Environmental Law and Property Rights

The Supreme Court's Property Rights Cases

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I. Introduction

The U.S. Supreme Court handed down three major decisions affecting private property rights during its 2004-05 term. *Lingle v. Chevron U.S.A., Inc.*[1] held that substantive due process plays no explicit role in Takings Clause [2] adjudications. *San Remo Hotel, L.P. v. City and County of San Francisco*[3] confirmed that, at least under the Court's current jurisprudence, it is almost impossible to have an as-applied regulatory takings claim heard in federal court. Finally, *Kelo v. City of New London*[4] essentially drained the Fifth Amendment's Public Use Clause of any remaining significance, holding that it does not bar the taking of private property for retransfer to other private owners for purposes of economic development.

The Court also used *Lingle* to summarize the elements of its regulatory takings law. It characterized these strands as sharing "a common touchstone."[5] Nevertheless, Justice O'Connor's opinion for a unanimous Court[6] conceded that its "regulatory takings jurisprudence cannot be characterized as unified."[7] In fact, beneath a façade of tidiness, the Court did nothing to eliminate the basic incoherence of its takings doctrine. As my law school mentor, the late Myres McDougal, once put it: "to make a superb inventory of Augean stables is not to cleanse them!"[8]

It would be a mistake, however, to think that the Court's takings cases are uniformly negative in their promise. The Court's longstanding antipathy to explicit use of substantive due process in Takings Clause analysis might have preordained the outcome in *Lingle*, but, as Justice Kennedy noted in his separate concurrence, does not rule out due process in other contexts.[9] *Lingle* also makes it clear that a due process challenge to an asserted property deprivation "probes the regulation's underlying validity," is thus "logically prior to and distinct from" the Takings Clause, and hence cannot be subsumed under it.[10] *San Remo* closes a narrow door to federal judicial review of takings cases, but four justices suggested that future litigants press upon a broader one.[11]

While *Kelo* rejected a bright-line test for demarcating the Public Use clause generally, five justices indicated that it would be appropriate to do so, at least in some situations. Even Justice Stevens, together with Justices Souter, Ginsburg, and Breyer, who joined in his opinion for the Court without qualification, seem to have sloughed the starry-eyed faith in the ability of eminent domain to improve the human condition that had marked the Court's landmark cases of half a century earlier.[12]

II. Takings and Substantive Due Process—*Lingle v. Chevron U.S.A.*

In *Lingle v. Chevron U.S.A. Inc.*,[13] the Supreme Court revisited and rejected a test for facial regulatory takings claims that it had enunciated 25 years earlier, in *Agins v. City of Tiburon*.[14]

A. The Agins *"Substantially Advances" Test*

Agins stated that the enactment of a zoning ordinance constituted a taking when that ordinance "does not substantially advance legitimate state interests."[15] Justice O'Connor commenced the Court's *Lingle* opinion with the observation that the *Agins* "substantially advances" formula was an example of the "doctrinal rule or test that finds its way into our case law through simple repetition of a phrase."[16] On close examination, she concluded, the "substantially advances" test relates to the validity of a regulation, an inquiry "logically prior to and distinct from the question whether a regulation effects a taking."[17]

During the "substantially advances" formulation's 25-year life, it had been criticized as a Takings Clause test by some commentators[18] and defended by others.[19] When the U.S. Solicitor General filed an unusual amicus brief imploring the Court to repudiate the "substantially advances" prong of *Agins* in a case not raising it squarely, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[20] the Court responded with a curt rebuff.[21] It added that, while the Court had not provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions," the trial court's instructions employing the test were "consistent with our previous general discussions of regulatory takings liability."[22] The Court then cited a litany of cases in which "substantially advances" language was employed.[23]

B. The Facts were Unfavorable to Petitioner

Before delving deeper into *Lingle*'s theoretical aspects, it is worth noting that the case again confirms the truism that the presence or absence of compelling facts goes a long way in Supreme Court takings cases. In *Del Monte Dunes*,[24] one factor that led to the award of takings damages was the palpable feeling of the justices, voiced from the bench by Justice Scalia, that the developer might feel it was being "jerked around" and that after a while one might begin to "smell a rat."[25] On the other hand, in this past Term's *Kelo* case, Justice Stevens stressed with approval the "thorough deliberation that preceded [the redevelopment plan's] adoption."[26]

The facts in *Lingle* were unfavorable to the petitioner. The Court was being asked to ratify a robust doctrine that

some regarded as a judicial usurpation of legislative power through substantive due process.[27] Yet neither malice nor actual injury appeared to be present and the trial court's fact finding process arguably was insufficient. The statute, even if counterproductive from an economic perspective, did not approach the level of "egregious government misconduct"[28] or conduct that "shocks the conscience"[29] that U.S. Courts of Appeals have required to establish a due process violation generally, and in land use cases.[30]

The petitioner, Chevron, was the larger of the two gasoline refiners in Hawaii and the largest marketer of gasoline as well.[31] Chevron sold most of its gas through independent lessee-dealers. Typically, Chevron charged these dealers a monthly rent, defined as a percentage of the dealer's margin on retail sales. Chevron also required that the dealers buy gasoline at a rate it unilaterally set. In an effort to limit retail gasoline prices in Hawaii, the Legislature enacted a law in 1997 limiting the rent that oil companies could charge lessee-dealers to 15 percent of gross profits.[32]

Chevron immediately sought to enjoin enforcement of the statute, on the ground, pertinent to the Supreme Court's review, that the rent cap constituted a facial taking. Both Chevron and the state sought summary judgment. They stipulated that Chevron's return on its lessee-dealer stations under the statute would satisfy any constitutional standard.[33] Thus, the lack of even asserted direct harm probably undercut any thought that the petitioner had been treated unfairly. Were the Court to find unfairness, then, it would have to be solely by dint of the intrinsically arbitrary nature of the state's regulation.

The U.S. District Court accepted Hawaii's argument that the cap was intended to prevent concentration of the gasoline market, and the resulting high price to consumers, by maintaining the viability of independent lessee-dealers. However, it granted Chevron summary judgment on the grounds that the statute would not substantially advance the State's asserted and legitimate interest, since it did not preclude oil companies from charging the transferees of incumbent dealers a premium that would offset the advantage of the mandated percentage rent deduction.[34]

The U.S. Court of Appeals for the Ninth Circuit upheld the district court's use of the "substantially advances" standard, but vacated the judgment and remanded for a determination of whether the rent cap would, in fact, substantially advance the state's goal.[35] On remand, the trial court held a one-day bench trial, heard one expert from each side, and concluded that Chevron's expert was "more persuasive" as to whether the Hawaii statute would achieve its objective.[36] "Along the way," as the Supreme Court put it, the district court "determined that the state was not entitled to enact a prophylactic rent cap without actual evidence that oil companies had charged, or would charge, excessive rents."[37]

The Ninth Circuit affirmed the remand decision, holding that its prior opinion barred the state from challenging use of the "substantially advances" test, and also rejecting the state's challenge to the application of this standard to the facts of the case.[38] As the Supreme Court noted, "the lower courts in this case struck down Hawaii's rent control statute as an 'unconstitutional regulatory taking,' based solely upon a finding that it does not substantially advance the state's asserted interest in controlling retail gasoline prices."[39] The Supreme Court reversed.[40]

Whatever the merits of the litigants' claims,[41] the Court hinted that it took into account the apparently casual nature of the trial court's fact finding process in its dismissive summary of that court's conclusions: "We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation."[42]

C. The Court Criticized "Substantially Advances" as a Due Process Test

The gravamen of the Supreme Court's *Lingle* holding is that the "substantially advances" test is a due process test and, as such, has no rule in regulatory takings analysis. Early in its opinion, the Court stated:

> The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, provides that private property shall not "be taken for public use, without just compensation." As its text makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." In other words, it "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." While scholars have offered various justifications for this regime, we have emphasized its role in "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[43]

The "substantially advances" formula, the Court adds, anomalously would distinguish between burdens that are equally onerous, requiring compensation only where the regulation is not efficacious, a distinction of no bearing to the individual owner.[44]

> The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation

> may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.[45]

The Court concluded that the lower courts in *Lingle* took the "substantially advance" statement "to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course."[46]

D. The Court's "Takings" Tests are Largely Based on Due Process

Were the Supreme Court to have developed a robust doctrine of reviewing government *deprivations* of private property under the Due Process clause, and government *takings* of private property under a property rights-based Takings Clause, *Lingle*'s holding would be doctrinally consistent. Instead, for the last 30 years the Court has conflated the two approaches, defining takings of property not in terms of property rights, but in terms of ends-means analysis and, above all, "fairness."

1. A True Property Rights Approach to Takings

It is black letter law that "property" consists not of "things," but rather of the right to use, exclude others from, and alienate things.[47] A property rights-based Takings Clause jurisprudence would ask, first, whether property rights have been appropriated by government and, second, whether the affected owners received implicit compensation in the form of "reciprocity of advantage."[48] Appropriation without reciprocal advantage would constitute a compensable taking.

Such a straightforward approach would involve the application of judgment, but the contours of decisionmaking seem clear. Reciprocity, for instance, would include instances where each owner benefits from restrictions imposed on all other owners, such as the merchants in the French Quarter of New Orleans whose historic structures would be devalued if neighbors were allowed to convert to modern fast food restaurants.[49] Reciprocity would not include the situation in *Penn Central Transportation Co. v. City of New York*,[50] where, as then-Justice Rehnquist noted in dissent, 400 buildings were singled out for designation as official landmarks out of over one million buildings and structures in New York City. The "landmark designation imposes upon [affected owners] a substantial cost, with little or no offsetting benefit."[51]

Another articulated concern about a property rights approach to takings is that owners will define the interest they allege to be taken to correspond exactly with the scope of the government action. This has been referred to as "entitlement chopping"[52] and "conceptual severance."[53] However, at least two objective tests have been proposed to deal with this problem. Professor John Fee has suggested an "independent economic viability" standard.[54] I have advocated accepting the landowner's delineation of the relevant parcel only if it corresponds with a "commercial unit" of property in fact traded in the relevant market.[55]

2. The Court's Crypto-Due Process Approach to Takings

In her *Lingle* opinion, Justice O'Connor observed that there was "no question that the 'substantially advances' formula was derived from due process, not takings, precedents."[56] She noted that *Agins* cited *Nectow v. City of Cambridge*,[57] where the plaintiff claimed to be deprived of his property "without due process of law,"[58] and *Village of Euclid v. Ambler Realty Co.*,[59] "a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not 'clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare.*'"[60] While the Court has tried to recharacterize its property deprivation precedents as firmly rooted in the Takings Clause,[61] due process always has played a leading role.[62]

Yet since the beginning of the Supreme Court's contemporary interest in takings law, marked here as its 1978 decision in *Penn Central Transportation Co. v. City of New York*,[63] the Court has conflated takings and substantive due process concepts.

The essential difference between "property" and the command over resources evinced by contract is that the latter is bilateral. Contract rights normally are binding only upon those in privity to the agreement. On the other hand, property rights are in rem—they are binding upon everyone in the world.[64] Likewise, "due process" is an inherently relational concept. The Due Process Clauses of the Fifth[65] and Fourteenth Amendments[66] are not directed towards defining "property" or when government conduct constitutes its appropriation. Instead, their object is ensure that individual receive the benefit of procedures designed to produce fair outcomes and government conduct that is not arbitrary.

E. The Court's Revealing Summary of Its Takings Jurisprudence

In her *Lingle* summary of contemporary takings law, Justice O'Connor noted the landmark cases enunciating some of its strands; *Loretto v. Teleprompter Manhattan CATV Corp.*,[67] involving permanent physical invasions; *Lucas v. South Carolina Coastal Council*,[68] involving deprivations of all economically beneficial use; and *Penn Central Transportation Co. v. City of New York*,[69] involving an ad hoc multifactor test stressing the economic impact of the regulation on the claimant particularly, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the regulation."[70] She continued:

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto, Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally

> equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.[71]

Only in a metaphorical sense could Justice O'Connor have been speaking about "the severity of the burden that government imposes upon private property rights." Property rights, as such, have no burdens. Only owners have burdens. Economic impacts do not impinge upon property rights—they impinge only on property owners, for whom a loss of a given absolute magnitude might or might now be meaningful or tolerable, depending on their overall wealth or poverty. The inquiry is subtly shifted from whether there is a taking property to whether a burden has been imposed that is meaningful, given the circumstances of the particular owner.

Finally, the "degree to which it interferes with legitimate property interests" formulation is highly revealing. Given that interests deemed by law to be "illegitimate" are not property, and given Justice O'Connor's particular affinity towards *Penn Central*,[72] her more precise reference would be to "reasonable investment-backed expectations."[73] But, why "expectations" is a test of property is not discernable. As Professor Richard Epstein noted, none of the justices has offered "any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property' (which are, after all, not mere gloss, but actual constitutional text)."[74]

F. Lingle *Legitimizes Separate Due Process Clause Judicial Review*

At the same time that it rejected the "substantially advances" formula as a Takings Clause test, the Supreme Court affirmed its role for it in connection with the Due Process Clause.

> [T]he "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . .. Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.[75]

This part of the *Lingle* opinion is important, since U.S. Circuit Courts of Appeals have split on whether claims that state or local deprivations of property could constitute violations of owners' due process rights are actionable under Section 1983[76] without first fulfilling the exceedingly onerous requirements for federal review of takings claims under the Supreme Court's *Williamson County* doctrine.[77]

In *Albright v. Oliver*,[78] the Supreme Court reiterated the general rule established by its earlier holding in *Graham v. Connor*[79] that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'"[80] Based on *Graham*, the Ninth Circuit, in *Penman v. Armendariz*,[81] held that "that the scope of substantive due process, however ill-defined, does not extend to circumstances already addressed by other constitutional provisions."[82] *Lingle* now makes it clear that due process review is not "already addressed" by the Takings Clause.

Still, the flowering of meaningful substantive due process review for property deprivation claims awaits the enunciation of a reasonable standard for review of such claims. The Supreme Court has stated that "[t]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained."[83]

In practice, the bar is a high one. In *County of Sacramento v. Lewis*,[84] the Supreme Court added that "the core of the concept" of due process is "protection against arbitrary action" and that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense."[85] The U.S. Courts of Appeals have echoed that view.[86]

Justice Kennedy's concurring opinion in *Lingle* reminded his colleagues that, although Chevron had voluntarily dismissed its due process claim, the Court's decision "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."[87] In his concurring opinion in *Kelo v. City of New London*,[88] also decided this term, Justice Kennedy wrote that, under some circumstances, courts applying rational-basis review under the Public Use Clause should scrutinized the facts in the manner used by courts under the Equal Protection Clause. Kennedy reinforced this significant signal by citing to *Cleburne v. Cleburne Living Center, Inc.*,[89] a case associated with "covert heightened scrutiny."[90]

III. Federal Court Review of State and Local Regulatory Takings—*San Remo*

In *San Remo Hotel, L.P. v. City and County of San Francisco*,[91] the Supreme Court held that the full faith and credit statute precluded the relitigation of regulatory takings issues adjudicated by the California courts. The petitioners had no desire to have their case heard in the California courts at all, but sued there only because that was required by the "state litigation" prong of the U.S. Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*.[92]

All nine justices in *San Remo* deemed the general rules of issue preclusion applicable. The result was that substantive federal review, held out to be "premature" pending state review in *Williamson County*,[93] never would take place at all. The Court had granted cert because the Second Circuit recently had found such a result intolerable in *Santini v. Connecticut Hazardous Waste Management Service*,[94] a result that conflicted with the Ninth Circuit's holding in *San Remo*.[95] In *Santini*, the Second Circuit declared:

> It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.,* those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court.[96]

Justice O'Connor's comment about how a "doctrinal rule or test finds its way into our case law through simple repetition of a phrase," although made in *Lingle*,[97] would have been at least as appropriate in *San Remo*. As Chief Justice Rehnquist noted in his concurrence in the judgment, joined by Justices O'Connor, Kennedy and Thomas, "the affirmative case for the state-litigation requirement has yet to be made."[98] He concluded:

> I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . .. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.[99]

A. The Facts in San Remo

In *San Remo*, a city ordinance, based on a "severe shortage" of affordable housing, barred the petitioners from converting their 62-unit hotel in the Fisherman's Wharf neighborhood from residential to tourist use unless they provided replacement residential units or paid a $567,000 "in lieu" fee. The petitioners litigated their takings claims based on California law in the California courts, and asserted that they would reserve their federal takings claims for adjudication in federal court, if necessary.[100] The state court of appeal held the "in lieu" fee to constitute an exaction and that it failed to pass muster under the intermediate scrutiny standard.[101] The California Supreme Court reversed, noting, however, that the petitioners had reserved their federal causes of action.[102] Nevertheless, according to the U.S. Supreme Court, the state court did not confine its analysis to California jurisprudence:

> In the portion of its opinion discussing the Takings Clause of the California Constitution, however, the court noted that "we appear to have construed the clauses congruently." Accordingly, despite the fact that petitioners sought relief only under California law, the state court decided to "analyze their takings claim under the relevant decisions of both this court and the United States Supreme Court."[103]

Justice Stevens stated the question before the Court as "whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation."[104] He asserted that the case supporting the right of litigants to reserve their federal claims while litigating others in state court, *England v. Louisiana State Board of Medical Examiners*,[105] applies only when the antecedent state issue "was *distinct* from the reserved federal issue."[106]

> Although petitioners were certainly entitled to reserve some of their federal claims . . . *England* does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. Federal courts, moreover, are not free to disregard 28 U.S.C. § 1738 [the full faith and credit statute] simply to guarantee that all takings plaintiffs can have their day in federal court.[107]

B. Williamson County *and Its Progeny*

The hotel owners in *San Remo* had attempted to avoid the *Williamson County* doctrine, "a special ripeness doctrine applicable only to constitutional property rights claims"[108] that places exceedingly onerous and expensive burdens on litigants.[109]

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[110] the bank sued in federal court immediately after the commission denied approval for its

planned expansion of a subdivision. The bank did not pursue alternative forms of relief, including requesting a variance, appealing to the County Council, requesting that the county's general plan be amended, or suing in inverse condemnation in state court.[111] The Supreme Court ruled that it could not determine whether there had been a taking, because there had been no "final decision" by the planning commission. Furthermore, the "respondent did not seek compensation through the procedures the State has provided for doing so."[112] For these two reasons, the Supreme Court ordered the claim to be dismissed from the federal courts as unripe.[113]

The "final decision" prong of *Williamson County* asserts that an as-applied takings claim "is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to *the property* at issue."[114] Since this prong was not relevant in *San Remo*, it suffices to note that it's assumption that planners decide how much development is permissible in a complex project simply misapprehends their professional role,[115] and that the apparently simple requirement for a decision has embroiled landowners in a plethora of sub-prongs.[116]

The "state litigation" prong of *Williamson County* was the basis for *San Remo*. As *Williamson* declared: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[117] Thus, it added "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."[118] The Court noted soon after *Williamson*, in *MacDonald, Sommer & Frates v. Yolo County*, that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide."[119] Thus, an owner asserting that a government action constitutes a taking must make a formal demand upon the responsible agency for compensation and that claim must be rejected before the owner has a constitutional takings claim. If the *Williamson County* doctrine had stopped there, the Constitutional anomaly exacerbated by *San Remo* would not exist.

C. The Williamson County *"State Litigation" Prong has No Logical Basis*

At oral argument in *San Remo*, while the petitioners' attorney was explaining the case's complex history, Justice O'Connor interjected: "And you haven't asked us to revisit that *Williamson County* case, have you?" When the attorney responded in the negative, O'Connor retorted: "Maybe you should have."[120]

Williamson County stated:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.[121]

Subsequently, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[122] the Court vacated a judgment by the California Supreme Court striking the church's claim for regulatory takings damages on the ground that appropriate remedy would have been invalidation of a regulation determined to constitute a taking. The U.S. Supreme Court held that a landowner would be entitled to money damages for the time that an invalidated regulation was in effect, and remanded for further proceedings.[123] There had been no determination on the merits. Under prior California doctrine, there was no need to establish a mechanism for paying just compensation, since invalidation was deemed sufficient. It was in this context—that California had not yet devised a compensation mechanism—that the U.S. Supreme Court quoted *Williamson County*: "Our cases have also required that one seeking compensation must 'seek compensation through the procedures the State has provided for doing so' before the claim is ripe for review."[124]

There are two significant problems with this analysis. First, it lacks appreciation of the gradual evolution in the mechanism for seeking compensation from the Federal Government. Prior to 1855, the only recourse of those with monetary claims against the United States was in persuading members to introduce private bills in Congress. In that year, the U.S. Court of Claims was created, but had the power only to advise Congress regarding payment. Congress subsequently gave the Court of Claims the power to make binding judgments in 1863. The Tucker Act, enacted in 1887, gave the Court of Claims the power to hear suits based on the Constitution. The court has been reorganized, most recently as the U.S. Court of Federal Claims, under Article I of the Constitution, with appeals to an Article III tribunal, the U.S. Court of Appeals for the Federal Circuit.[125] Under the Tucker Act, the U.S. Court of Federal Claims has exclusive jurisdiction over takings claims against the Federal Government in excess of $10,000.[126] As this brief history indicates, the evolution from making demands for compensation directly to Congress to making them through an independent tribunal established at the pleasure of Congress has been gradual.

With respect to takings claims against local governments, there is no logical connection between the requirement that the purported inverse condemnee demand compensation from the condemnor, say, a city, and the requirement that it file suit in state court in order to obtain it.

Williamson County noted that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[127] Thus, "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."[128] But just compensation accrues from the time that the city engages in the act that constitutes the taking,[129] and the Constitutional claim logically is perfected when the city explicitly refuses to compensate.

The structure of the Takings Clause, which makes takings lawful, but conditions them on payment, does not make that provision unique so as to justify the "state litigation" requirement. Cities engage in conditionally permissible actions all the time. For instance, they have a right to prevent free speech, conditioned on their exercise of reasonable time, place, and manner restrictions. Hewing more closely to the Constitutional text, government searches and seizures are lawful, although conditioned on the showing of probable cause and the issuance, where necessary, of a warrant.[130]

There is no more logical reason why a person claiming a regulatory taking should have to sue in state court to establish the proposition of lack of compensation than a person denied the right to speak in a public park should have to sue in state court to establish that the narrow grounds on which a city might legitimately suppress speech do not exist.

The general rule, as Chief Justice Rehnquist noted in his *San Remo* concurrence in the judgment, is that, as in *Patsy v. Board of Regents of Florida*,[131] plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies.[132] Just as *San Remo* applied the general rule of issue preclusion to state court procedures required to ripen takings claims, the rule enunciated in *Patsy* should apply to *Williamson County* itself. Furthermore, in *Suitum v. Tahoe Regional Planning Agency*,[133] the Court described *Williamson* as a "prudential" ripeness test,[134] thus indicating that the Court could eliminate it, *sua sponte*.

Another aspect of the unfairness of the state litigation prong is its disparate treatment of property owners and government defendants. In *City of Chicago v. International College of Surgeons*,[135] the Supreme Court held that a municipal *defendant* can remove a regulatory takings case to federal court, even though it could not have been heard there, in the first instance, at the *plaintiff's* behest. After *International College of Surgeons*, the U.S. Court of Appeals concluded that the *Williamson County* doctrine "may be anomalous," but, with a broad hint, added that announcing its repudiation "is for the Supreme Court to say, not us."[136] The Court denied *certiorari*,[137] but four justices seem primed to act now.

Just as the Court rejected an exception to the general rule of issue preclusion in *San Remo*, it should repudiate the exception to the general rule that the plaintiff selects from among appropriate fora that was a basis of *Patsy*. There is no need for a regulatory takings plaintiff to have two bites at the apple. Issue preclusion, among other doctrines, will prevent this.138 But the plaintiff should select its bite.

IV. Takings for Economic Development and the "Public Use" Requirement—*Kelo*

Kelo v. City of New London,[139] in which the Supreme Court explicated the Public Use Clause,[140] has generated an immense amount of professional[141] and public interest.[142] "To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision by the highest court in the land would be more accurate."[143]

Kelo considered whether the condemnation of private homes in a non-blighted neighborhood, with subsequent transfer to private developers for the purpose of economic revitalization, constituted a public use. The affected homeowners included longtime residents,[144] and their resistance to the condemnation of their working class neighborhood for upscale redevelopment resonated with the public.

A. The Kelo *Facts Resonate with the Public and Legal Scholars*

One reason for the intense public interest is surprise. People associate eminent domain with traditional public uses and generally have been unaware of the increasing use of condemnation to acquire private property for transfer to other private entities. The growth of public awareness of condemnations for retransfer largely came about through a series of articles by *Wall Street Journal* reporter Dean Starkman. In 1998, he wrote:

> Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business."[145]

Follow-up articles in 2001 noted that state courts were starting to reign in eminent domain abuse.[146] Nevertheless, by late 2004 it seemed that localities valued eminent domain for retransfer more than ever:

> Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers. Condemnation cases aren't tracked nationally,

> but even retailers themselves acknowledge that the explosive growth of the format in the 1990s and torrid competition for land has increasingly pushed them into increasingly problematic areas—including sites owned by other people.[147]

The most comprehensive study of eminent domain for retransfer to private interests was prepared by the Institute for Justice, a libertarian public interest organization that also represented the *Kelo* petitioners.[148] This analysis, which reviewed condemnation activity in 41 states during the years 1998-2002, indicated that a total of 10,282 takings were threatened or filed in which the real property involved would be retransferred to a private entity.[149]

The city of New London is located in southeastern Connecticut, where the Thames enters Long Island Sound. Largely because of the loss of manufacturing and naval jobs, the economy and population of New London have undergone a significant and prolonged economic decline. The State of Connecticut has designated it a "distressed municipality."[150]

In January 1998, Connecticut approved a $5.35 million bond issue for redevelopment planning in the Fort Trumbull area, and a separate $10 million bond issue for a state park there.[151] In February 1998, the pharmaceutical manufacturer Pfizer Inc. announced that it would construct a $300 million research facility adjoining Fort Trumbull.[152] Local planners hoped that the Pfizer project with draw in new business and serve as a "catalyst to the area's rejuvenation."[153] After extensive hearings and in coordination with the state, the city formulated an economic revitalization plan for the Fort Trumbull area, to be effectuated through its non-profit entity, the New London Development Corporation.[154] The plan included a waterfront conference hotel, restaurants, shopping and new residences and support facilities.[155] According to the Supreme Court of Connecticut, the plan "was 'projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.'"[156]

B. Four Opinions, Four Perspectives

There were four opinions in *Kelo*. Justice Stevens, writing for a 5-4 majority, asserted that "public purpose" has morphed to subsume "public use," and that the Fort Trumbull project served a public purpose.[157] Justice Kennedy signed on to the Stevens opinion, but, in a separate concurring opinion, made it clear that, under certain unspecified circumstances, heightened judicial scrutiny of condemnations for retransfer is required.[158] Justice O'Connor wrote the principal dissent, in what apparently was her swansong takings opinion,[159] In line with her penchant for pragmatism, she stressed the possibilities of abuse in the Court's prior public use language.[160] Finally, Justice Thomas, who also joined the O'Connor dissent, asserted that the Court's error had been fundamental—it had stripped the "Public Use Clause" out of the Constitution.[161]

1. Justice Stevens and the "Living Constitution"

The "living constitution," a jurisprudential approach often associated with Justice Brennan and the Warren Court, asserts that the Constitution as a living document subject to "contemporary ratification," and must be interpreted in light of society's "current problems and current needs."[162] Justice Stevens, writing for the Court in *Kelo* in that idiom,[163] declared that the question was "whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."[164] From a popular perspective, the issue posed by *Kelo* is whether the right to keep one's own home yields to condemnation for private redevelopment, countenanced for purposes of economic development? The Court ruled 5-4 that it does.

Justice Stevens attempted to demonstrate that even the Court's older cases equated "public use" with "public purpose" He thus cited *Fallbrook Irrigation District v. Bradley*[165] as standing for the proposition that "when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'"[166] *Strickley v. Highland Boy Gold Mining Co.*,[167] he added, upheld a mining company's use of an aerial bucket line to transport ore over property it did not own, and that the Court's opinion by Justice Holmes "stressed 'the inadequacy of use by the general public as a universal test.'"[168]

Stevens also took full advantage of expansive language in the Court's cases upholding takings for retransfer for private development that were decided in an era of considerable optimism about large-scale urban renewal. These were *Berman v. Parker*,[169] upholding the condemnation of a sound department structure so that the blighted area in which it was located could be comprehensively revitalized, and *Hawaii Housing Authority v. Midkiff*,[170] upholding the condemnation of underlying fee interests concentrated in a few eleemosynary trusts and retransferring the titles to the individual residential parcels to the homeowners who had long-term ground leases. These were justified as a means of ending feudalism in Hawaii.

In *Berman*, Justice Douglas rhapsodized at length about the power of government to ennoble individuals and communities:

> We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. . .. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . .. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. . ..
>
> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . .. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . ..
>
> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . ..[171]

Notably, public use, public purpose, transfers to other private parties, and the police power all were fused together.

In *Midkiff*, Justice O'Connor built upon *Berman*, declaring: "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."[172] As consumer advocate Ralph Nader recently observed, the effect of Justice O'Connor's broad language is to make the definition of public use "[w]hatever the government says it is."[173]

Summing up in *Kelo*, Justice Stevens concluded that "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."

He noted cases, like *99 Cents Only Stores v. Lancaster Redevelopment Agency*,[174] which troubled Justice O'Connor,[175] but wrote that abuses "can be confronted if and when they arise."[176]

2. Justice Kennedy Remains Enamored with the Potential of Due Process

Justice Kennedy, whose vote was needed for Stevens' majority, warned in a concurring opinion that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted."[177] In his *Lingle* concurrence, Kennedy had cited *Eastern Enterprises v. Apfel*.[178] There, Kennedy was the only justice to conclude that a severely retroactive, large, and unexpected demand for payment to replenish a retirement and medical benefits fund made upon a former employer was invalid under the Due Process Clause. Kennedy's *Kelo* concurrence established a marker for future cases:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. . ..
>
> A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. . ..[179]

It is particularly notable that in the course of this discussion Justice Kennedy cited *Department of Agriculture v. Moreno*[180] and *City of Cleburne v. Cleburne Living Center, Inc.*,[181] both cases associated with the surreptitious higher standard of review termed rational basis "with bite,"[182] or "covert heightened scrutiny,"[183] in order to establish whether government conduct is arbitrary.

3. Justice O'Connor's Distress with the Pragmatism She Wrought

Justice O'Connor, the author of the principal dissent, declared that, under the majority's view, "the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power."[184]

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash

> out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.[185]

Justice O'Connor set out to distinguish Justice Douglas's *Berman* opinion,[186] and her own *Midkiff* opinion.[187]

> [F]or all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." . . .
>
> The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society —in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. . .. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.[188]

Referring to "errant language in *Berman* and *Midkiff*," Justice O'Connor conceded that her *Midkiff* equation of "public use" as "coterminous" with the police power "was unnecessary to the specific holding[]."[189] She also warned that Justice Kennedy's "as-yet-undisclosed test" was apt not to work: "The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."[190]

4. Justice Thomas and the Need for First Principles

Finally, Justice Thomas dissented tartly, noting that the Framers had embodied in the Fifth Amendment's Public Use Clause Blackstone's view that "'the law of the land. . . postpone[s] even public necessity to the sacred and inviolable rights of private property.'"[191] "Defying this understanding, the Court replaces the Public Use Clause with a "'[P]ublic [P]urpose'" Clause (or perhaps the "Diverse and Always Evolving Needs of Society" Clause.[192]

Justice Thomas also criticized Justice Stevens' explanation that the older case law supported the Court's equation of public use with public purpose. In his analysis of *Fallbrook Irrigation Dist. v. Bradley*,[193] for instance, the condemnation for purposes of constructing an irrigation ditch did serve a public purpose, since all landowners affected by the ditch had a right to use it.[194] Likewise *Strickley v. Highland Boy Gold Mining Co.*[195] "could have been disposed of on the narrower ground that 'the plaintiff [was] a carrier for itself and others,' and therefore that the bucket line was legally open to the public."[196]

C. Who is benefited by condemnation for retransfer and why does it matter?

Justice Stevens started his analysis be asserting that it was "perfectly clear" that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."[197] Likewise impermissible would be would be a taking "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[198] On that score, Justice Stevens reassured that the "takings before us, however, would be executed pursuant to a 'carefully considered' development plan."[199] A "one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot," such cases could "be confronted when and if they arise."[200] "Courts have viewed such aberrations with a skeptical eye."[201]

One of the examples that Stevens cited for this proposition was *99 Cents Only Stores v. Lancaster Redevelopment Agency*.[202] There, a leading "big box" retail chain, Costco, had threatened to leave the city unless its smaller competitor's adjacent land was condemned and transferred to it. The agency instituted eminent domain proceedings, on the pretextual grounds of blight. The court found that "by Lancaster's own admissions, it is was willing to go to any lengths . . . simply to keep Costco within the city's boundaries. In short, the *very reason* that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes."[203]

But nothing in *99 Cents Only Stores* suggests that redevelopment agency or city officials were bribed, or otherwise acted out of any motive other than the city's welfare. They were aware of the importance of retaining Costco, a principal tenant in the agency's most successful project and the only shopping center in Lancaster with a regional draw for customers. The court noted that these officials "[v]iew[ed] Costco as a so-called "anchor tenant" and [were] fearful of Costco's relocation to another city."[204] As the Lancaster city attorney candidly said, "99 Cents produces less than $40,000 [a year] in sales taxes, and Costco was producing more than $400,000. You tell me which was more important."[205]

It is true, of course, that Costco would gain from displacing 99 Cents Only Stores, and that it was motivated by its own prospects of gain. But that does not distinguish Costco from any other commercial developer or retailer.

Going on the premise that condemnation for economic development has no lesser legal status than condemnation for alleviation of physical blight, it is hard to distinguish the agency that condemns an unblighted "big box" store at the behest of its larger competitor, in order to derive the benefits that inure from the continued cooperation and presence of the larger firm, from condemning the unblighted small department store that stood in the way of a complete neighborhood make-over in *Berman v. Parker*.[206] Indeed, Justice Stevens took pains to point out, in *Kelo*, that it would be a "misreading" to term *Berman* a removal of blight case, since it involved comprehensive revitalization. "Had the public use in *Berman* been defined more narrowly, it would have been difficult to justify the taking of the plaintiff's nonblighted department store."[207]

Justice Stevens' emphasis on the comprehensiveness of the plan in *Kelo* also is important:

> Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.[208]

It is difficult to know what to make of this pronouncement. It might relate to the fact that large-scale actions are more inherently "legislative" and scrutinized by the public, so as to make them more worthy of deference.[209] The "legislative" versus "adjudicative" distinction drawn by the Supreme Court in *Dolan v. City of Tigard*,[210] where the Court imposed heightened scrutiny on administrative agency decisions but not legislative ones, comes to mind as well. In any event, allowing a party to litigation to designate the scale of the inquiry has some of the same drawbacks as allowing that party to designate the "relevant parcel" in the conventional regulatory takings case.[211] In both situations, the fairness of the result depends in large measure at how far the court looks. The fact that a city might be interested in "comprehensive" redevelopment of a wide area might imbue the entire scheme with a public purpose, but does not mean that the taking of an individual small parcel necessarily is for a public use.

Justice Stevens defended the condemnation in *Kelo* on the grounds that all of the state judges involved in the case "agreed that there was no evidence of an illegitimate purpose" and that "the city's development plan was not adopted 'to benefit a particular class of identifiable individuals.'"[212] Likewise, "'the development plan was not intended to serve the interests of Pfizer."[213]

However, as Justice O'Connor noted in her dissent, in economic development takings, "private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs."[214] Justice Thomas noted that the project, which stated a "vague promise of new jobs and increased tax revenue," also was "suspiciously agreeable to the Pfizer Corporation."[215]

The record certainly indicates that the needs of Pfizer were not far from the minds of redevelopment officials. The city's development consultant noted that Pfizer was "the '10,000 pound gorilla' and 'a big driving point' behind the development project.'"[216] A letter from the president of the city's development corporation to the president of Pfizer's research division noted that Pfizer's "requirements" had been met and that the corporation "was 'pleased to make the commitments outlined below to enable you to decide to construct a Pfizer Central Research Facility in New London.'"[217]

Perhaps, as the state supreme court found, the underlying purpose was benefit to the city.[218] But, ultimately, the quest for the definitive quid pro quo between the city and Pfizer not only is illusive, it is irrelevant. The prime interest of New London, and also of the State of Connecticut, which very actively participated in the Fort Trumbull project, was not contractual liability, but rather reputation as a redevelopment partner. If major companies like Pfizer are pleased with the upscale hotels, executive housing, attractive shops, and other amenities adjoining the sites they have redeveloped, other corporations that might be significant redevelopment partners in the government entity's future projects will learn of it. Correspondingly, if companies like Pfizer are unhappy, future redevelopment efforts would become more difficult.

In *Lingle v. Chevron U.S.A., Inc.*[219] the Court asserted that there was a fundamental dissonance in basing the landowner's entitlement to compensation on whether the city acted to further a legitimate purpose—the owner was, or was not, deprived of property regardless of the city's reason.[220] Yet in *Kelo*, the question of whether the city is acting primarily for public benefit raises the same sort of questions. If a condemnation for retransfer results in a large increment in amenities, jobs, and tax revenues, should it nevertheless be invalidated because the redeveloper obtained a larger benefit, or because the local official was acting to benefit the redeveloper instead of his or her employer? Likewise, if the city obtains a poor deal, either in terms of the absolute amount of benefit that it receives, in relation to better deals that were available, or compared with the condemnee's subjective (and therefore noncompensable) losses, should the city officials' fidelity to the goal of primary public benefit obviate the other factors?

C. County of Wayne v. Hathcock—*An Alternative Approach*

An important recent case that presents a comprehensive alternative to the *Kelo* approach to "public use" is the Michigan Supreme Court's sweeping repudiation of its very well known *Poletown* doctrine,[221] in *County of Wayne v. Hathcock*.[222] In *Poletown*, the state high court had upheld the condemnation of an entire ethnic neighborhood of some 1,400 homes, schools, 16 churches, and 144 local businesses for retransfer to General Motors Corporation, which intended to build a Cadillac assembly plant. Alleviation of Detroit's severe unemployment was the articulated and accepted justification. In 2004, in *Hathcock*, the Michigan court rejected condemnation for development of a large business and technology park, with a conference center, hotel accommodations, and a recreational facility, to be located near the Detroit airport.

Hathcock held *Poletown* to have been a "radical departure from fundamental constitutional principles."[223] The state supreme court reviewed the history of the term "public use" under the Michigan constitutions, and concluded that "the transfer of condemned property is a 'pubic use' when it possesses one of the three characteristics in our pre-1963 case law identified by Justice Ryan" in his *Poletown* dissent:

> First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved "public necessity of the extreme sort otherwise impracticable."
>
> Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution's "public use" requirement when the private entity remains accountable to the public in its use of that property.
>
> Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan's words, the property must be selected on the basis of "facts of independent public significance," meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement.[224]

D. The Transmutation of Private Ownership from Preventing Public Harm to Furthering Public Good

In its reaction to the *Kelo* case, perhaps the public found most vivid the following observation in Justice O'Connor's dissent:

> The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.[225]

These sentences point to a seismic shift in the basis for the Supreme Court's view of land use regulation. In the seminal case upholding the concept of zoning, *Village of Euclid v. Ambler Realty Co*., the Court found that its police power justification was intimately related to the law of nuisance.[226] This is but an application of the Court's broader observation, in *Mugler v. Kansas*, that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[227]

Yet *Kelo* implicitly suggests that the touchstone has changed from the owner's *right* to use property, subject to the obligation to do no harm, to the owner's affirmative *obligation* to use property in ways that benefit the community—lest that property be taken away and vested in others.

E. Coda

Given the practical impossibility of cabining condemnation for retransfer for economic revitalization, the Supreme Court has two choices. The first, which four justices selected, is to transmute the Public Use Clause into an *ad hoc* analysis of public purpose and fairness. The second, which four other justices selected, is to hold fast to the traditional limitations on public use, as was done by the Michigan Supreme Court in *Hathcock*.[228]

It may be, however, that, when all is said and done, the U.S. Supreme Court will attempt to split the difference with a relaxed definition of "public use," enforced through a higher level of judicial scrutiny, as suggested by the swing Justice, Anthony Kennedy.

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Footnotes

[1] 125 S.Ct. 2074 (2005).

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

[3] 125 S.Ct. 2491 (2005).

[4] 125 S.Ct. 2655 (2005).

[5] *Lingle*, 125 S.Ct. at 2081.

[6] Justice Kennedy also filed a separate concurring opinion.

[7] 125 S.Ct. at 2082.

[8] Myres S. McDougal, *Future Interests Restated: Traditions Versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1115 (1942).

[9] *Lingle*, 125 S.Ct. at 2087. *See supra* text accompanying note 87.

[10] *Id*. at 2084. *See supra* text accompanying notes 75-82.

[11] *See infra* text accompanying notes 97-99, 120-138.

[12] *See infra* text accompanying note 171.

[13] 125 S.Ct. 2074 (2005).

[14] 447 U.S. 255 (1980).

[15] *Id.* at 260.

[16] 125 S.Ct. at 2077.

[17] *Id*. at 2084.

[18] *See, e.g*., Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the* Agins *Tests*, 33 URB. LAW. 343 (2001).

[19] *See* R. S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL L.J. 353 (2004).

[20] 526 U.S. 687 (1999).

[21] 526 U.S. at 704.

[22] *Id*. at 704.

[23] *Id*. at 704 (citing Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); Yee v. Escondido, 503 U.S. 519, 534 (1992); Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 485 (1987); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

[24] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[25] *Id*., oral argument, 1998 WL 721087, at 17 (1998).

[26] Kelo v. City of New London, 125 S.Ct. 2655, 2665 (2005).

[27] *See infra* text accompanying notes 84-86.

[28] George Washington University v. District of Columbia, 318 F.3d 203, 209 (D.C. Cir. 2003).

[29] Creative Environments, Inc. v. Estabrook, 680 F.2d 882, 883 (1st Cir. 1982).

[30] *See also*, *infra* note 86.

[31] *Lingle*, 125 S.Ct. at 2078.

[32] *Id*.

[33] *Id*. at 2078-79.

[34] *Id*. at 2079 (citing Chevron U.S. A. Inc. v. Cayetano, 57 F.Supp.2d 1003, 1014 (D. Hawaii 1998).

[35] *Id*. at 2079-80 (citing Chevron U.S. A. Inc. v. Cayetano, 224 F.3d 1030, 1033-37 (9th Cir. 2000). Judge William Fletcher concurred only in the judgment, asserting that the "reasonableness" standard applicable to "ordinary price and rent control laws" should govern the court's disposition. *Id*. at 1048).

[36] *Id.* at 2085 (citing *Chevron*, 198 F.Supp.2d 1182 (D. Hawaii 2002).

[37] *Id*. (citing *Chevron* 198 F.Supp.2d at 1191).

[38] *Id*. (citing *Chevron*, 363 F.3d 846, 849-855 (9th Cir. 2004))(Once again, Judge Fletcher dissented the grounds that the "reasonableness" test was applicable. 363 F.3d at 359-361).

[39] *Id*. at 2082 (citing *Chevron*, 198 F.Supp.2d at 1193).

[40] *Id*. at 2080.

[41] For an earlier discussion of *Lingle* in this journal, delving more closely into its factual basis and economic reasoning, *see* Louis K. Fisher and Esther Slater McDonald, *Supreme Court Preview: Regulatory Takings*, 6 ENGAGE 1: 4 (2002).

[42] *Lingle*, 125 S.Ct. at 2085.

[43] *Id*. (citations omitted) (emphasis and brackets in original).

[44] 125 S.Ct. at 2084.

[45] *Id*. (emphasis in original).

[46] *Lingle* at 2087.

[47] *See* PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 83 n.6 (1980) ("The term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.' . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.* (quoting United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945))) .

[48] The phrase was first used by Justice Holmes in Jackson v. Rosenbaum, 260 U.S. 22, 30 (1922). Holmes repeated the phrase, more famously and in the takings context, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[49] *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding Vieux Carre ordinance).

[50] 438 U.S. 104 (1978).

[51] *Id*. at 138-139 (Rehnquist, J., dissenting).

[52] Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1601 (1988).

[53] Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

[54] John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1557-62 (1994). Under this standard, a taking has occurred when "any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation." *Id*. at 1538.

[55] STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7(e)(5) (3d ed. 2005).

[56] *Lingle*, 125 S.Ct. at 2083.

[57] 277 U.S. 183 (1928).

[58] *Id.* at 185.

[59] 272 U.S. 365 (1926).

[60] *Lingle*, 125 S.Ct. at 2083 (quoting *Euclid*, 272 U.S. at 395) (emphasis supplied by *Lingle*).

[61] *See*, *e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 n.5 (1994) (dismissing as incorrect the view that regulatory takings jurisprudence is based upon due process concepts).

[62] For elaboration, *see* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 998-1005 (2000).

[63] 438 U.S. 104 (1978).

[64] For an explication of this concept, *see generally* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 Colum. L. Rev. 773 (2001).

[65] U.S. Const., amend. V (1791) ("[N]or shall any person . . . be deprived of life, liberty or property, without due process of law.").

[66] U.S. Const., amend XIV (1868) ("[N]or shall any State deprive any person of life, liberty, or property without due process of law.").

[67] 458 U.S. 419 (1982).

[68] 505 U.S. 1003 (1992).

[69] 438 U.S. 104 (1978).

[70] *Lingle*, 125 S.Ct. at 2081-82 (discussing *Penn Central*, 438 U.S. at 124).

[71] *Id*. at 2082 (internal citations omitted).

[72] *See*, *e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (avowing that *Penn Central* remains the "polestar" of the Court's regulatory takings jurisprudence).

[73] The concept apparently originated in Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1233 (1967) (assigning preference to actions predicated upon "distinctly perceived, sharply crystallized, investment-backed expectation"). It was adopted by Justice Brennan in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("distinct investment-backed expectations,") and restated without explanation in Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979), as "reasonable investment-backed expectations." *See* Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 Urb. Law. 437 (2000).

[74] Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993) (criticizing Justice Scalia's *Lucas* opinion).

[75] *Lingle*, 125 S.Ct. at 2084.

[76] 42 U.S.C. § 1983, Civil Action for Deprivation of Rights. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured . . .."

[77] *See infra* text accompanying notes 108-118.

[78] 510 U.S. 266 (1994) (plurality).

[79] 490 U.S. 386 (1989).

[80] 510 U.S. at 273 (quoting *Graham*, 490 U.S. at 395).

[81] 75 F.3d 1311 (9th Cir. 1996).

[82] *Id*. at 1325.

[83] PruneYard Shopping Center v. Robins, 447 U.S. 74, 84-85 (1980).

[84] 523 U.S. 833 (1998).

[85] *Id*. at 845-46.

[86] *See, e.g.*, Crider v. Board of County Commissioners, 246 F.3d 1285, 1289 (10th Cir. 2001) (holding arbitrary and capricious "does not mean simply erroneous;" Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455, 459 (D.C. Cir. 1997) (noting "grave unfairness" as a result of "substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that tramples significant personal or property rights . . ."; Stern v. Halligan, 158 F.3d 729, 731 (3d Cir. 1998) (declaring ". . . simple unfairness will not suffice to invalidate a law.")).

[87] *Lingle*, 125 S.Ct. at 2087 (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

[88] 125 S.Ct. 2655 (2005).

[89] 473 U.S. 432, 446-447, 450 (1985).

[90] Laurence H. Tribe, American Constitutional Law 1612 (2d ed. 1988).

[91] 125 S.Ct. 2491 (2005).

[92] 473 U.S. 172 (1985).

[93] *Id*. at 185.

[94] 342 F.3d 118 (2nd Cir. 2003).

[95] *San Remo*, 364 F.3d 1088 (9th Cir. 2004).

[96] *Santini*, 342 F.3d at 130.

[97] Lingle v. Chevron U.S.A., Inc., 125 S.Ct. 2074, 2077 (2005).

[98] *Id*. at 2509 (Rehnquist, C.J., concurring in the judgment).

[99] *Id*. at 2509-10 (Rehnquist, C.J., concurring in the judgment).

[100] *Id*. at 2497-98. The Supreme Court noted that, in state court, petitioners "phrased their state claims in language that sounded in the rules and standards established and refined by this Court's takings jurisprudence. *Id*.

[101] *Id*. at 2498 (citing the California Supreme Court summary, 41 P.3d 87, 96-97 (Cal. 2002)). The intermediate standard of review for exactions of property was discussed by the Supreme Court in *Lingle*. *See supra* QQ.

[102] *Id*. (citing 41 P.3d at 91).

[103] *Id*. (citing 41 P.3d, at 100-101 (citing cases)).

[104] *Id.* at 2501 (citing *Williamson County*).

[105] 375 U.S. 411 (1964) (federal court abstained from adjudicating constitutionality of state refusal to deem graduates of chiropractic school compliant with Medical Practice Act so that state courts could determine whether Act applied to chiropractors at all).

[106] *San Remo*, 125 S.Ct. at 2502 (emphasis in original).

[107] *Id*. at 2501-02.

[108] Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. Rev. 1, 2 (1992).

[109] *See generally*, John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999).

[110] 473 U.S. 172 (1985).

[111] *Id*. at 196-97.

[112] *Id*. at 194.

[113] *Id*. at 185.

[114] *Id*. at 186 (emphasis added).

[115] *See* Michael M. Berger, *The "Ripeness" Mess in the Federal Courts*, C872 ALI-ABA 41 (1993). "The planner's job is to draw an abstract plan and then determine whether a specific proposal meets all the requirements. Anyone who thinks that he can get a planning agency to tell him what he *can* do on his land has probably been abusing some controlled substance—or doesn't understand the planning process." *Id.* at 45 (emphasis in original).

[116] *See*, e.g., MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353 n.9 (1986) (holding submitted plan must not be "exceedingly grandiose"); Gil v. Inland Wetlands and Watercourses Agency, 593 A.2d 1368, 1374-75 (Conn. 1991) (holding multiple applications expected and four insufficient here); Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990) (holding number dependent upon nature of project and challenge); Landmark Land Co. v. Buchanan, 874 F.2d 717 (10th Cir. 1989) (requiring one application plus some effort to pursue compromise with city).

[117] Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297, n.40 (1981)).

[118] *Id*. at 195, n.13 (emphasis in original).

[119] 477 U.S. 340, 350 (1986).

[120] Oral Argument Transcript, San Remo Hotel, L.P. v. City and County of San Francisco, 125 S.Ct. 685 (2005) (No. 04-340), 2005 WL 757887 at *6.

[121] *Williamson County*, 473 U.S. at 194-95 (internal citations omitted).

[122] 482 U.S. 304 (1987).

[123] *Id*. at 322.

[124] *Id*. at 312 n.6 (quoting *Williamson*, 473 U.S. at 194).

[125] *See generally*, Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 606-611 (2003).

[126] 28 U.S.C. § 1491(a)(1). The Act, originally passed in 1887, also provides for the adjudication of government contract, tax, government salary, and other disputes.

[127] Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297, n.40 (1981)).

[128] *Id*. at 195, n.13 (emphasis in original).

[129] *See First English*, 482 U.S. at 320 n.10 ("Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time.") *Id*. (citing Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 5 (1984)) ("Where Government physically occupies land without condemnation proceedings, "the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land *on the date of the intrusion by the Government*")." *Id*. (quoting *Kirby*, 467 U.S. at 4 (emphasis added in *First English*)).

[130] U.S. CONST., amend. IV (1791).

[131] 457 U.S. 496, 516 (1982).

[132] *San Remo*, 125 S.Ct. at 2508 (Rehnquist, C.J., concurring in judgment) (citing *Patsy*, 457 U.S. at 516).

[133] 520 U.S. 725 (1997)

[134] *Id*. at 733-34.

[135] 522 U.S. 156 (1997).

[136] Kottschade v. City of Rochester, 319 F.3d 1038, 1040 (8th Cir. 2003).

[137] 540 U.S. 825 (2003).

[138] *See*, *e.g*., the *Rooker-Feldman* doctrine. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (holding that inferior federal courts generally do not have the power to exercise appellate review over state court decisions).

[139] 125 S.Ct. 2655 (June 23, 2005). Justice Stevens' opinion for the Court was joined by Kennedy, Souter, Ginsburg, and Breyer, JJ. Justice Kennedy filed a concurring opinion as well. Justice O'Connor wrote a dissent, joined by Rehnquist, C.J., and Scalia and Thomas, JJ. Justice Thomas wrote a separate dissent, as well.

[140] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[141] No fewer than 29 amicus brief were filed on behalf of the petitioners and 10 on behalf of the respondents.

[142] According to a July 8-11, 2005, *Wall Street Journal*/*NBC News* poll "In the wake of court's eminent domain decision, Americans overall cite 'private-property rights' as the current legal issue they care most about, topping parental notification for minors' abortions or state right-to-die laws." John Harwood, *Washington Wire*, WALL ST. J., July 15, 2005, at A4.

[143] Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1.

[144] *Kelo*, 125 S.Ct. at 2660 (noting that one petitioner, Wilhelmina Dery, was born in her house in 1918 and has lived there ever since, and that another petitioner, Susette Kelo, has lived in the area since 1997, works as a nurse, and is much attached to her house and its water view).

[145] Dean Starkman, *Take and Give: Condemnation Is Used To Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1.

[146] Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, Wall St. J., July 23, 2001, at B1; Dean Starkman, *State Courts Side with Property Owner in Another Eminent Domain Contest*, WALL. ST. J., Feb. 15, 2001, at B14.

[147] Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004, at B1.

[148] *See* Dana Berliner, *Public Power, Private Gain*, CASTLE COALITION (2003), *available at* http://www.castlecoalition.org/report/pdf/ED_report.pdf.

[149] *Id*. at 2.

[150] *Kelo*, 125 S.Ct. 2655, 2658 (2005).

[151] *Id.* at 2659.

[152] *Id*.

[153] *Id*.

[154] *Id*. at 2658-59.

[155] *Id*. at 2659.

[156] *Id*. at 2658 (quoting Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004)).

[157] *See infra* text accompanying notes 162-176.

[158] *See infra* text accompanying notes 177-183.

[159] As of this writing, Justice O'Connor had submitted her resignation, effective with the conformation of a successor. Judge John G. Roberts of the U.S. Court of Appeals for the District of Columbia Circuit has been nominated to succeed her, but not yet confirmed.

[160] *See infra* text accompanying notes 184-190.

[161] *See infra* text accompanying notes 191-196.

[162] William J. Brennan, Jr., *Presentation to the American Bar Association* (July 9, 1985), in AMERICAN CONSTITUTIONAL LAW 607, 610 (Mason & Stephenson eds., 8th ed. 1987). *See* Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution,"* 139 U. PA. L. REV. 1319 (1991)("This view of the Constitution as a living and evolving document whose interpretations should not be cabined by too literal a quest for the Framers' intent is a position that Justice Brennan consistently defended and thoughtfully espoused . . .") *Id*. at 1319. Brennan wrote the Court's opinion in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[163] *See infra* text accompanying note 192.

[164] *Kelo*, 125 S.Ct. at 2663.

[165] 164 U.S. 112 (1896).

[166] *Id*. at 2662 (citing *Bradley*, 164 U.S. at 158-164).

[167] 200 U.S. 527 (1906).

[168] 125 S.Ct. at 2662 (quoting *Bradley*, 200 U.S. at 531).

[169] 348 U.S. 26 (1954).

[170] 467 U.S. 229 (1984).

[171] *Id*. at 31-34.

[172] *Id*. at 240.

[173] Ralph Nader and Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 211 (2004) ("Rather than emphasizing the justification of the public use in question, or the relatively small harm, the Court swept aside virtually any objection to any exercise of eminent domain. The Court gave away the game at the outset when it grappled with the definition of 'public use.' The Court's definition? Whatever the government says it is.") *Id*. at 210-211 (citations omitted).

[174] 237 F.Supp.2d 1123 (C.D. Cal. 2001).

[175] QQ Xref.

[176] 125 S.Ct. at 2667.

[177] *Id*. at 2670 (Kennedy, J. concurring).

[178] *Lingle*, 125 S.Ct. at 2087 (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

[179] *Kelo*, 125 S.Ct. at 2669 (Kennedy, J. concurring) (internal citations omitted).

[180] 413 U.S. 528, 533-536 (1973) (striking down statute excluding from federal food stamp program households containing an individual unrelated to any other member of the household as irrational classification).

[181] 473 U.S. 432, 446-447, 450 (1985) (finding no rational basis in record for believing that group home would pose any special threat to city's legitimate interests).

[182] Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

[183] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1612 (2d ed. 1988).

[184] 125 S.Ct. at 2675 (O'Connor, J., dissenting).

[185] *Id*. at 2671 (O'Connor, J., dissenting).

[186] Berman v. Parker, 348 U.S. 26 (1954).1

[187] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[188] *Id*. at 2674-75 (Connor, J., dissenting) (quoting *Midkiff,* 467 U.S. at 245).

[189] *Id*. at 2675 (Connor, J., dissenting) (quoting *Midkiff,* 467 U.S. at 240).

[190] *Id*. at 2675 (Connor, J., dissenting).

[191] *Id*. at 2677 (Thomas, J., dissenting).

[192] *Id*. (quoting from Justice Stevens' opinion, *id*. at 2662-63 and adding capitalization).

[193] 164 U.S. 112, 161-162 (1896).

[194] *Kelo*, 125 S.Ct. at 2683 (Thomas, J., dissenting).

[195] 200 U.S. 527 (1906).

[196] *Kelo*, 125 S.Ct. at 2683-84 (Thomas, J., dissenting) (quoting *Strickley*, 200 U.S. at 531-32).

[197] *Id*. at 2661 & n.5 (paraphrasing and citing Calder v. Bull, 3 U.S. (3 Dall.) 386 (1789)).

[198] *Id*. at 2661.

[199] *Id*. (citing *Kelo*, 843 A.2d at 536).

[200] *Id.* at 2667.

[201] *Id.* at 2667 n.17.

[202] *Id.* (citing 237 F.Supp.2d 1123 (C.D. Cal. 2001).

[203] 237 F. Supp. 2d at 1129 (emphasis in original).

[204] *99 Cents Only Stores*, 237 F.Supp.2d at 1127.

[205] Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, B1 (quoting David McEwan).

[206] 348 U.S. 26 (1954).

[207] 125 S.Ct. at 2265 n.13.

[208] *Id*. at 2665.

[209] *See* Fasano v. Board of Commissioners of Washington County, 507 P.2d 23, (Or. 1973) *overruled on other grounds,* Neuberger v. City of Portland, 607 P.2d 722, 725 (Or. 1980) (deeming small-scale rezoning quasi-judicial in nature). *Compare*, Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980) (holding zoning ordinances legislative acts regardless of size of parcel affected).

[210] 512 U.S. 374, 385 (1994).

[211] *See*, *e.g*. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (noting "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction.'")(citation omitted).

[212] *Kelo*, 125 S.Ct. at 2661-2662 (quoting *Midkiff*, 467 U.S. at 245).

[213] *Id*. at 2662 n.6 (quoting *Kelo*, 843 A.2d at 595 (Zarella, J., concurring in part and dissenting in part).

[214] 125 S.Ct. at 2675-76.

[215] *Id*. at 2677-78.

[216] Kelo v. City of New London, 843 A.2d 500, 537 (Conn. 2004).

[217] *Id*. at 538 n.51.

[218] *Id*. at 538.

[219] 125 S.Ct. 2074 (2005).

[220] *See supra* text accompanying note 45.

[221] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

[222] 684 N.W.2d 765 (Mich. 2004).

[223] *Id*. at 788.

[224] *Id*. at 781-783 (quoting *Poletown*, 304 N.W.2d at 478-480 (Ryan, J. dissenting).

[225] *Kelo*, 125 S.Ct. at 2676 (O'Connor, J., dissenting).

[226] 272 U.S. 365, 387-89 (1926).

[227] 123 U.S. 623, 665 (1887).

[228] *See* text associated with notes 221-224, *supra*.