practices unambiguously encourage expanded development. Before looking at some recent public use cases, here is how the drama unfolds.

II. ELEMENTS OF THE PERFECT STORM

A. Restrictive Zoning Requirements

The first factor that expands government use of its condemnation power is the restrictive zoning regulations that are imposed widely throughout the United States. The political dynamics of zoning are hard to capture in a few sentences, for the practices of zoning can vary widely across communities. Some communities go out of their way to make it easy for developers, while others throw every obstacle in their path. In all settings, takings for public use vary inversely to the intrusiveness of the state regulation. Where the state allows private developers to assemble parcels and build, they have little need to rely on the eminent domain power. Where the obstacles abound, inside deals are more likely to occur. These judgments about the extent of state regulation do not carry with them the implication that all types of zoning are illegitimate regardless of their rationale or effect. But sensible zoning ordinances, such as some sign, setback, or height ordinances, which increase the value of property, are rarely impediments to development. More aggressive zoning will typically impose severe land use restrictions and is effectively deployed to allow established parties to exclude either business rivals or unwelcome residents.

In the short run, these obstructionist tactics often pay handsome dividends to the winning faction. But the entire matter is dogged by a persistent prisoner's dilemma game. Each person counts himself victorious to the extent that he is able to prevent some new home or business from being built next door, hence the NIMBY motto "not in my back yard." But for each time one small faction gains a local victory, others in the

community may suffer from a global defeat. The political dynamic that allows immediate neighbors to block in one backyard invites blockades in all backyards, either simultaneously or successively. The result is an overall level of development that is lower than many local citizens would want, coupled with a gradual depreciation of the tax base and infrastructure on which local communities depend. After several new entrants suffer bruising defeats in a local neighborhood, the fighting stops, as astute developers and businesspeople move to the town next door which has not been burdened with these policies.

There is an inner economic logic at work here. The Tiebout hypothesis that explains how local governments operate in competition with each other—even as they maintain local monopolies over some aspects of their activities—plays itself out.[7] The systematic decline then attracts notice, but at this point, outside capital is reluctant to enter the community unless and until it receives some assurance that it will not be met with protracted resistance. And how is this done? By having the municipality condemn land for transfer so that the program is more or less prearranged in ways that sharply reduce the developer's risk. To be sure, this maneuvering comes at a political price because it is always easier to keep outsiders—who lack the vote and local ties—out than it is to force insiders—who have the vote and some local ties—to surrender their property. But there are no absolutes here, so that sometimes the insider groups that support the developer are able to run roughshod over the particular landowners who stand to lose their homes. The administrative state does not follow a model of strong property rights and develops procedures to match, both on the public use and the zoning side of the issue.

B. Land Use Exactions

The second element is the frequent use of exactions as a condition for allowing new development in the local community. The usual game works like this: A permit to build frequently increases the value of the affected land by huge margins. The local government treats this private gain as a form of state largess because it knows that under today's capacious definition of the police power, it can impose virtually any restriction on land use so long as it does not claim a possessory interest—for example, a public easement over property—that triggers a

7. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

higher standard of judicial review.[8] Hence, it is, in general, fair game today to impose special charges that make the new developer pay a disproportionate contribution to local road repairs, subway renovations, schools, or cultural activities. The local government knows that it cannot overstep all bounds but, at the same time, it speculates that the large gains to the new entrant are only inframarginal, so that they can be taxed away without altering the developer's decision to go ahead with the project. The net effect is to try to shift some fraction of the cost of a public improvement that works to the equal benefit of new and old residents onto the new residents. In some cases, this strategy will work, but usually only after protracted negotiations and corresponding delays. Taken together, the relative overtaxation from the exaction, coupled with the additional time and expense, operate as a special tax on new development which is not offset by any special benefit. The upshot is clear. These commonly used exactions operate like any other tax. They slow down the rate of private development, which once again increases the pressure to use the public condemnation power when the need for more development seems pressing.

C. Procedural Abuses

We thus come to the third element of the perfect storm, which covers the relaxed standards for setting the timeframe in which land use decisions are made. In this regard, it is important to understand that the optimum procedures will invariably take the form of an inverted u-shaped curve. Give too little protection, and the local government can engage in the arbitrary use of power. Give too much protection, and the local government can use endless delays to kill off new development that some neighbors oppose. The legal and constitutional ideal is to find some middle ground suitable in both cases. But, here again, the rational basis test exerts its baleful influence in a predictable fashion. Where the local government is intent on keeping the outsiders out, the amount of process afforded knows no clear end: Final judgments are shunned because they open the possible path to judicial review.

The threat here is real. One common characteristic of many of the Supreme Court cases that deal with building permits is that extra process becomes standard operating procedure. A generation ago, after *First English Evangelical Lutheran Church v. County of Los Angeles*,[9] there was some expectation that a local government that engaged in endless

8. For the complex limitations on easements, see *Nollan v. California Coastal Commission*, 483 U.S. 825, 831–37 (1987).

9. 482 U.S. 304 (1987).

delay could be forced to compensate the aggrieved landowner for any total loss of a property's interim use. But that protection offered in *First English* has turned out to be largely illusory. Calculating the damages from total temporary takings is not an easy business, especially if the baseline is not the full use of the property in the interim, but its use value only under the most restrictive zoning ordinance that could have been imposed without incurring obligations to compensate. All that requires is that there be no loss of all viable economic use. There is not a lot of money in those cases if the damages in cases of temporary total takings are measured against the paltry returns that local governments can allow.

The situation only gets worse in light of the procedural impediments that block even that limited avenue of recovery. Chief amongst these is the rule which was mentioned but not material to the outcome in *First English*: the local government was allowed to impose restrictions on use without compensation so long as it was engaged in the "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us," because the administrative decision was implemented early on in the process.[10] In retrospect, this concession by Chief Justice William Rehnquist, writing for the Court, turned out to be fatal. To be sure, the limitation sounds sensible so long as there is a fixed upper bound to the length of administrative review, after which a full compensation obligation kicks in. Indeed, many state statutes provide for some maximum period during which these administrative reviews are supposed to be completed.[11] The logic here is that all landowners can expect to go through some abbreviated process at some time, such that the short dispensation has no disparate impact over time and reduces the administrative costs of running the compensation.[12] Stated otherwise, from the ex ante perspective, the imposition of a short grace period for government delays is likely to increase the value of all properties subject to the rule. Indeed, this desirable pattern was the source of Rehnquist's caution about "normal delays." But the term *normal* proved to carry no independent normative weight. Instead, the

10. *Id.* at 321.

11. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 353–54 (2002); *see also, e.g.*, CAL. GOV'T CODE § 65858 (Deering 1987 & Supp. 2007); N.J. STAT. ANN. § 40:55D-90(b) (West 1991) (providing examples of state laws that limit the duration of administrative review).

12. *See* Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1099 (1999).

period of time allowable for administrative review counted as normal if it were routinely given. The local governments sensed that the situation extended their normal review processes and thus effectively blunted the operation of the *First English* boomlet. The net effect is that flexible procedures are routinely available to slow matters down.

To add insult to injury, it has become equally clear that the Supreme Court has taken the position that federal courts should not be allowed open to just compensation claims brought against the states under Section 1983, which speaks—or better, spoke—about the ability to gain entry into federal court for the vindication of any federal constitutional right that had been denied under color of state law. In *Patsy v. Board of Regents*, which involved civil rights claims for racial discrimination, the distrust of state governments led the Supreme Court to hold that Patsy did not have to exhaust her administrative remedies in state court in order to press her constitutional claim in federal district court.[13] They could just start in federal court and bypass the state system. But *Patsy* was distinguished away in *Williamson County Regional Planning Commission v. Hamilton Bank*[14] on frivolous grounds that show once again why property rights are second-class citizens in the current constitutional hierarchy. *Patsy* had held that no aggrieved party had to participate in any administrative process *at all*. As such, there was no need for that party either to exhaust the many procedural steps that were available or bear the time and delay of having an administrative decision adverse to interest. Because there was no need to get into the administrative system, there was no need to worry about the impact of any final decision within that system. But in *Williamson*, *Patsy* was reinterpreted to say that it was concerned only with exhaustion and not with administrative finality, even though *Patsy* required neither.[15] The upshot was that, after *Williamson*, a landowner could not escape the administrative process even after an application for general approval under a local plan was denied, but was instead forced to seek a variance, which is rarely granted, and then only after the passage of time has given rise to a change in local circumstances that was not contemplated when the plan was first put into effect. The imposition of the finality requirement in *Williamson* thus knocked out the direct access to federal court and mired individual applicants in the state procedural web.

Williamson does not stand alone. Since that time, further procedural barriers have limited the ability of landowners to bring takings claims in

13. 457 U.S. 496, 502–03, 516 (1982).
14. 473 U.S. 172, 192–93 (1985).
15. *Id.*

federal court,[16] or to keep them there even if they obtain initial jurisdiction, given the application of the various abstention doctrines.[17] The details of these various rules need not be discussed here. The one point that shines through is that state and local land use planning commissions can bottle up takings claims indefinitely in administrative maneuvers and keep them before sympathetic local courts until a final decision is made, if one is made at all. Twenty-year cycles are not uncommon in takings cases under the current procedural rules,[18] which assume that delay does not constitute a loss because there is always a chance that the landowner's claim will succeed at the administrative level. Imagine how the world of free speech would look if prior restraints on publication were judged by the same lax standards.

The procedural situation often takes on a different complexion, however, when powerful government interests wish to use the eminent domain power to take land for public use. Once state or local governments, or both, back a project, then the risk is that administrative processes will move at warp speed. There is a chance that major actions will be passed without any legislative or administrative review at all, or that various requirements for requests for proposals or competitive bids will be waived in favor of a preferred suitor. These decisions may be challenged in court, but at this point, the presumption in favor of the propriety of government action can toss any procedural constraints to one side. There is no reason to think that this practice should universally occur, given that the operative go-aheads could easily be made in forums that do not allow local opposition to galvanize. But the risk is surely here. And just as too much political protection is unwanted, so too is too little.

D. Systematic Undercompensation

The next spur to aggressive use of the eminent domain power comes from the systematic undercompensation that is paid out in all public takings cases. In principle, the correct standard for compensation derives from the overall design of the Takings Clause. The key point here is that

16. *See, e.g.*, San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 342–47 (2005).

17. Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409–10 (9th Cir. 1996) (applying *Pullman* abstention).

18. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 695–96 (1999) (resulting in a denial of five successive proposals for development of projects for 344, 264, 224, and finally 190 units, all of which were eventually rejected).

the genius of the Clause rests in its charting a middle track between two unacceptable extremes. The first extreme allows the state to take property only with the consent of its owner, that is, by purchase. The evident risk in many key land assembly cases is that individual landowners will hold out for a small fortune and thus shipwreck public projects that in all likelihood would work social improvements. That holdout risk could be overcome by simply allowing the state to take any land that it wishes for public projects, without just compensation.

In principle, states that have perfect knowledge and pure motivations should only take property when the gain from placing the property in public hands is greater than the losses sustained by the former private owners.[19] Compensation would be a mere detail because the virtuous and knowledgeable state would only take on desirable projects, whose cumulative impact would create across-the-board benefits. From the ex ante position, all citizens would benefit from a set of rules that dispensed with the pesky administrative costs needed to value the property so taken. But of course, Madison's concern with faction in *Federalist Ten* was only the first of many astute observations about the fragility of these twin assumptions. Governments are often ignorant of the true facts, and they respond to political pressure.

The combination of these two dangers means that in all cases, the power of the state to take should be qualified by its obligation to compensate owners for the losses that they sustain. Now the state still has a powerful option, but one that can be exercised only on payment. That payment thus disciplines government behavior by forcing taxpayers to make honest evaluations of whether they receive from acquiring public ownership a benefit commensurate with the costs that they impose—the very thing that does not happen when exactions are freely allowed. But this system of compensation will work only on one condition: The price set for government compensation has to be calibrated so as to leave the individual citizen at least as well off after the eminent domain power has been exercised as he or she was before. The current rules fail to do this in systematic ways. They offer no compensation for the loss of subjective value, which can be quite high for properties that are not for sale. They offer no compensation for the legal and appraisal fees needed to challenge a condemnation. They offer no moving expenses or compensation for loss of goodwill. These shortcomings are systematic and likely large. There are, to my knowledge, no systematic errors that cut in the opposite direction, to offset the undercompensation risk.

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19. For an elaboration, see Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 51–53 (1992).

The net effect is that the low just compensation rule reduces the costs to the government of exercising its takings power. Even if nothing were done to prop up the current flaccid structure of the Public Use Clause, tighter and more accurate rules on just compensation would raise the price for the use of the eminent domain power and thus lower the likelihood of its occurrence. But, as matters stand, the weak rules on just compensation offer an implicit subsidy which the state can capitalize on whenever it exercises its eminent domain powers. As with all subsidies, the lax compensation rules stimulate too much taking for public use.

E. State Subsidies for Development Programs

The last critical weakness in our basic constitutional structure is that it places relatively few constraints on the ability of the state to create cross-subsidies among its members. The efforts to restrain various uses of public resources that help *A* and hurt *B* are difficult, because there is no obvious textual home for the rules. The Constitution is much more explicit in the way in which it limits the power of the state to regulate private property than it is with any limitations that it imposes on state largess with, of course, other people's money. There have been a number of judicial efforts to impose limitations on state power to transfer public land, for example, to favored constituents, of which perhaps the most famous is Justice Field's effort to create a public trust doctrine in *Illinois Central Railroad v. Illinois*.[20] But those rules have no teeth in connection with shifts in land use patterns for property that remains under state ownership. Diversion from one group to another is not just a routine management decision that carries with it no real constitutional implications.[21] The same result attaches, for the most part, to the use of cash subsidies to aid poor or impoverished areas—or rich and successful ones—and has not been curbed by any general judicial prohibition against transfers. These transfer payments and cross-subsidies turn out to make a substantial difference in the land use cases. The current practice is to offer handsome subsidies to the construction of various stadia on the one hand, or to general programs of urban development on the other. Frequently, the result is that the local governments in dysfunctional communities receive additional funds to expand their operations, when

20. 146 U.S. 387, 453–55 (1892).
21. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 170–71 (2002).

the better approach is, if anything, to take funds away from municipal governments that have handled things badly. Since taking land costs money under the Constitution, the infusion of these funds from outside the community will increase the scale of land acquisition, which will in turn increase the pressures on our feeble public use constraint. Yet the indirect effects of these programs are nowhere taken into account in dealing with that issue.

III. THESE FACTORS AT WORK

I have not done any systematic study of the frequency and use of the takings power of the United States Constitution. But careful work through the Institute for Justice on the scope and frequency of taking land for public use does make it clear, at the very least, that this is no small or isolated problem.[22] For our purposes, it is sufficient to take some recent incidents that have resulted in appellate litigation—doubtless a small part of the overall sample—to show how these factors play out in a wide array of situations. The two that are most easy to observe are rapid process and heavy public subsidy, which are present in these cases.

A. Kelo

The first illustration is of course *Kelo v. City of New London*, which resulted in the condemnation of a number of houses for an ambitious real estate development project that never got off the ground.[23] It was painfully clear that none of the landowners who resisted the government takeover was engaged in any holdout game. As a matter of principle, they refused to entertain any government offers at all. Nor did they pose any blockade problem because the New London Development Corporation had acquired title to more than enough land to complete any development project that it chose. New London's serious difficulties stemmed from its failure to move quickly enough with the land that was already in public hands, so that private developers in nearby communities filled the market niche by building the right kind of hotel and office space before anything got off the ground in New London.[24] New London thus proved

22. DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD 1, 2, 6 (2006), http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf.

23. 545 U.S. 469 (2005).

24. "By July 2002, . . . Pfizer had been open in New London for a year, and it had found other hotels in the area . . . . With that demand met, and with the corporate landscape altered, the company [informed] Corcoran Jennison that the justification for the hotel was 'no longer apparent.'" Kate Moran, *Developer Says Fort Trumbull Hotel*

itself as maladroit in condemnation as in other elements of land use management.

Next, there were the evident subsidies in this case. The State of Connecticut had awarded the City about $73 million in public funds to run its revitalization program.[25] The usual justification was to prop up communities that had gone through bad times.[26] Yet, unfortunately, the decision rewarded incompetence by giving the money to a city whose track record left nothing to admire. Armed with the extra money—and, in all likelihood, fearful of having to return it unspent—New London embarked on an ambitious program of land acquisition and infrastructure improvement on a scale that would never have been attempted if all the needed revenue had to come from taxes on the local community. To be sure, *Kelo* exhibited much collective deliberation, which was ultimately why Justice John Paul Stevens, writing for the Court, blessed its decision. But judging from the output, the deliberation did not lead to an improvement in the collective decision.

Kelo did not, however, give an automatic clearance to all government actions that claimed that a particular taking of land was for private use. Rather, Justice Stevens's vision of the Clause dovetails perfectly with today's dominant view of the administrative state whereby rights to process and public participation are said to operate as a substitute for the stronger property rights that limit the exercise of public power under a classical liberal regime of government.[27] In line with this vision, Justice Stevens wrote that one avenue for public use challenge still remained, which was to show that the particular takings in question were a mere pretext in order to supply benefits for some private individuals:

> [T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.[28]

Plan Not Viable Since 2002; Project Became Unrealistic Without Pfizer Commitment, THE DAY (New London, Conn.), June 12, 2004, at A1.

25. Institute for Justice, Web Release, *Prescription for an Ill-Fated Land Grab*, Oct. 18, 2005, http://www.ij.org/private_property/connecticut/10_18_05pr.html.

26. *Kelo*, 545 U.S. at 473.

27. For a defense, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578–82 (1984).

28. *Kelo*, 545 U.S. at 477–478 (citations omitted).

"Pretext" within this framework has been defined to occur when an "ostensible public use" is employed to conceal "the desire to achieve the naked transfer of property from one private party to another."[29] The word *naked* is quite evocative, but is intended to cover those cases in which there is no—or possibly very little—public justification for the taking in question. The pretext notion was not the focal point in much earlier takings litigation, but it looms larger now as the behavior of public bodies has become more aggressive in the wake of *Kelo*. Here are some of the key recent developments that mark this important doctrinal shift.

B. Didden

In *Didden v. Village of Port Chester*,[30] the Village of Port Chester had entered into a comprehensive development plan under which it delegated to a private developer, Gregg Wasser, the right to approve or disapprove all new projects within the official redevelopment area.[31] Bart Didden and his partner Domenick Bologna proposed to place a CVS drug store within the development area. Wasser told the partners that he expected either an $800,000 payment or a fifty percent stake in the venture before he would allow it to go forward. He then made it clear that he would have the Village condemn the property unless the partners yielded to the threat—which he carried out the day after they refused to accept his proposition. Wasser then arranged for a Walgreens Drugstore to take over the location. It is difficult to credit any public purpose to this particular maneuver. Either way, the land in question was to be used for a drug store, so that the case presents no issue of additional adverse neighborhood effects or local externalities of the sort that new developments often generate. The question here was not whether a new drugstore would be built, but only who would get the gains. The case looks as though the condemnation was only to help Wasser—and those with whom he worked—maintain dominance over the site. The instantaneous approval of the condemnation that he received from the Village only confirms the advantage that the insiders have in these projects. Even though the overall urban redevelopment plan had received the usual public vetting, this particular choice, which in no way advanced the objectives of that plan, was done without any independent public review. Yet the Second Circuit found that the deference under

29. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *dismissed and remanded*, 60 F. App'x 123 (9th Cir. 2003).

30. 173 F. App'x 931, 932 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007).

31. For further commentary and factual background on the *Didden* decision, see Richard A. Epstein & Ilya Somin, *A Pretextual Taking*, NAT'L L.J., Jan. 8, 2007, at 27.

Kelo carried the day, and the Supreme Court declined to grant certiorari in the case. The perils of delegated authority should be evident in this case, even if they prompt no judicial response.

C. Atlantic Yards

Right now a far larger project in New York City also is at the center of a public use controversy. The Atlantic Yards project in Brooklyn, New York, will cover about twenty-two acres and "is planned to consist of sixteen towers and 8.6 million square feet of floor space, including a sports arena, 6,860 housing units, approximately 600,000 square feet of office space, and a hotel."[32] Much of the project is located over dilapidated structures, but the overall size of the project required the Empire State Development Corporation to order condemnation of a number of private homes within the area to keep the development alive.[33]

Two of the key elements in the public use equation are present in this case. First, the bidding process here went quite quickly.[34] The developer, Forest City Ratner Companies (FCRC), had only one competitor, the Extell Corporation, which offered $150 million for a more modest proposal that did not require it to dispossess any residents from their homes. Extell also submitted the required twenty-year profit and loss projections. The FCRC bid was for only $50 million, and did not contain the required profit and loss projections. Because it included the basketball arena, the FCRC bid did require uprooting people from their private homes. The entire bidding and approval process lasted only four months from May 2005 to September 2005, which stands in stunning contrast to the twenty-year time frames that abound when real estate developers seek to develop a project on private lands that the public authorities oppose as faithful representatives to their local citizenry.

Several features are immediately apparent from this process. The first is that all stadium deals are financial losers to local governments. To build these stadia therefore requires that the developer pay less money going in, and develop a larger area. The differences between the Extell

32. Goldstein v. Pataki, 488 F. Supp. 2d 254, 256 (E.D.N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008).
33. Goldstein v. Pataki, No. 06cv5827, 2007 WL 1695573 (E.D.N.Y. Feb. 23, 2007).
34. *Goldstein*, 488 F. Supp. 2d at 257.

bid and the FCRC bid are consistent with this point. The question is whether the truncated process in favor of FCRC would in some sense be found to contravene the public use requirement, to which the District Court answered in the negative, in a decision that the Second Circuit affirmed.[35] To be sure, FCRC was well-connected and stands to do very well from the project, so it is easy to raise suspicion. In this sense, there exists the type of favoritism that was not found in *Kelo*, where the developer, Corcoran Jennison, was only selected after the City of New London had committed itself to the condemnation of the private homes. But, as with all large projects of this sort, it is hard to deny that other people besides the developer will benefit from the offices, hotels, and homes that are built in the region, so that the deferential standard of *Kelo* effectively prevented the private homeowners from blocking the project.

The key problem with subsidies is that they distort the proper margins for decision, which should ideally allow the taking to occur only to the extent that its marginal benefits exceed its marginal costs. Yet once the subsidies are in play, the margins move so that the overexpansion of the project is a certainty, which is what happened here. Nonetheless, the judicial reliance on the rational basis test precludes any systematic examination of the scope of the project. It is worth recalling that in *Kelo*, the trial judge tried something of this sort when it ruled that those homes that stood on the periphery of the development area could not be taken, while those that were located toward the center could be. In effect, it held that the more essential homes had to be sacrificed for public use while the others did not. The Connecticut Supreme Court rejected the thoughtful decision of the trial judge to split the baby[36]—which would have defused much of the public protest in the case—and the United States Supreme Court, of course, followed suit. That path of events presaged the outcome in the *Atlantic Yards* struggle as the District Court concluded simply: "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."[37] The Court got out of the messy business of balancing and allowed the overambitious project to go forward at high private cost. The collateral damage and the likely social losses are both evident.

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35. Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008).

36. Kelo v. City of New London, No. 557299, 2002 WL 500238, at *112 (Conn. Super. Ct. Mar. 13, 2002) (allowing the differential treatment), *rev'd in part*, 843 A.2d 500, 508 (Conn. 2004) (rejecting it), *aff'd*, 545 U.S. 469 (2005).

37. *Goldstein*, 488 F. Supp. 2d at 279.

D. Soldier Field

The *Atlantic Yards* case is not the only stadium case that is worthy of note. Some years earlier I worked as a member of the Landmark Preservation Council of Illinois in an effort to derail the decision by the Illinois State legislature and the Mayor and City Council of Chicago to erect a huge addition on top of Soldier Field to allow the Chicago Bears to construct sky boxes from which to view home games. *Friends of the Parks v. Chicago Park District* is not the usual type of public use case in that the land in question did not start in public hands.[38] The property in question was owned by the Park District, which had already leased the site to the Chicago Bears.[39] The question was whether this additional construction, which defiled a red list—or highest rated—public monument, could be stopped as an abuse of state power. Since no private property was involved, the case did not turn on the public use language of the Fifth Amendment. But it did turn on the question of whether the deal with the Chicago Bears ran afoul of the public trust doctrine on grounds that it represented a gift of public assets, collected in various forms of local taxes, to the Bears.[40] In dealing with this case, the opponents of the maneuver—of whom I was one—sought to introduce evidence by the sports-economist Allen R. Sanderson to the effect that the tax burden was in the order of $600 million while the net increase in the value of the Bears Franchise was only $300 million.[41] That evidence was, however, excluded on the ground that the local government had full discretion to decide whether or not to proceed with the plan.

The case has all the hallmarks of bad public deals. There were no hearings on the legislation that authorized the construction of the new project,[42] which meant that there was no willingness to entertain an alternative, and cheaper, proposal that would have restored Soldier Field to its original purpose as a soccer and track stadium by raising up the floor, which would both have increased its size to allow for these activities and reduced its capacity and hence its operating costs.[43] The

38. 786 N.E.2d 161, 163 (Ill. 2003).
39. *Id.* at 163.
40. *Id.* at 165.
41. Allen R. Sanderson, A Home for the NFL Chicago Bears: A Case Study in Political Economy and Power 8 (June 16, 2008) (unpublished manuscript, on file with author), *available at* http://home.uchicago.edu/~arsx/Bears&SoldierFieldJuly04.pdf.
42. *Id.* at 5.
43. *Id.* at 16.

Bears in turn would have been housed in a new domed stadium that could have been built near the White Sox Park to take advantage of shared common infrastructure at that location.[44] This total deal, which would have provided two up-to-date venues, would have cost less than the renovation of Soldier Field and would not have led to the desecration of a national landmark.

But, again, none of this mattered in the rational basis universe. Here the Illinois Supreme Court invoked the test once again, noting that its earlier decision "in *Lappe* require[s] us to defer to the legislative findings announced in the Act unless the plaintiffs make a threshold showing that the findings are evasive and that the purpose of the legislation is principally to benefit private interests," which could not be established in light of Soldier Field's extensive use for sporting events.[45] *In re Marriage of Lappe*, on which the Court relied, upheld legislation that redefined support obligations to children of divorce, but had nothing to do with the larger political forces at work in this Soldier Field dispute.[46]

This decision came as something of a disappointment because of a then recent decision in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, where the local development authority had used its quick-take eminent domain power to condemn private property held by NCE, a metal recycling company, for use of Gateway, which ran its own race track.[47] The decision involved a transfer of private property through an overdeferential administrative process, and thus was distinguishable on its facts from the current case.[48] But the distinction is more superficial than real. The use of public power in both cases worked transfers between private persons. Even though there was not an outright transfer of the leased property to the Chicago Bears, the leasehold transaction created vested rights whose value to the team were far lower than their costs to the public at large. But the unwillingness to scrutinize the transaction in any of its particulars meant that the case sailed through. The rational basis test had claimed another victim.

E. Love Field

At this point it becomes an open question of how much fight is left to the public use limitation. That question might be answered in short order in connection with the dispute that has taken place at Love Field in

44. *Id.* at 15.
45. *Friends of the Parks*, 786 N.E.2d at 166–67.
46. 680 N.E.2d 380, 392 (Ill. 1997).
47. 768 N.E.2d 1, 4 (Ill. 2002).
48. *Id.* at 10.

the North Texas airline market.[49] The problem here began in the aftermath of the major 1978 airline deregulation, with the passage of the Wright Amendment in 1979—named after House Speaker Jim Wright—which limited flights out of Love Field.[50] Only planes that flew fifty-six or fewer passengers out of the Field could go to any point in the United States. Other flights had to remain in Texas or land in one of four contiguous states. The clear protectionist purpose of this statute was to aid the Dallas Fort Worth Airport, where American Airlines was the dominant carrier, in resisting competition from Southwest Airlines, which used Love Field, conveniently located near downtown Dallas. With the passage of time, the pressure on the Wright Amendment grew. In response thereto, American Airlines, Southwest, the Dallas Fort Worth Airport, and the two cities of Dallas and Fort Worth entered into a comprehensive agreement under which all parties would work toward the repeal of the Wright Amendment by 2014, but with this catch: The twelve gates at Love Field that were not owned by Southwest would be condemned by the Airport authority and destroyed at the earliest possible moment.[51] Owing to the obvious antitrust risk of this market division, the agreement was expressly conditioned on approval from the United States Congress, which duly came in 2006.[52]

The initial round of litigation in this case challenged the agreement under the antitrust laws. Judge Sidney A. Fitzwater held that the antitrust conspiracy was obvious from the face of the agreement but that it was entitled to complete protection under the various antitrust immunities of the so-called *Noerr-Pennington* doctrine, with respect to the various petitioning doctrines,[53] and because the parties were compelled to order the takings under the Wright Amendment Reform Act of 2006,[54] which they were so instrumental in procuring.[55] For our purposes, we can assume that these findings are incontestable, so the question then arises whether there is a public use challenge to the taking and destruction of the gates in question. The pretext exception that was announced by Justice Stevens seems very much at play. The contractual agreement has

49. For all the details, see *Love Terminal Partners v. City of Dallas*, 527 F. Supp. 2d 538, 543–47 (N.D. Tex. 2007).
50. *Id.* at 544.
51. *Id.* at 545.
52. *Id.* at 547.
53. *Id.* at 550–52.
54. *Id.* at 558–60.
55. *Id.* at 545–47.

two named private parties, American Airlines and Southwest. The antitrust judgment suggests that there is a prior judicial finding that the third party effects of this agreement are negative, so that it is hard to argue, with a straight face, that this agreement works for the benefit of the public at large. But stranger things have happened. It is, in principle, possible for any court to argue that there are other benefits that derive from this peaceful resolution of a long-simmering dispute. And there are incredible claims that cutting out the competitors is appropriate to control air traffic and curb pollution. But there is no explanation why the entire cutback has to benefit the insiders at the expense of everyone else. All that can be said at this time is that if this particular agreement is said to pass the public use test in the face of its per se antitrust violation, then Justice Stevens's exception is a true dead letter. We do not know whether this line of argument will be pursued or, if so, whether it will prevail. But we do know that each successive relaxation of a constitutional constraint will induce at least some government agencies to take advantage of it.

IV. CONCLUSION: THE ORIGINALIST QUESTION

This review of the various cases has profound implications for how we think about constitutional law. Bernie Siegan was one of the earlier defenders of the originalist approach to constitutional law, which sought to extract the meaning of the text as it was understood at the time of the founding as the sole, or at least dominant, guide to constitutional interpretation. That originalist view does not condemn us to a static view of the Constitution in the face of major social and technical change. For example, the power of Congress to regulate commerce among the several states is not limited to stagecoaches and sailboats. It covers all modern technologies that engage in journeys that cross state lines. Yet by the same token, if a purely intrastate horseback ride were outside the scope of federal power in 1787, then the corresponding car ride should be outside its scope today, even though the law cuts very much in the opposite direction.

The question then arises as to how this approach applies to both the takings law with its public use requirement as well as other aspects of the protection of private property and economic liberties. On these questions, all we know from the text is that its preferred objects of protection include private property and ordinary contractual liberties. There is not a trace of positive rights to jobs, housing, health care, or anything else. But by the same token, the developed law in these areas was quite weak. The takings jurisprudence, for example, had not yet confronted any systematic cases where property was not taken into

possession by government agents, who chose to pass restrictions on its use and disposition. I have argued that the line between these two classes of takings is made of gossamer on the ground of simple structural analogies. What sense does it make to say that someone may exclude the government from land that he is not allowed to enter, use, or sell? But others, notably William Treanor in this Conference, have taken the opposite position.[56] Similarly, the early cases give no indication of the extent to which the police power could limit the exercise of liberty and property, as that issue only came to the fore toward the end of the Marshall Court.[57] It would be nice if we could find some authoritative texts on these key doctrines, but the historical record is noticeably reticent in connection with both the Takings Clause and the Contracts Clause, for example.

In the face of this gap, how then does an originalist proceed? I think that there is only one answer. The overall structure of the Constitution is one that concentrates on limited federal powers and the protection of individual rights to property and contracts. We know that these rights are in no sense absolute. Property can be taken with just compensation, and is subject to taxation, so the challenge is in how we find the appropriate limitations. On that question, the one wrong guide is surely the rational basis test, which affords every presumption in favor of the use of state power, when any theory of limited government has to reverse the presumption to the state to give some reason why it must act. There are many such reasons, including the prevention of fraud and violence, the control of monopoly, the provision of infrastructure, and the protection of minors and other incompetents. And it is striking that whenever the United States Supreme Court announces anything stronger than a rational basis test, it always gravitates to rules that are limited to these ends, and which choose means that have a fair likelihood of

56. William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633 (2008). Note that even the current law deviates from that position by at least allowing compensation in some regulatory takings cases. The hard question is why, once that barrier is necessarily crossed, we no longer apply the doctrine to lesser regulations which have huge negative impacts on value. In dealing with physical occupations, the size of the invasion determines the amount of compensation owed. Why not here?

57. *See, e.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (reconciling local police power with federal commerce power); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 423, 428 (1827) (dealing with power of state regulation of imports and importers).

achieving them.[58] So at this point the originalist approach has a direct tie to the political theory that animated the Constitution. That theory may not require all of the results that I have urged in this essay and on other occasions. But it narrows the range of possibilities down far below what the current courts are routinely willing to tolerate in dealing with both private property and the liberty to enter into voluntary agreements. Bernie Siegan was the first modern scholar to see the dangers in this approach. And now our great homage to him is to recognize that on the one point that really matters, he was spot on.

58. For my defense of this approach, see Richard A. Epstein, *The "Necessary" History of Property and Liberty*, 6 CHAPMAN L. REV. 1, 27–29 (2003).