

# The Supreme Court and Takings: —Four Essays—



Essays on the Supreme Court's takings jurisprudence as reflected in the cases of the 2004 term, *Lingle v. Chevron USA*, *Kelo v. City of New London*, and *San Remo Hotel v. San Francisco*.

Richard Brooks ■ John Echeverria ■ Marc Mihaly ■ L. Kinvin Wroth

Vermont Law School's Land Use Institute  
Vermont Journal of Environmental Law

# The Supreme Court and Takings: Four Essays

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# Introduction

Karin P. Sheldon\*

Environmental lawyers expected the Supreme Court's 2004 Term to be a quiet one for environmental issues, especially following the 2003 Term, in which the Court decided eight significant environmental cases. So it was something of a surprise when the Court heard three "takings" cases: *Kelo v. City of New London*,<sup>1</sup> *Lingle v. Chevron U.S.A., Inc.*,<sup>2</sup> and *San Remo Hotel, L.P. v. City & County of San Francisco*.<sup>3</sup> These cases represent notable developments in the Court's jurisprudence on the Takings Clause of the Fifth Amendment of the Constitution.

The *Kelo* case was the most controversial. The Supreme Court, through Justice Stevens, upheld the use of eminent domain by the City of New London to further the City's economic development plan. The Court ruled that the City's taking of property met the constitutional requirement of a "public use," even though the condemned land was not a blighted urban area, but a neighborhood of well-kept middle class homes, and the taking was intended to facilitate the City's plan for private commercial activities, rather than public services.

The Court rejected the requirement that condemned property be put to use for the public in favor of an interpretation of public use as "public purpose." The Court determined that the City's plan met the public purpose requirement because it was the product of a careful, integrated planning process and would not benefit a particular class of individuals. The Court also emphasized its deference to the state statute authorizing the City's use of eminent domain power for economic development. Justice O'Connor penned a strong dissent, joined by Justices Rehnquist and Scalia, contending that condemnation for purposes of economic development is unconstitutional. Justice Thomas filed a dissent on similar grounds.

The public reaction to the *Kelo* decision was immediate and pronounced. Newspapers and conservative weblogs reported on the effort of one outraged individual who applied the *Kelo* principles to allow the government to take Justice Souter's modest New Hampshire farmhouse for a hotel and other economically profitable private development.<sup>4</sup> Privately, however, most lawyers concluded that the *Kelo* case did not make a major change in takings law, but clarified the scope of

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<sup>1</sup> 125 S. Ct. 2655 (2005).

<sup>2</sup> 125 S. Ct. 2074 (2005).

<sup>3</sup> 125 S. Ct. 2491 (2005).

<sup>4</sup> See, e.g., Eric Rasmusen's Weblog, Taking Souter's House Under Kelo; Judicial Usurpation <http://www.rasmusen.org/x/archives/714> (last visited Nov. 4, 2005).

the Fifth Amendment's public use requirement. State legislatures and Congress are moving forward with various proposed limitations on the use of condemnation in the redevelopment context.

The *Lingle* case caused less of a stir, but may have greater legal significance. The Hawaii legislature, concerned about the impact of market concentration on the escalating price of gasoline within the state, instituted a limit on the rent that oil companies could charge dealers leasing company-owned service stations. Chevron U.S.A., one of the largest oil companies in Hawaii, challenged the rent cap as an unconstitutional taking of its property.

The district court applied the Supreme Court's ruling in *Agins v. Tiburon*<sup>5</sup> that government regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests."<sup>6</sup> The court held that the Hawaii statute authorizing the rent cap was an unconstitutional taking because it failed to substantially advance the State's interest in controlling gasoline prices. The Ninth Circuit Court of Appeals affirmed.

In an opinion by Justice O'Connor, the Supreme Court repudiated the "substantially advance legitimate state interests" test for determining whether a regulation effects a taking. (The Court was careful, however, not to invalidate *Agins* and a number of other cases in which it had previously applied the "substantially advance" test.) The Court explained that it was looking for a test to identify regulatory actions that are "functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain."<sup>7</sup> The Court ruled that the "substantially advance" test fails because it calls for a due process inquiry, rather than measuring the burdensomeness of government action on private property rights. The Court also found the "substantially advance" test inconsistent with the premise in takings cases that government action must serve a legitimate public use.

Finally, in *San Remo*, Justice Stevens writing for the majority refused to permit property owners to make duplicative takings claims in state and federal courts. The *San Remo* petitioners, owners of a hotel in San Francisco, objected to a city ordinance requiring the payment of fees for converting residential hotel rooms into rooms for tourists. The residential hotel rooms provided an important source of low-income housing in the community. After losing in state court, the hotel owners raised the same claims under federal law in federal court. In order to avoid the bar of issue preclusion, they asked the court to exempt Fifth Amendment takings claims from the full faith and credit statute<sup>8</sup> on the grounds that a federal court should disregard the state court decision in order to assure that the federal claims were considered on the merits. The Supreme Court refused to make an exception to the full faith and credit statute for takings claims. It ruled that the petitioners were not entitled to re-litigate unsuccessful state-law claims under federal law in federal court.

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<sup>5</sup> 447 U.S. 255 (1980).

<sup>6</sup> *Id.* at 260.

<sup>7</sup> *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2082 (2005).

<sup>8</sup> 28 U.S.C. § 1738 (2000).

## The Essays and Authors

As part of our ongoing series of papers on significant environmental legal and policy issues, the Environmental Law Center, the Land Use Institute of Vermont Law School, and the *Vermont Journal of Environmental Law* are pleased to present a group of essays on the Supreme Court's takings jurisprudence as reflected in these three cases. The essays examine the cases from a variety of interesting perspectives. They place the cases in context, and illuminate the development of the Supreme Court's takings jurisprudence over time.

The authors of the essays are particularly well qualified to assess the takings cases and their impact. All of them have a direct connection to the history, policy, and legal issues leading to the Court's decisions.

**Richard Brooks**, Professor of Law at Vermont Law School, Founding Director of the Environmental Law Center, and self-described "former denizen of New London" was instrumental in the City's community development project in the 1960s and co-authored the New London Model Cities program. In 1975, he drafted the Connecticut Coastal Management legislation that was applied in the *Kelo* case. His teaching and scholarship since that time have included land use planning and coastal management law.

Professor Brooks critically examines the *Kelo* opinion in light of the history of American planning, concluding that the Court failed to articulate a convincing rationale for defining the public purpose aspect of "public use."

**John Echeverria**, Executive Director of the Georgetown Environmental Law and Policy Institute and frequent commentator on regulatory takings issues, served as co-counsel for the Governor and Attorney General of Hawaii in the *Lingle* case. He has represented governments, citizen groups, and economists in a variety of takings cases and written extensively about the Supreme Court's takings jurisprudence.

Mr. Echeverria puts *Kelo*, *Lingle*, and *San Remo* in context with an examination of the evolution of Justice Stevens takings jurisprudence from dissenter to formulator of the Court's majority view.

**Marc Mihaly**, Assistant Professor of Law, Acting Associate Dean for the Environmental Law program and Director of the VLS Environmental Law Center, represented communities and municipalities in a variety of redevelopment efforts during his lengthy career in private practice. As a specialist in land use law, he participated in a number of regulatory takings cases in California. His law firm, Shute, Mihaly & Weinberger, represented the defendants in *Agins v. City of Tiburon*<sup>9</sup> and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>10</sup>

<sup>9</sup> 447 U.S. 255 (1980).

<sup>10</sup> 535 U.S. 302 (2002).

Professor Mihaly evaluates the *Kelo* opinion in light of current public-private urban redevelopment efforts and their contractual nature, concluding that neither the Court's majority nor its dissenters understood the realities of modern urban renewal projects.

**L. Kinvin Wroth** is the former Dean of VLS and Director of its new Land Use Institute. He was previously Dean of the University of Maine School of Law. While in Maine, he helped found Greater Portland Landmarks, Inc., a historic preservation organization, and served on the Portland Model Cities Task Force. For many years he was a member and chair of the New Gloucester, Maine planning board. More recently in Vermont, he was a member of the working group that produced a proposal for designated opportunity zones and master plan/master permitting legislation.

Professor Wroth compares United States takings jurisprudence, as reflected in *Kelo* and *Lingle*, with the current legal bases of Canadian domestic expropriation law. He also considers the interplay of the two domestic regimes and the expropriation provisions of the North American Free Trade Agreement.

# ***Kelo* and the “Whaling City”: The Failure of the Supreme Court’s Opportunity to Articulate a Public Purpose of Sustainability**

Richard O. Brooks\*

## INTRODUCTION

“And here, the city, all port, gives on the ocean generously”<sup>1</sup>

New London is a seaman’s town—a three-mile crescent of land bordering the Thames River and the Long Island Sound. The Old Stone Custom House from its sea-trading days still remains. By 1670, shipyards, merchant wharfs, and warehouses along with the town ferry and its landing lined its shores. Fort Trumbull, the historic center of development and home of the controversial development project in *Kelo*, protected shipping lanes during the Revolutionary War, and has continued to serve maritime functions throughout the past two centuries. In the 1800s, the town was the one of nation’s leading whaling ports. With the decline of whale oil, other marine-related activities continued including shipbuilding, marine trade, and fishing. Piers and ports continued Fort Trumbull’s maritime history into and through the twentieth century.<sup>2</sup> The recent home of extensive underwater research and the home of the U.S. Coast Guard, the lure of the sea continues. At the end of this century, the large, black nuclear submarines glided silently in New London’s waters and the clang of shipbuilding now echoes from Electric Boat yards on the other side of the river. The annual Yale-Harvard boat race on the Thames imitated its English cousin and added a touch of class to the scene. This is the setting for a recent Supreme Court case which appeared to set the homes and lives of a few long-time residents in this maritime city against the economic and political power of the well-intentioned seeking to rebuild a city down on its luck and fighting against modern economic forces indifferent to the charm of this seaside city.

By the end of the twentieth century, despite its raffish charm, New London was in economic decline.<sup>3</sup> Perhaps its fate was sealed when, almost two centuries earlier, it lost its

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\* Professor of Law, Vermont Law School. I write this with the love of a former denizen of New London, where I worked, taught, and moored my boat, chomping great greasy hamburgers at its seedy marinas. Thanks to student assistants Elizabeth Vires, John Briley, and Jennifer Turnbull for their help. Thanks also to my dear friends, Thomas and Margaret Sheridan, who live in the New London area and are continuing to contribute to its welfare.

<sup>1</sup> William Meredith, *Waterways*, THE OPEN SEA AND OTHER POEMS 17 (1957). Meredith is a fine American poet residing near New London.

<sup>2</sup> For a readable history of New London, see ROBERT OWEN DECKER, THE WHALING CITY: A HISTORY OF NEW LONDON (1976). This history documents New London’s maritime trajectory and confirms its historical identity as a seafaring town.

<sup>3</sup> This condition of New London is well documented in the City of New London’s Plan of Conservation

surrounding land and tax base to other towns, Ledyard, Groton, and Waterford—towns which have prospered in more recent years. Effectively by-passed by the thoroughway linking Boston, New York, and Washington, the spine of the Northeast Jean Gottman’s “Megalopolis” in the mid-twentieth century,<sup>4</sup> New London was also by-passed by the commercial growth of surrounding suburbs—the sad tale of many of our nation’s urban places. And it was crippled by a paucity of taxable land, due to the Coast Guard Academy, Connecticut College, and lands owned by other non-profit and public entities, the combination of which erases half of New London’s land base from the tax roles.<sup>5</sup> In recent years, New London has lost population, and gained minorities (some of whom worked in the area shipyards at the height of the shipbuilding period). In the past half century, New London struggled to reinvent itself through a variety of private and public programs. In the 1960s, major downtown renewal took place; in the 1970s, a new coastal management program was initiated,<sup>6</sup> and a refurbished train station and new ferry landing were constructed. Some of this renewal was a mixed blessing since it failed to economically revitalize the city and left in its trail a substantial amount of subsidized housing which held a low-income elderly and minority population. Much of its coastal lands remained unrenewed, with historically useful but now-declined industries and substantial vacant and deteriorated housing still present.

Most relevant to the *Kelo* case is the arrival of Pfizer Company’s research facility in the 1990s. An extension or transplant from nearby Groton, the research facility was in some ways a foreign body in New London. Largely unrelated to New London’s maritime heritage and manned by a largely well-educated work force, the Pfizer facility was a bit like the “man from Hadleyberg” who appears to promise and indeed leaves a pile of gold in the town, in the form of the promised

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and Development (1997) and is adverted to in the lower court opinions of *Kelo*. See *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at \*341 (Conn. Super. Ct. Mar. 13, 2002); *Kelo v. City of New London*, 843 A.2d 500, 574 (2004). The city was designated “distressed” under state laws in 1990. *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005). This designation assumed some importance for those dissenting Supreme Court Justices who appear to believe that some form of specific “blight” must be found to establish a public purpose for eminent domain. This underlying assumption mistakenly limits public action for the city only to remediation of distress, rather than broader support of its sustainability.

<sup>4</sup> Limited thoroughway frontage means that New London is the proud possessor of two early vintage shopping centers located in the shadows of mega-malls located in its neighboring Waterford. These mega-malls, along with nuclear power plants, make up the massive tax base for Waterford. The balance of tax base could change in the future if mass transport is reinvigorated to enliven New London’s rail line, and the nuclear power plants are decommissioned.

<sup>5</sup> This limited tax base assumes importance in light of the serious problems confronting New London’s schools. These schools are trying to cope with an increasing black and hispanic population, now making up one-third of the city’s population and accounting for a high drop-out rate from its schools. CITY OF NEW LONDON, PLAN OF CONSERVATION AND DEVELOPMENT (1997).

<sup>6</sup> This coastal management program is set forth in RAYMOND, PARISH, PINE & WEINER, INC., MUNICIPAL COASTAL MANAGEMENT PROGRAM: NEW LONDON, CONN. (1982). This program assumes some importance in the assessment of the *Kelo* case as discussed below.

arrival of well-educated citizens, new homes, jobs, and businesses. The elegant research facility looks out on the water, symbolic of the change of the nation’s economy and New London’s fate; a fate not of working with the sea, but rather regarding it as a pretty picture backdrop to unrelated work, tourism, or recreation.

The pile of gold was in the form of a development plan. The announcement of the Pfizer arrival preceded this proposed development plan at issue in the *Kelo* case and even before the plan was well underway, the Pfizer arrival was accompanied by nearby clearance and the building of attractive townhouses. These initial efforts, as well as others, such as the refurbishing of the town’s Ocean Beach park, have succeeded in creating neighborhoods of gentrified and livable homes in this seaside city next to the Sound.<sup>7</sup>

But in New London, the past half-century effort to make the transition from an industrial age port city to a post-industrial ecologically sustainable and socially just urban place has not been completed. Even with the arrival of Pfizer, high unemployment, continued loss of population, and poverty remain. Thus, it was not unreasonable to launch a new effort at renewal which would reconfigure parts of the city’s lands, given the advent of Pfizer, the resurgence of Amtrak (with a second refurbishing of the station in downtown New London), the planned building of a new Coast Guard museum, the refurbishing of Fort Trumbull, and the partly completed pedestrian way along the coast. With a new comprehensive plan of development, a non-profit economic development corporation was formed and *The Fort Trumbull Municipal Development Plan* was adopted at the turn of the new millennium.<sup>8</sup> This was the pot of gold that then divided the citizens of the town.

The Fort Trumbull Plan was more than an economic development plan. The plan sought to strengthen Pfizer’s presence in the city, with the proposed construction of a hotel and conference center as well as more housing to serve the needs of its employees. These “goodies” were part of the “understanding” that Pfizer brought with them to New London, and there is no doubt that the plan, in part, aimed to serve the needs of Pfizer, although those needs appeared to coincide with New London’s needs as well. Although the development plan clearly intended to complement the undertakings of Pfizer, it also sought to create other economic assets including a variety of offices, an extension of a pedestrian way along the Sound and parkland on the Thames River, a museum, eighty new residences and other retail sites, and marinas. The plan also proposed the environmental cleanup of more than a century of marine-industrial activities as well as the

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<sup>7</sup> Such gentrification was at the price of displacing a number of residents, including elderly residents to nearby suburbs. Justice Thomas, seeking once again to play the race card, mistakenly appears to analogize this displacement to the displacement of blacks in earlier renewal programs. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2687 (Thomas, J., dissenting).

<sup>8</sup> NEW LONDON DEV. CORP., FORT TRUMBULL MUNICIPAL DEVELOPMENT PLAN (2000). The more general wisdom of economic development efforts in inner cities is explored in Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753 (1996-1997).

protection and restoration of important wetlands, improvements of the sewer system, and control of odor pollution from the waste-water treatment facility in the area. In short, the ninety-acre plan was, to all intents and purposes, a classic redevelopment plan seeking to take advantage of some on-going public projects, but adding and coordinating them with some new public and private initiatives. In one way or another, with the exception of the Pfizer facility itself (an admittedly large exception), the development plan represented a bold new effort to continue New London's maritime heritage with access to the sea, water-related recreation, and a historical reminder of what New London was all about.

This maritime heritage is a crucial element in New London's identity, based upon its history, its surroundings, and this continuous effort to perpetuate that heritage. Every city has its identity and those who live, work, and visit that city can share in that identity. Without exaggeration, one might say that the development plan expressed New London's collective memory and identity as a marine city continuing to seek sustainability in a changing economy. The sustainability as a maritime city means the presence of an economy that supports the way of life of its residents and protects the marine environment.

In this sense, the New London plan was one of a myriad of recent efforts at urban coastal development around the nation.<sup>9</sup> These efforts have been designed to promote development, and to "clean up" polluted coastlines and provide coastal access to the citizenry. Marinas, parks, shopping quays, beach and wetland restoration, and coastal housing developments have been undertaken in many cities, both enhancing the cities' beauty, urban life, and their tax base, while reminding their residents of their city's heritage.

For the most part, the citizen complainants in the *Kelo* case did not contest the importance of the proposed development plan although they did view the plan as serving primarily the private purposes of Pfizer and private developers. Essentially, the complainants were contesting the vehicle of the plan—the New London Development Corporation. Such corporations emerged in the course of urban renewal in the 1960s and 1970s. They are authorized by state statutes, which, in turn, are part of a maze of both regulatory and grant-in-aid laws to facilitate urban development projects. They are linked to state economic development agencies which provide grants and contracts; they are designated by municipalities and guided by both state law and municipal laws and plans. These corporations were designed to attract private investment to the redevelopment projects and, in the case of some community development corporations, to facilitate participation of low-income persons and small businesses in low-income areas.

In the New London case, some of the board members of the New London Development

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<sup>9</sup> For accounts of such development efforts, see Joseph Petrillo, *Small City Waterfront Restoration*, 15 COASTAL MANAGEMENT 197 (1987); for an assessment, see Robert F. Goodwin, *Redeveloping Deteriorated Urban Waterfronts: The Effectiveness of U.S. Coastal Management Programs*, 27 COASTAL MANAGEMENT 239 (1999).

Corporation were linked to Pfizer, either by employment or family relationships. Moreover, the development corporation did have a clear agenda of facilitating development objectives that would make the Pfizer facility more successful. Thus, as indicated above, middle-income housing was planned to house some of the Pfizer research staff, the hotel was to serve Pfizer visitors as well as the public, and the renewal, including the cleaning up of odors and junkyards, would enhance the renovation of the Pfizer facility. Adding the match of Pfizer membership on the development agency to the combustible mix of advantages to Pfizer from the development plan was enough to start a fire. Ignored in the resulting community conflagration was the fact that many of these objectives of the plan corresponded to the city’s objectives of attracting the middle classes back to the city, cleaning up degraded sites, and promoting new tourist facilities. In any case, both the development corporation and its plan were approved by the municipal authorities.

To carry out the plan in New London, the development corporation not only had to acquire properties from willing sellers, but also had to take property from a very small group of unwilling residents through state-authorized eminent domain.<sup>10</sup> The properties at issue were located in areas designed for a proposed marina and water-related commercial property. Some of the properties were acquired by their owners for investment; some for residential purposes. Some were occupied by relatively new residents; some by long-term residents.<sup>11</sup>

Some of the residents sought to stop the taking of their homes by filing suit in Connecticut Superior Court, claiming that the eminent domain was not for a “public use.” The court enjoined the taking of some of the parcels, but not others that were found to be reasonably necessary to the project.<sup>12</sup> Upon appeal to the Connecticut Supreme Court, the court, despite a vigorous dissent, upheld all of the eminent domain takings in question, finding them all to be reasonably necessary to the project.<sup>13</sup> The U.S. Supreme Court granted certiorari to determine whether the eminent domain in question was for a public use under the Fifth Amendment of the Constitution.

A majority of the Supreme Court upheld the eminent domain of the properties, finding it to be for a “public use.”<sup>14</sup> The majority argued that the eminent domain clause of the Constitution, which required compensation for property taken for public use, had long since been broadened

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<sup>10</sup> Although some have suggested that private acquisition can adequately handle the problem of hold-outs, the methods suggested, such as secret acquisition of property, hardly promote the effort to establish a cohesive community.

<sup>11</sup> The number of long-time permanent residents was quite limited, despite rhetorical efforts on the part of opponents to the project to exaggerate both their number and motivation for ownership.

<sup>12</sup> *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at \*341 (Conn. Super. Ct. Mar. 13, 2002). The parcels enjoined from taking appeared to the court to be less related to the overall development plan and its purposes.

<sup>13</sup> *Kelo v. City of New London*, 843 A.2d 500, 574 (Conn. 2004).

<sup>14</sup> *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

to include the taking of property for a public purpose. The Court determined that economic development was such a public purpose. The Court based its decision primarily upon two previous decisions, *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*.<sup>15</sup> Both decisions upheld the exercise of the eminent domain power for public purposes.

One theme running throughout the majority decision in *Kelo* was the importance of careful planning to insure the government's pursuit of public purposes. In the words of the Court:

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.<sup>16</sup>

In reaching this conclusion, the majority recognized the role of planning as the coordination of “a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts.”<sup>17</sup> The majority properly rejected the dissents' effort to interpret the rationale of public use as simply serving a narrow private-nuisance standard in which eminent domain would only be justified to prevent specific harms to specific individuals.<sup>18</sup> Such a narrow standard of public interest advanced by the minority ignores a more comprehensive concept of the public interest and the essential role of both law and planning to coordinate the use of both public and private mechanisms to rebuild our nation's cities. Unfortunately, the majority failed to document the array of planning provisions that were relevant to the *Kelo* situation. I shall discuss these below.

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<sup>15</sup> *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). The “hidden precedent” of the case was *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), in which the Michigan Supreme Court upheld the taking of an entire neighborhood to permit the expansion of an automobile plan. *Id.* at 459–60. (The case was later rejected by the Michigan Supreme Court, in *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004). The *Poletown* case is not analogous to *Kelo*, whose plan involved a variety of public purposes. For an excellent review of the history of “public use” in urban renewal, see Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003). My colleague, Marc Mihaly, in an accompanying article, properly characterizes the majority opinion as “tepid.” If one compares it with the fine majority opinion in *Berman*, which recognizes the broad purposes of urban renewal, the *Kelo* majority opinion is indeed weak.

<sup>16</sup> 125 S. Ct. at 2665.

<sup>17</sup> *Id.*

<sup>18</sup> The dissenters ignore the common law public nuisance standard—a broader standard permitting the abatement of nuisances that violate common rights. More importantly, the land use laws of the twentieth century go far beyond the common law nuisance standards, seeking to affirmatively promote a community's common good through land use and environmental regulation.

## I. THE HISTORY OF PLANNING IN AMERICA

Since the Court's ruling rests, in part, upon an appeal to the planning process which preceded the eminent domain, it is important to understand the controversial history of planning in America over the past half century.<sup>19</sup> At the national level, this history extends back to the New Deal-planning efforts of the 1930s, the Second World War plans, the commitment to full employment planning after the war, the urban-renewal effort beginning in the 1950s, the social planning of the Great Society, Nixon's commitments to new town, population and land-use planning in the early 1970s, and the diversification of planning (transportation, health, energy, environmental, economic) of the past twenty years.

Especially important has been the rise of environmental planning in the past thirty years, which has embraced air and water quality management, forest, coastal zone, and ecological impacts in general. Environmental planning is essential to capturing the interdependent effects of ecosystems and tracing the impacts of intervention into those systems.<sup>20</sup> Although eminent domain implementation of such planning has not been as common as in other areas, it is an important tool in the implementation of some environmental laws.

This history of planning in the United States in the twentieth century is found in the *Kelo* case, almost like layers of sediment at an archeological site. The *Kelo* case concerned comprehensive land-use planning by means of state enabling laws and local zoning plans, municipal economic development plans authorized by state economic-development legislation, and environmental plans, including environmental impact and coastal management plans authorized by federal and state statutes.

For the most part, however, the power of eminent domain is associated with land-use planning and redevelopment. This nation has undertaken an extensive effort at local and regional land-use planning beginning in the 1920s, and continuing to the present day. State statutes lay out the public purposes served by such planning and authorize eminent domain when necessary to carry out these purposes.

This effort at planning, at the national and state and local levels, has been controversial. The New Deal, the Great Society, and more recent New Town and proposed industrial-policy planning efforts produced political backlashes.<sup>21</sup> Perhaps the greatest opposition came from those

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<sup>19</sup> For a brief, readable history of national planning up to the Nixon regime, see OTIS L. GRAHAM, *TOWARD A PLANNED SOCIETY: FROM ROOSEVELT TO NIXON* (1976).

<sup>20</sup> The importance of planning in environmental law is revealed in the history of environmental legal regimes as set forth in RICHARD O. BROOKS, ROSS A. VIRGINIA, & ROSS JONES, *LAW AND ECOLOGY* (2002).

<sup>21</sup> For an account of New Deal planning, see MARION CLAWSON, *NEW DEAL PLANNING: THE NATIONAL RESOURCES PLANNING BOARD* (1981). For new towns, in addition to the author's *NEW TOWNS AND COMMUNAL VALUES* (1974), see IRVING L. ALLEN, *NEW TOWNS AND THE SUBURBAN DREAM: IDEOLOGY AND UTOPIA IN PLANNING AND DEVELOPMENT* (1977). For a discussion of industrial policy, see OTIS L. GRAHAM, *LOSING TIME: THE INDUSTRIAL POLICY DEBATE* (1992).

who saw the national planning efforts as the first step towards a socialist or communist society. It is interesting to speculate whether, as the communist threat recedes, fear of planning may also recede. However, land-use plans have been fought at the local level, in part because of their threat to a libertarian notion of untrammelled property rights.

Scholars have also been concerned about national and local planning. Some leading political theorists suggest that nations and communities do not have purposes, like corporations, and hence are not capable of being instrumentally planned.<sup>22</sup> Different scholars and reformers have suggested different ideals for our cities—“the city beautiful,” the “communitarian city,” the “good city,” the “just city,” the “sustainable city,” and so forth.<sup>23</sup> There is also a diversity of views of the planning process corresponding to those ideals.<sup>24</sup> These disagreements of scholars are mirrored by disagreements among citizens; hence, a public pluralism makes agreement on planning efforts difficult. This disagreement has impaired the effectiveness of planning and there has been a myriad of scholarly criticisms of the effectiveness of planning.<sup>25</sup> Notably, Justice Stevens, the author of the majority opinion in the *Kelo* case, recently commented that he had more faith in the marketplace than in government planning.

Complicating matters in recent years has been the recognition of the important role the private sector can play in any public-planning efforts. Private planning has been important for many years, especially within large corporations.<sup>26</sup> The integral role of private investment has been an essential part of urban renewal. Here, a brief history of urban renewal is useful. When urban renewal began in the 1950s, its principal purpose was to remove selected blighted areas of inadequate housing. This effort was followed by efforts to revitalize the downtowns of our cities, which were competing with suburban economic centers. This effort required relocation, the building of subsidized housing, and significant social, employment, and educational services. To finance such services, in addition to federal and state funding, it proved necessary to refurbish the city’s tax base, which could only be accomplished by attracting economic investment to the city. Hence, economic development efforts were undertaken and these efforts required close working with economic interests. Ironically, at the same time, primarily through the work of Jane Jacobs, it was recognized that only with vibrant economic activity could the spirit of the city be retained and grow.<sup>27</sup>

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<sup>22</sup> MICHAEL JOSEPH OAKESHOTT, *ON HUMAN CONDUCT* (1975).

<sup>23</sup> PETER GEOFFREY HALL, *CITIES OF TOMORROW* (1988).

<sup>24</sup> For a marvelous intellectual history of planning, see JOHN FRIEDMANN, *PLANNING IN THE PUBLIC DOMAIN: FROM KNOWLEDGE TO ACTION* (1987).

<sup>25</sup> MARTIN MEYERSON & EDWARD C. BANFIELD, *POLITICS, PLANNING, AND THE PUBLIC INTEREST* (1955).

<sup>26</sup> JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (2nd ed., rev. 1971).

<sup>27</sup> JAMES Q. WILSON, *URBAN RENEWAL; THE RECORD AND THE CONTROVERSY* (1966); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* (1989).

As my colleague Marc Mihaly demonstrates in an accompanying article, partnerships between public and private have been an important part of past urban development and present urban-economic development projects. This important role of the private sector within the public-planning process was recognized as early as the 1950s when Robert Dahl and Charles Lindblom published their classic: *Politics, Economics, and Welfare*,<sup>28</sup> documenting the continuum between public and private. The newest joinder of public planning and the private sector is the establishment of publicly managed markets in environmental regulation and other fields. The close relationship between public and private opens the possibility of private corruption of public planning through rent-seeking efforts of the private sector.<sup>29</sup>

All of these historical themes may be found within the circumstances surrounding the *Kelo* opinion and are reflected in the opinion: the plaintiff’s distrust of the effectiveness and fairness of the plan, the palpable pain of the Court at the plan’s impact upon property owners, the appeals to and attacks of urban-renewal planning, the underlying pluralism of New London with its conflicting interests, and the important role that the private sector plays within the plan. It is this “mare’s nest” of complicating historical cross currents into which the Supreme Court steps in the *Kelo* case.

## II. EMINENT DOMAIN AS AN INSTRUMENT OF PLANNING AND THE “PUBLIC PURPOSE RATIONALE”

The *Kelo* majority opinion properly begins with the relevant text of our Constitution: “[N]or shall private property be taken for public use without just compensation.”<sup>30</sup> This provision appears to suggest three issues. First, the government cannot simply “take” private property. This text has been expanded by interpretation to apply to some “takings” of property values by regulation and this interpretation by courts and scholars has led to a myriad of cases and discussions.<sup>31</sup>

But these discussions of taking are unrelated to the second question: if property is taken for public use, compensation must be given. This text has been expanded by interpretation to include the eminent domain of property for a public purpose, not merely public use. By expanding the possibility of compensation for public use, it becomes difficult to draw the line between private

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<sup>28</sup> ROBERT ALAN DAHL & CHARLES EDWARD LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE: PLANNING AND POLITICO-ECONOMIC SYSTEMS RESOLVED INTO BASIC SOCIAL PROCESSES* (1953).

<sup>29</sup> Perhaps a more significant work is the concern about “neo-corporatism”—the undue influence of corporations on public policy not only by means of public-private partnerships, but through a variety of “influences” of the private upon public decision-making.

<sup>30</sup> U.S. CONST. amend. V.

<sup>31</sup> Some scholars and ideologues have sought to push their concerns about the taking of property by emphasizing the second separate phrase of the constitutional provision concerning compensation for public uses, and thus narrowing the interpretation of the clause.

and public uses. The *Kelo* case poses the second issue: whether the compensation is indeed for a public purpose.<sup>32</sup> Since there are both public and private uses involved in the development project, determining how and when there is a public purpose is indeed difficult.

A third issue is the question of whether compensation by money is appropriate to the eminent domain of some properties. This is often referred to as the commodification issue.<sup>33</sup> This issue can arise under the “taking” provision in determining whether inverse condemnation or declaring the regulation null and void should be the remedy. The suitability of compensation can also arise under the second issue of eminent domain. Although not raised by the legal complaint in the *Kelo* case, the issue of the suitability of compensation in the case of elderly people occupying the home of a lifetime is certainly a key concern in the case. Since this issue is not dealt with in *Kelo*, I shall not address it here, except to suggest that the recognition of the non-market, non-commodity values of long-time residence may be better handled through non-legal channels.<sup>34</sup>

The problem of the “public purpose” rationale, like its kissing cousin, the “public interest” standard, is that it is a very broad and vague standard. The vagueness of this standard was vigorously attacked by political scientist Theodore Lowi, who suggested that such a standard permits the undercutting of democracy by allowing wholesale delegation to administrative agencies.<sup>35</sup> The attack was elegantly capsulated in Charles Reich’s classic article, *The Law of the Planned Society*,<sup>36</sup> which argued that the “public interest” statute, which guided planning and administrative efforts, established a myth that such efforts were based upon an objective standard. Reich then argued that planning and administrative decisions in the public interest should be supplemented by required provisions for citizen participation in the planning process, as well as statutes that list a range of specific values affected by the proposed government action. Reich also recommended citizen-advisory bodies and judicial review of agency action. These and other arguments have been reiterated by Thomas Schoenbrod and Ross Sandler in recent books and articles and have been discussed by other scholars in different contexts.<sup>37</sup>

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<sup>32</sup> Of course, the plaintiffs and one dissenter, Thomas, sought to limit eminent domain powers to securing public uses. Precedents have long since abandoned such a narrow reading. It is interesting to note that the broader public purpose doctrine was invoked at the turn of the twentieth century to draw a distinction between eminent domain to secure a public good and permissible “taking” without compensation to prevent a public harm. Some of the dissenters seek to take the latter standard, which applied to permissible takings, and apply it as a requirement in eminent domain.

<sup>33</sup> MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

<sup>34</sup> The method for handling it may be some form of “deep compromise” as outlined in HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 143–62 (2002).

<sup>35</sup> THEODORE J. LOWI, *THE END OF LIBERALISM* (1979).

<sup>36</sup> Charles A. Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227 (1966).

<sup>37</sup> Among these contexts is the regulation of communications, see Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 *FED. COMM. L.J.* 605 (1998). For other discussions, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

(To be sure, in *Kelo*, the issue is the constitutional “public purpose” standard, whereas in administrative law contexts, the “public interest” issues have focused upon “public interest” provisions within statutes;<sup>38</sup> however, for our purposes, the issues may be treated together since concerns about vagueness and objectivity appear to bedevil both constitutional and statutory standards.)

The *Kelo* case offers a fine test case of the adequacy of the “public purpose” rationale in constitutional review efforts. The majority found an adequate public purpose for the eminent domain adopting a deferential approach to what it perceived to be the deliberate, comprehensive, and procedurally satisfactory planning effort in New London. The minority sought to make the public-interest standard more specific by requiring the condemnation to be addressed to prevent specific harms.<sup>39</sup> Both were concerned with finding some objective basis for the determination of public purpose, one through appeals to planning and deliberation, one through appeals to a specific nuisance-harm standard.

But neither the majority nor the minority of the Supreme Court sought to carefully review the statutes that were in operation and that governed eminent domain in this case. These statutes set forth a variety of more specific objectives and corresponding processes requiring the community’s officials to determine if these objectives were properly pursued. Let us briefly identify these statutes, of which all were passed since the 1960s and all address the problems of the public-interest standard (albeit, for the most part, at a state level), about which Lowi and Reich were concerned.

As indicated above, the statutes relevant in *Kelo* are: (1) the federal and state coastal management acts;<sup>40</sup> (2) the state and local land-use planning acts;<sup>41</sup> (3) the state and local economic-development acts;<sup>42</sup> and (4) the state environmental impact law.<sup>43</sup> Each of these statutes contains a set of carefully articulated purposes, requirements for public approval of plans and their implementation, opportunities for citizen participation, limits upon private interests within the planning process, and opportunities for judicial review.<sup>44</sup> In addition, there are specific limits to

<sup>38</sup> At the time of the concern over the “public interest” standard in the 1950s, philosophers became interested in the issue. For an excellent discussion, see WAYNE ALBERT RISSER LEYS & CHARNER MARQUIS PERRY, *PHILOSOPHY AND THE PUBLIC INTEREST* (1959).

<sup>39</sup> It is interesting to note that the Supreme Court dissenters could take refuge in the liberal, pragmatic writing of John Dewey in his *THE PUBLIC AND ITS PROBLEMS* (1927), in which he argues that there is no pre-existing form of the public, but only the organized response to the indirect, important, and continuous harmful consequences of “private groups.”

<sup>40</sup> 16 U.S.C. § 1451 (2005); CONN. GEN. STAT. ANN. § 22a-90 (West 2005).

<sup>41</sup> See Title 8 of Connecticut’s General Laws for Connecticut’s statutes on Zoning, Planning, Housing, Economic and Community Development and Human Resources.

<sup>42</sup> CONN. GEN. STAT. ANN. §§ 8-31a to 8-438.

<sup>43</sup> *Id.* §§ 22a-16 to 27g.

<sup>44</sup> The lower Connecticut court in the *Kelo* case reviewed these processes in considerable detail. See *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789 (Conn. Super. Ct. Mar. 13, 2002).

possible private enrichment set forth within state non-profit laws and the federal tax laws and their regulations.<sup>45</sup>

All of these laws are designed to insure, among other things, that the private interests within the plan are controlled and coordinated by public purposes. Thus, their proper application in the *Kelo* case would presumably stop the abuse of the public interest by private interests. But, of course, courts may need to determine if such abuse is present. Such an inquiry requires a careful examination of the relations among the statutes, as well as the application of the statutes to the case at hand. Such a determination requires the judicial review of the purposes of the statute; this review requires a purposive review.

### III. UNDERSTANDING JUDICIAL REVIEW OF PUBLIC PURPOSES

The courts' review of whether eminent domain is justified by public purposes is part of a more general "purposive review" by the courts in many different kinds of cases.<sup>46</sup> Courts in such review often seek to specify public purposes through constitutional or legislative interpretation. When fundamental liberties or suspect classifications are threatened, the court seeks to determine whether there are "compelling state purposes." When administrative actions are challenged as "vague" or as "delegating" legislative powers, the adequacy of the statement of legislative purpose to guide administrative action or private parties may be at issue. When the question arises as to whether a specific activity should be conducted by the federal or the state government, the court may explore the purpose of the statute at issue to determine whether it is properly federal or state. When a taking issue is posed by a regulation, the court may look to and weigh the purpose of the regulation against the degree of taking. And when the activity involves eminent domain, the court must explore whether such eminent domain serves a public purpose. Determining "compellingness," specificity, federal level appropriateness, proper rationale for regulation, and private involvement requires the court to review and perhaps specify the government purpose.

These "purposive" reviews have been difficult for the courts since they threaten to require a counter-majoritarian court to adopt the position of second guessing the legislature. Thus, the courts have vacillated in their decisions that seek to handle all of these issues, i.e. the issues of defining "compelling state purposes," the "public interest," the articulation of federal or state activities, and the weight of a purpose for justifying regulation without compensation. Courts have

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<sup>45</sup> A review of the tax laws bearing upon economic development and its implications for controlling private interests is set forth in chapter eight of WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* (2001).

<sup>46</sup> For a discussion of "purposive review," see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997).

failed to recognize that their task is to specify, through interpretive definition, the public purposes at issue.

The *Kelo* case offers simply one more example of the problem of judicial review of government purposes. In *Kelo*, the court can only review the extent to which eminent domain seeks to promote public purposes by carefully reviewing whether the eminent domain is properly contained with the plans and these plans are authorized by legislative purpose. Put another way, the condemnation by the economic-development agency must be in accordance with the planning process and must further the legislative purposes that authorize it. It is not the plan (i.e., that an administrative action) that establishes the basis of public interest, but the legislative findings, purposes, and objectives that authorize the plan.

This task of judicial review is complicated by two considerations. First, there are often multiple statutes involved. In the *Kelo* case, there are at least four such statutes. Consequently, the court must determine the relation among the statutes’ purposes before determining whether the action in question promotes the appropriate mix of purposes. This, however, is a normal part of a court’s job, especially when faced with cases involving multiple statutes. Second, the inquiry into the compatibility of the action and plan in question to the purposes of the statutes may not be reduced to a means-ends inquiry.<sup>47</sup> Rather, the court may be faced with the need to carefully articulate the public-interest purpose and explore how the statutory objectives and activity under that statute “fits” with that purpose. Thus, in the *Kelo* case, the court must examine how the eminent domain fits with the specific purposes of economic development, as well as the relation of economic-development purposes to the environmental and land-planning purposes of the respective statutes, where relevant.

Thus, in *Kelo*, the court first had to explore and specify the meaning of the economic-development statute at issue.<sup>48</sup> In a remarkably thorough and extensive lower-court opinion, the judge sought to define by interpretation the economic objectives of the law governing the project at issue. The court carefully parsed the economic-development purposes of the relevant statutes, determining that the statute is not reserved to blighted areas, but rather has a broader purpose of economically rejuvenating distressed cities. That purpose includes the acquisition of larger land areas to facilitate development purposes, acquire private lands (including residential lands to do so),

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<sup>47</sup> The recognition that the court’s analysis may require something other than simply means-ends reasoning is set forth in HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY* (2002), and the possibility of “thinking about ends” is set forth in HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* (1994). The kind of reasoning involves the achievement of coherence in the definition of purposes. The determination of whether eminent domain is a proper means to the ends of redevelopment or environmental objectives requires the prior definition of what those redevelopment and environmental goals are.

<sup>48</sup> The handling of several statutes is not uncommon in complex federal court cases and in undertaking interpretations in accordance with the legislative interpretative principle of *in pari materia*.

and enter into arrangements with other private parties to develop the lands in question, even if the incidental purposes of which may be to benefit some private parties. This analysis of the purposes of the statute was partly based upon the language of the statute, partly upon precedent. The court went on to examine the project at issue, finding its purpose indeed to be the economic development of the city and, by exploring both the motivation of the agreement at issue and the consequences of the agreement, found the private benefits to be incidental. This latter finding depended upon the court's examination of the specific context and objectives of the development plan itself.

#### IV. THE PUBLIC PURPOSES AND SUSTAINABILITY

The statutes in the background of the *Kelo* case included not only land-use and economic-development statutes, but also environmental statutes. The project, insofar as it was a development project, could threaten environmental damage. At the same time, the project could promote environmental purposes by conducting environmental cleanups and reducing odors, as well as increasing the public access to the coast and coastal recreation opportunities. These possible benefits and harms are governed by the state and federal coastal management legislation and the environmental impact legislation. The state and federal coastal management act mandate a municipal coastal management plan, which was adopted. Local officials deemed the development to conform with that plan. Similarly, the environmental impacts were assessed and found to be satisfactory in an extensive environmental impact statement. These actions constituted a judgment that the development in question was environmentally sustainable.

Although the *Kelo* Court did not address the relationship of these environmental statutes to the project in question, they were reviewed in prior litigation challenging the procedure of environmental assessment.<sup>49</sup> This litigation did not require that there be court-review at the time of the plaintiff's petition. As a consequence, the Court was not required to determine whether the plan in question substantively complied with the coastal management act or the broad values of the state's environmental impact statutes. Presumably, when and if such review takes place, the Court will be required to explore the relationship between the purposes of the development and environmental statutes. At such a time, the Court may, in effect, be articulating the standards of sustainability for this urban-development project.

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<sup>49</sup> Fort Trumbull Conservancy, L.L.C. v. Planning & Zoning Comm'n of the City of New London, 832 A.2d 611 (Conn. 2003). For a follow-up discussion, see Jane Kimball Warren, *Is Your Client's Proposed Development Safe from Environmental Attack?* Apr. 15, 2005, <http://www.msi-network.com/com/content/cmsdoc179.asp>.

## V. SUPREME COURT REVIEW AND DEFERENCE

The U.S. Supreme Court expressed deference in this case, and offered several rationales for that deference. Since the issue was one of economic regulation, a minimal scope of review was indicated. In addition, the Court explicitly deferred to the state legislature and the careful municipal-planning process. If the matter had been one of a federal administrative agency, one might expect deference to that agency. Finally, the Court might have deferred to the careful analysis and findings of the state courts.

Underlying such deference are several principles: the principle of lesser protection accorded to economic and social regulation of property interests, the principle of federalism accorded to land-use activities which have been viewed as “traditionally” state activities, the principle of administrative expertise (a kind of *Chevron* deference), and the principle of respect of lower court mixed fact/law determinations. However, despite the abundance of reasons to accord deference, a blank check cannot be granted by the Supreme Court to the administrative agencies, the city, or the lower courts. The U.S. Supreme Court, in according such deference, should articulate the grounds and limits of its deference. It should extend this deference only after insuring that the administrative agency and the lower court review of that agency determined that the eminent domain will indeed serve broader public purposes.

The principle of limited judicial review of government action serving social and economic purposes is well established in constitutional law, but it may deserve a full and fair reexamination in the case of eminent domain of personal residential property. However, that issue is beyond the scope of this paper.<sup>50</sup> A second principle of deference, deference to administrative expertise, may be questioned in cases where the agency for various reasons is suspected of not having the relevant expertise or of abusing the expertise.<sup>51</sup>

The third principle of deference, the principle of federalism, may have special force in *Kelo*. The case is clearly a land use related case,<sup>52</sup> ordinarily considered the province of state and local governments. Hence, it may be appropriate to accord special deference to the state and local officials who approved the plan resulting in eminent domain. The Supreme Court has recently reasserted the state and local characteristic of local zoning-like decisions and hence, such federalist deference might apply here.<sup>53</sup>

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<sup>50</sup> Although it occurs to me that the dissenters, in adopting a nuisance-based standard for eminent domain, may be indirectly seeking to strengthen the claims of private property in eminent domain cases.

<sup>51</sup> These exceptions to *Chevron* deference are found in cases that apply exceptions to the deference principles after the *Chevron* case. The dissenters in the *Kelo* case did not take this route, nor shall I.

<sup>52</sup> Categorizing a case, such as the *Kelo* case, in one way or another is an arguable matter. Thus, it might be viewed as “an environmental case” or, to the extent that federal-economic development funds are involved, “an economic development case”; both characterizations make it more difficult to label it a traditional state concern.

A fourth and final approach to offering modern deference in *Kelo* is to offer deference to state courts after review of their decisions to determine whether they carefully addressed the issue of whether the eminent domain in question complied with the statutory provisions and purposes authorizing eminent domain. If the lower courts carried out such a careful review, then their decision may be accepted. If they did not, the Court might remand to the state courts to insure that they carefully review the record to determine whether the eminent domain did serve the public purposes.

In fact, the lower state court *did* carefully review the proposed plan and eminent domain in light of at least some of the objectives of some of the statutes—specifically the eminent domain statute, the laws enabling the municipal development project, and their statutory objectives.<sup>54</sup> As indicated above, the court explored the purposes of the principal statute, the legislative history, the structure of the statute, past precedents dealing with similar statutes, and scholarly commentaries, as well as the requirements of conformity of the economic development statutes with other statutes. The implementation of plans under the municipal development statutes were found to have conformed to the municipal conservation and development plans of the municipality.<sup>55</sup> The plans and eminent domain actions were reviewed by appropriate offices to determine their linkage to statutory purposes. This lower court analysis permitted the Supreme Court to defer to its review.<sup>56</sup>

#### CONCLUSION

For environmentalists, the Supreme Court's failure to carefully review the use of eminent domain to serve the publicly adopted statutory purposes might seem to be a blessing. On the one hand, such deference, as in *Kelo*, may give a free hand to coastal municipalities and others to undertake urban coastal-development projects that enhance coastal access and clean up a degraded

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<sup>53</sup> It is worth noting that the Justices urging such deference in other cases were not the Justices suggesting deference in the *Kelo* case.

<sup>54</sup> *Kelo v. City of New London*, No. 557299, 2002 Conn. Super. LEXIS 789, at \*20 (Conn. Super. Ct. Mar. 13, 2002) (discussing Conn. Gen. Stat. Ann. § 8-186). This focus appeared to be justified in light of the central issue of the case raised by plaintiff that economic development was not a public use.

<sup>55</sup> The court, however, did not explore whether the plan did indeed advance the specific purposes of the planning-enabling act, nor the purposes of the environmental statutes in question. One other dimension of determining the applicability of these statutes and plans is their "fit" to the marine history of New London. This fit is discussed in much legal and non-legal literature. See, e.g., John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1 (1996-1997).

<sup>56</sup> An amicus brief authored by some land use law professors mistakenly argued for intermediate review, without understanding the proper rationale of the Court's deference in *Kelo*. See Brief Amicus Curiae of Professors David L. Callies et al. in Support of Petitioners, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108). I have set forth that rationale.

environment. Similarly, as a result of this case, environmentally beneficial non-coastal projects may be given a green light without significant Supreme Court review. But, of course, development projects, whether coastal or not, are not all environmentally beneficial and deference then would have different implications for environmental protection. Perhaps it would be better if the Supreme Court at least carefully reviewed the lower courts' decisions to determine that they had properly reconciled development and environmental statutes and had properly applied the conclusion.

A more important consequence of the Supreme Court's deference is the Court's failure to clearly indicate the need for purposive review in the lower courts. This purposive review should embrace the important environmental purposes involved in economic-development projects. If not corrected by the Supreme Court through remanding to the lower courts upon their failure for full review, the lower courts will not be required to perform an important task. That task is the careful interpretation of the relationship between environmental and development-oriented laws, or within multi-purpose environmental laws (such as the Coastal Zone Management Act). This failure is the failure to articulate the shared legal meaning of sustainability which lies at the heart of reconciling economic development and environmental laws.

Thus, the task of the Supreme Court, from this point of view, is to insure that the ends of law are deliberated through full interpretation of the statutory public purposes and their applicability. In *Kelo*, the Supreme Court deferentially permitted the lower state court to review carefully the public purposes of the laws enabling economic-development projects, although the Supreme Court failed to clearly set forth the basis of its deference. And, perhaps because the issue was not clearly raised in the lower courts, the Supreme Court failed to remand to require the lower courts to explore the relation between the project and the environmental legislative purposes, which were also applicable in the case. In failing this latter task, the Court failed to promote a public articulation of the public ends of sustainability as defined in its environmental impact and coastal management legislation. In this latter sense, in the case of New London, the courts may have failed to insure that New London's plans continue to retain its sea-tide identity.

"But wherever I strike the waterfront, on my walks . . .  
It boils with the salt tide and its headwaters.  
It is at full with early water, changing the banks  
And here, the city, all port, gives on the ocean generously."<sup>57</sup>

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<sup>57</sup> William Meredith, *Waterways*, THE OPEN SEA AND OTHER POEMS 17 (1957).

# The Triumph of Justice Stevens and the Principle Of Generality

John D. Echeverria\*

## INTRODUCTION

The recent spate of takings decisions by the U.S. Supreme Court—all coming down on the side of government—reflects the leadership and considerable influence of Justice John Paul Stevens. In the 2004 term, Justice Stevens authored two takings decisions, *Kelo v. City of New London*,<sup>1</sup> upholding the use of eminent domain to promote economic development, and *San Remo Hotel, L.P. v. City & County of San Francisco*,<sup>2</sup> refusing to permit property owners to mount duplicative takings claims against local governments in state and federal court. His influence is also reflected in the Court's third takings decision of the term, its unanimous ruling in *Lingle v. Chevron U.S.A.*,<sup>3</sup> repudiating the “substantially advance” takings test. In addition, in 2003, Justice Stevens authored the opinion for the Court in *Brown v. Legal Foundation of Washington*,<sup>4</sup> rejecting a takings challenge to a program supporting legal services for the poor, and in 2002, he authored the opinion for the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>5</sup> rejecting takings claims based on a development moratorium.

This successful run justifies a comprehensive appraisal of Justice Stevens' work on the takings issue, including an examination of the major themes of his takings opinions, an analysis of how he has influenced the direction of the Court's thinking on the takings issue, and an assessment of the state of takings doctrine as he reaches the height of a long and illustrious career.

Justice Stevens was appointed to the Supreme Court by President Gerald R. Ford and took his seat on the Court on December 19, 1975. In rough outline, Justice Stevens' career on the Court in relation to takings doctrine falls into three discrete phases. The first should be called the Era of Disinterest, because for the first ten years of his career (with one notable exception) Justice Stevens wrote and did little of significance in the area of takings. This lack of activity may have reflected a lack of curiosity about the issue, or perhaps the lesser influence that a junior Justice customarily exerts. The second phase should be called the Era of Exile, because it is characterized by a series

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<sup>1</sup> 125 S. Ct. 2655 (2005).

<sup>2</sup> 125 S. Ct. 2491 (2005).

<sup>3</sup> 125 S. Ct. 2074 (2005).

<sup>4</sup> 538 U.S. 216 (2003).

<sup>5</sup> 535 U.S. 302 (2002).

of dissents, usually expressing his views alone, reflecting increasing disillusion with the direction of the Court's takings doctrine, including in *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>6</sup> *Dolan v. City of Tigard*,<sup>7</sup> and *Lucas v. South Carolina Coastal Council*.<sup>8</sup> The final phase should be called the Era of Triumph, because it represents Justice Stevens leading a firm Court majority in the articulation of an increasingly coherent vision of takings law, one that cuts back in important respects on the decisions from which Justice Stevens dissented during the Era of Exile.

There are several plausible, possibly overlapping explanations for the arc of Justice Stevens' career on takings. In part his stances relative to the rest of the Court may reflect the shifting ideological makeup of the Court itself, first in the direction of a more pro-takings position,<sup>9</sup> and more recently toward the center.<sup>10</sup> One can also view the Court's recent takings decisions as an indication that the property-rights agenda has begun to founder on its contradictions with other aspects of conservative judicial ideology. In particular, the property rights agenda conflicts with conservatives' stated commitments to restrained constitutional interpretation based on fidelity to text and history,<sup>11</sup> as well as to judicial respect for state and local government autonomy within our federal system.<sup>12</sup> It also is no doubt true that the most recent takings cases presented more favorable sets of facts from the government standpoint than some prior cases. Finally, as Professor Richard Lazarus has argued, the Court's decisions suggest that divisions on the Court, perhaps triggered by Justice Scalia's confrontational style, undermined and ultimately destroyed a fragile majority that might have constructed a stable, relatively expansive takings jurisprudence.<sup>13</sup>

While there is some force to all of these explanations, this paper seeks to focus on the substance and internal logic of Justice Stevens' thinking over time, and attempts to discern whether and how his thinking has influenced the overall direction of the Court's takings decisions. As discussed below, an examination of Justice Stevens' career reveals a number of interesting and

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<sup>6</sup> 482 U.S. 304 (1987).

<sup>7</sup> 512 U.S. 374 (1994).

<sup>8</sup> 505 U.S. 1003 (1992).

<sup>9</sup> For example, with the appointment of Justice Antonin Scalia to the Court in 1986.

<sup>10</sup> For example, with the appointment of Justice Ruth Bader Ginsburg to the Court in 1993.

<sup>11</sup> See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (explaining why a strict originalist approach to constitutional interpretation does not support an expansive regulatory takings doctrine).

<sup>12</sup> See *Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (observing that "[t]he plurality opinion [in favor of a takings claim] would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts").

<sup>13</sup> See Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court* (draft article presented at 2005 Georgetown Conference on Litigating Regulatory Takings Claims).

important themes, including (1) support for the broad authority of the political institutions of government to reshape the content of property interests over time; (2) opposition to the temporary regulatory takings theory; and (3) emphasis on the need for an interpretation of the Takings Clause that does not intrude too deeply into the political process or interfere with the ability of government to respond flexibly to emerging social problems. Over time, Justice Stevens' consistent articulation of these themes has greatly influenced the Court's takings decisions.

But the most significant—and certainly the most consistent—thread of Justice Stevens' thinking on takings has been his focus on whether the challenged government action is general in character, affecting not only the claimant but others in the community as well, or whether instead the action singles out a particular owner for unique treatment. As will become apparent from the discussion that follows, Justice Stevens' focus on the issue of generality reflects two underlying considerations. The first, rooted in straightforward economic theory, is that general regulations should be less likely to raise takings concerns than particularized restrictions because they typically produce both burdens and countervailing benefits for individual property owners. The second is that when political institutions act in general terms, rather than in a targeted fashion, there is more reason for confidence that the decision reflects a thoughtful, carefully considered assessment of all relevant costs and benefits, rather than the opportunistic highjacking of the political process to benefit some special interest.

Justice Stevens did not originate the idea that the generality of government action should matter in takings law. It was Justice Oliver Wendell Holmes, in the seminal case of *Pennsylvania Coal Co. v. Mahon*,<sup>14</sup> who coined the phrase “reciprocity of advantage”<sup>15</sup> to explain how government regulation, applied broadly across the community, will produce not only burdens but corresponding benefits for individual owners. And Justice Lewis Powell, in a decision issued a few years after Stevens joined the Court, offered one of the most articulate expressions of this idea, in the context of zoning:

The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision of open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these

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<sup>14</sup> 260 U.S. 393 (1922).

<sup>15</sup> *Id.* at 415.

benefits must be considered along with any diminution in market value that the appellants might suffer.<sup>16</sup>

Nonetheless, Justice Stevens, more than any other member of the Court, made the concept of generality his own. He forcefully and consistently emphasized the importance of this factor in takings analysis, ultimately succeeding in making it a centerpiece of the Court's takings doctrine.

### I. THE ERA OF DISINTEREST

Over his first ten years on the Court, Justice Stevens contributed little to the development of takings doctrine. He was generally a silent joiner in majority opinions, sometimes siding with the takings claimant,<sup>17</sup> sometimes siding with the government.<sup>18</sup> He had been on the bench six years before he offered his first utterance in a takings case. In *Dames & Moore v. Regan*,<sup>19</sup> involving various challenges to the resolution of the Iranian hostage crisis, Justice Stevens wrote a very short concurring opinion addressing a takings issue in the case. He chided the majority for addressing whether the Court of Claims would have jurisdiction over potential takings claims based on suspension of private legal claims against Iran, stating, without elaboration or explanation, that such claims would be so insubstantial that it was not even worthwhile for the Court to address the jurisdictional issue.

More substantively, the following year, in *Texaco, Inc. v. Short*,<sup>20</sup> Justice Stevens, writing for a unanimous Court on the takings issue,<sup>21</sup> authored an opinion rejecting a takings claim based on an Indiana statute providing that mineral leases that remained unused for twenty years automatically lapsed unless the owner filed a statement of claim with the State.<sup>22</sup> Justice Stevens viewed the case as governed by the states' longstanding authority to define the scope and limits of private property interests: "In ruling that private property may be deemed to be abandoned and to lapse upon the

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<sup>16</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980).

<sup>17</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

<sup>18</sup> See, e.g., *Agins*, 447 U.S. 255; *Andrus v. Allard*, 444 U.S. 51 (1979).

<sup>19</sup> 453 U.S. 654, 690 (1981).

<sup>20</sup> 454 U.S. 516 (1982).

<sup>21</sup> Four Justices dissented on a procedural due process issue. See *id.* at 540-54.

<sup>22</sup> At least superficially pointing in an opposite direction, in *United States v. Locke*, 471 U.S. 84 (1985), decided three years later, Justice Stevens dissented from the Court's decision rejecting a takings claim based on a federal statute providing for extinguishment of mining claims based on failure to make a timely annual filing. Justice Stevens argued that the owners had achieved substantial compliance with the statute and that it was therefore unnecessary to address the constitutional issue. *Id.* at 128-29 (Stevens, J., dissenting).

failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect.”<sup>23</sup>

Justice Stevens did cast one significant—and arguably surprising—takings vote during this period, in the first takings case he heard as a member of the Supreme Court, *Penn Central Transportation Co. v. City of New York*.<sup>24</sup> By a vote of six to three, the Court rejected a takings claim based on New York City’s designation of Grand Central Terminal as a historic landmark. The designation barred the company from making any substantial change to the exterior of the structure, including building a potentially remunerative office tower above the terminal. Justice Stevens joined Justice William Rehnquist’s dissenting opinion, representing one of the very few instances (but not the only one) in which Stevens and Rehnquist ended up on the same side of a hotly contested takings case.

Justice Stevens’ vote in *Penn Central* has long been viewed as an anomaly given his relatively consistent support for the government side in takings disputes. Moreover, as I discuss below, some of Justice Stevens’ most recent writing on takings appears more consistent with the majority opinion in *Penn Central* than with the Rehnquist dissent. From a broader perspective, however, there is logical harmony between Justice Stevens’ vote in *Penn Central* and his career-long preoccupation in takings cases with the relative generality of the government action. For one focused on this issue, *Penn Central* was a very difficult and troubling case.

The critical feature of the New York City landmark law was that it applied historic designations only to individual buildings. Grand Central Terminal was one of some 400 similarly designated buildings across the city. All told, however, landmark designation applied to only a tiny fraction, less than one-tenth of one percent, of all the buildings in the city. The major issue that divided the Court in *Penn Central* was whether the extreme selectivity of the landmark law meant that it went “too far” for takings purposes.

In upholding the law, the Court rejected the company’s attempt to draw a sharp distinction between landmark designations, which apply only to “selected parcels,”<sup>25</sup> and zoning or historic district laws, which “regulate all properties within given physical communities.”<sup>26</sup> The Court said that landmark designation did not amount to “discriminatory, or ‘reverse spot,’ zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.”<sup>27</sup> Rather, the Court said, the designation was based on “a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”<sup>28</sup>

<sup>23</sup> 454 U.S. at 530.

<sup>24</sup> 438 U.S. 104 (1978).

<sup>25</sup> *Id.* at 132.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

In addition, the Court rejected the argument that landmark designation, because it does not apply to all properties within a particular area, is “inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action”<sup>29</sup> allegedly demanded by the Constitution. In the first place, the Court observed that it had frequently rejected takings claims based on regulation which “burdens some more than others,”<sup>30</sup> and that zoning laws themselves, though they apply across an entire community, often impose different burdens on different landowners. More fundamentally, the Court observed that it was simply incorrect that the company was “solely burdened and unbenefited”<sup>31</sup> by the landmark law:

Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole . . . , we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.<sup>32</sup>

Justice Rehnquist’s dissent, joined by Justice Stevens, was devoted almost entirely to a refutation of the argument that the regulation was sufficiently general in character to defeat the takings claim.<sup>33</sup> While the dissenters recognized that zoning succeeds in creating “an average reciprocity of advantage,”<sup>34</sup> to use Justice Holmes’s felicitous phrase, they posited that “no such reciprocity exists” in the case “[w]here a relatively few buildings, all separated from one another, are singled out and treated differently from surrounding buildings.”<sup>35</sup> They viewed the landmark law as imposing “a substantial cost”<sup>36</sup> on a small minority of property owners “for the general benefit of all its people.”<sup>37</sup> The dissent concluded, “It is exactly this imposition of general costs on a few individuals at which the ‘taking’ protection is directed.”<sup>38</sup>

It is fair to say that the majority and the dissenters in *Penn Central* both scored some points. In any event, as traced below, the concern about whether government actions single out

<sup>29</sup> *Id.* at 133.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 134.

<sup>32</sup> *Id.* at 134-35.

<sup>33</sup> The first sentence of the dissent reads: “Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.” *Id.* at 138 (Rehnquist, J., dissenting).

<sup>34</sup> *Id.* at 140 (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 139.

<sup>37</sup> *Id.* at 147.

<sup>38</sup> *Id.*

specific owners for special burdens has remained a consistent theme of Justice Stevens' takings work throughout his career.

One other noteworthy Stevens opinion of this period is his concurring opinion in *Moore v. City of East Cleveland*,<sup>39</sup> in which the Court struck down as a violation of due process a housing ordinance restricting occupancy of residential dwellings to narrowly defined family units. Justice Stevens agreed that the ordinance violated due process, but in a famous aside stated that Justice Sutherland's opinion for the Court in *Euclid v. Ambler Realty*<sup>40</sup> had "fused the two express constitutional restrictions on any state interference with private property that property shall not be taken without due process nor for a public purpose without just compensation into a single standard."<sup>41</sup> This reasoning is arguably reflected in the Court's later embrace of the so-called "substantially advance" takings test.<sup>42</sup> Justice Stevens, along with the rest of the Court, ultimately had to "eat crow"<sup>43</sup> on the notion that takings doctrine incorporates substantive due process analysis in *Lingle v. Chevron*,<sup>44</sup> discussed below.

## II. THE ERA IN EXILE

Ten years after his appointment to the Court, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,<sup>45</sup> Justice Stevens offered his first comment on a major, substantive takings issue. *Williamson County* was one in the series of Court cases in the 1980s circling around the question of whether the Takings Clause requires government to pay financial compensation for the period that a regulation found to be a taking was in effect, even if the government rescinds the regulation as soon as the judicial finding of a taking is handed down. In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>46</sup> the Court held that a takings claimant can recover compensation for a "temporary taking" in such circumstances.<sup>47</sup> In the prior *Williamson County* case the Court declined to reach the merits of the remedy issue because the takings claim was not ripe. But Justice Stevens filed a concurring opinion in the case expressing his view that the temporary takings theory, later embraced in *First English*, should be rejected. While

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<sup>39</sup> 431 U.S. 494 (1977).

<sup>40</sup> 272 U.S. 365 (1926).

<sup>41</sup> 431 U.S. at 514.

<sup>42</sup> See *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

<sup>43</sup> To quote Justice Scalia's famous quip during the oral argument in *Lingle*.

<sup>44</sup> 125 S. Ct. 2074 (2005).

<sup>45</sup> 473 U.S. 172 (1985).

<sup>46</sup> 482 U.S. 304 (1987).

<sup>47</sup> *Id.* at 318.

he recognized that an owner might have a claim on some theory for injuries suffered as a result of “unfair” government procedures, he thought there should be no liability under the Takings Clause for “temporary harms” which “are an unfortunate but necessary by-product” of legitimate government decision-making processes.<sup>48</sup>

In 1987, in accord with the views he expressed in *Williamson County*, Justice Stevens, in his most harshly worded takings opinion, dissented from the decision in *First English*. He expressed the concern that, as a practical matter, the decision would “undoubtedly have a significant adverse impact on the land-use regulatory process,”<sup>49</sup> and that as a result “[m]uch important regulation will never be enacted.”<sup>50</sup> In doctrinal terms, he objected to the majority’s reliance on takings cases involving temporary government seizures or occupations of private property to justify the conclusion that temporary implementation of regulations later found to be takings supported claims for financial compensation. Using language that he would have the opportunity to reprise fifteen years later, as discussed below, he objected that “regulatory takings and physical takings are very different . . . . While virtually all physical invasions are deemed takings, a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property’s value.”<sup>51</sup> Just a few weeks later, in *Nollan v. California Coastal Commission*,<sup>52</sup> striking down a development exaction as a taking, Justice Stevens, still smarting from the *First English* case, castigated Justice William Brennan for what he perceived as the “severe tension” between Brennan’s support for the majority position in *First English* and his position in *Nollan* that the Court was improperly constraining the discretion of government regulators.<sup>53</sup>

The other major Stevens takings opinion of 1987 was his opinion for the Court in *Keystone Bituminous Coal Ass’n. v. DeBenedictis*, 480 U.S. 470 (1987).<sup>54</sup> In that case, by a five to four vote, the

<sup>48</sup> 473 U.S. at 204 (Stevens, J., concurring). In *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), another in the series of cases leading up to *First English*, Justice Stevens wrote the opinion for the Court, deferring the remedy issue once more, on the ground that the county had not reached a “final, definitive” position on the plaintiff’s development application.

<sup>49</sup> 482 U.S. at 322 (Stevens, J., dissenting).

<sup>50</sup> *Id.* at 340.

<sup>51</sup> *Id.* at 329 (citations omitted).

<sup>52</sup> 483 U.S. 825 (1987).

<sup>53</sup> *Id.* at 867 (Stevens, J., dissenting).

<sup>54</sup> 480 U.S. 470 (1987). During the same year, Justice Stevens authored the opinion for the Court in *Bowen v. Gilliard*, 483 U.S. 587 (1987), rejecting (unanimously) on the takings issue the claim that the imposition of certain attribution requirements on welfare beneficiaries effected a taking. In *Hodel v. Irving*, 481 U.S. 704 (1987), Justice Stevens concurred in the Court’s judgment striking down a federal statute restricting the fractionation of Indian lands through inheritance, but on due process grounds rather than based on the takings theory embraced by the majority. A decade later, in *Babbitt v. Youpee*, 519 U.S. 234 (1997), an eight to one ruling again striking down federal legislation addressing fractionation of Indian lands, Justice Stevens dissented on the takings issue, arguing that “the Federal Government, like a State, has a valid

Court rejected a takings claim based on a state statute restricting coal mining quite similar to the state statute held to be a taking sixty-five years earlier in *Mahon*. The Court's decision is difficult to decipher, no doubt in part because Justice Stevens had to struggle to maintain his majority in support of sustaining the statute. The Court's opinion purports to apply the two-part takings test of *Agins v. City of Tiburon*,<sup>55</sup> but also appears to apply the more open-ended *Penn Central* analysis. The Court invokes the principle of *Mugler v. Kansas*,<sup>56</sup> that no regulation designed to protect the general public from harm can constitute a taking, yet ultimately does not rest on that principle.

For present purposes, the most significant aspect of Justice Stevens' opinion in *Keystone* is his emphasis on the issue of generality. First, the opinion highlights the fashion in which regulatory measures can positively benefit individual property owners:

Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions we, in turn, benefit greatly from the restrictions that are placed on others.<sup>57</sup>

In general, regulatory restrictions, Justice Stevens observed, "are 'properly treated as part of the burden of common citizenship.'"<sup>58</sup>

Applying this thinking to the facts in *Keystone*, Justice Stevens indicated that the critical factor distinguishing *Mahon* was that in *Keystone* the restrictions applied across the board, including to the coal companies themselves, whereas in *Mahon* the restrictions narrowly protected those who had bargained away their surface rights. In *Mahon*, the state had imposed a burden on the coal companies "only to ensure against damage to some private landowners' homes";<sup>59</sup> by contrast, in *Keystone*, the state, by regulating in a more comprehensive fashion, demonstrated a commitment "to protect the public interest in health, the environment, and the fiscal integrity of the area."<sup>60</sup> Thus, in Justice Stevens' view, *Keystone* was less like *Mahon*, and more like *Plymouth Coal Co. v. Pennsylvania*,<sup>61</sup>

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interest in removing legal impediments to the productive development of real estate." *Id.* at 246 (citing, among other decisions, his opinion for the Court in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)).

<sup>55</sup> See 447 U.S. 255, 260 (1980) (stating that a regulation effects a taking if it "does not substantially advance legitimate state interests, or denies an owner economically viable use" of the property).

<sup>56</sup> 123 U.S. 623 (1887).

<sup>57</sup> 480 U.S. 470, 491 (1987).

<sup>58</sup> *Id.*, quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

<sup>59</sup> *Id.* at 487. (discussing *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

<sup>60</sup> *Id.* at 488.

<sup>61</sup> 232 U.S. 531 (1914).

also involving mining restrictions, which the *Mahon* Court had distinguished on the ground that it involved a regulation that “secured an average reciprocity of advantage that has been recognized as a justification for various laws.”<sup>62</sup>

*Keystone* represented a fragile, unstable precedent. Apart from the close division on the Court, the decision does not reflect the application of settled doctrine. *Keystone* technically represents a “win” for Justice Stevens. But the analysis in the case is so fractured, and the outcome was so overshadowed by the results in *First English* and *Nollan* in the same year, that it is best understood as a product of his period in exile. However, at least in his emphasis on the generality of the regulation—the type of generality that Stevens evidently had found lacking in *Penn Central*—he outlined the foundation for a more stable regulatory takings jurisprudence to come.

The next takings case in which Justice Stevens offered his personal views was *Lucas v. South Carolina Coastal Council*,<sup>63</sup> in which the Court held that the South Carolina Beachfront Management Act effected a taking of David Lucas’ oceanfront building lots. The case purported to establish a new “categorical” rule that a regulation that denies the owner all economically viable use of private property automatically constitutes a taking. But the decision qualifies this rule in various respects, in particular by stating that even a regulation that denies all economically viable use does not constitute a taking if it parallels “background principles” of state property or nuisance law.<sup>64</sup>

Justice Stevens, in dissent, objected to the new categorical rule, primarily on the ground that it did not reflect that the “singling out” of individual owners to bear special burdens is the “central” concern of takings law. He observed that a regulation might “single out a property owner without depriving him of all of his property,” and it might “deprive him of all of his property without singling him out.”<sup>65</sup> What ultimately matters, Justice Stevens said, “is not the degree of diminution in value, but rather the specificity of the expropriating act.”<sup>66</sup>

Continuing in the same vein, Justice Stevens criticized the Court for neglecting what he called “the first and, in some ways, the most important factor in takings analysis: the character of the regulatory action.”<sup>67</sup> For example, he justified the special scrutiny applied by the Court in exactions cases as partly rooted in the Court’s concern about singling out. Similarly, as he had explained in *Keystone*, the Kohler Act (held to be a taking in *Mahon*) was distinguishable from the Subsidence Act (at issue in *Keystone*) because the latter was “substantially broader”<sup>68</sup> than the former, in the sense that the Subsidence Act affected not only those who sold the surface estate to the coal companies but

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<sup>62</sup> 480 U.S. at 488, quoting *Mahon*, 260 U.S. at 415.

<sup>63</sup> 505 U.S. 1003 (1992).

<sup>64</sup> *Id.* at 1029.

<sup>65</sup> *Id.* at 1067 (Stevens, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1071.

<sup>68</sup> *Id.* at 1072.

all affected surface owners, including the coal companies. Finally, Justice Stevens cited zoning—to be distinguished from “spot zoning”<sup>69</sup>—as the type of general regulation previously upheld against takings claims.

As a matter of theory, Justice Stevens justified focusing on the generality of the government action based on the Court’s “broader understandings of the Constitution as designed in part to control the ‘mischiefs of faction.’”<sup>70</sup> He cited a series of First Amendment decisions in which the Court had upheld neutral laws of general applicability even though they impinged on certain individuals’ or groups’ religious beliefs. Justice Stevens concluded, “[i]f such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.”<sup>71</sup>

Under this analysis, Justice Stevens concluded that the South Carolina law did not effect a taking. The statute did not apply only to Mr. Lucas or to a few landowners, but rather applied to “the coastline of the entire State.”<sup>72</sup> Indeed, the statute represented South Carolina’s contribution to a national effort to control coastal development under the auspices of the federal Coastal Zone Management Act. Moreover, the South Carolina law applied not only to owners of undeveloped property, but also prevented owners of developed property from rebuilding structures that were destroyed by storms, or from repairing erosion-control structures. This generality, in its various aspects, Justice Stevens concluded, “indicate[d] that the act is not an effort to expropriate owners of undeveloped land.”<sup>73</sup> The generality of the law, combined with “the risk inherent” in investments in coastal property, as well as the “compelling purpose” of the law, persuaded Justice Stevens that the law did not effect a taking, even assuming Lucas’ property had been rendered valueless.<sup>74</sup>

Justice Scalia, speaking for the majority, dismissed Justice Stevens’ focus on the generality of regulation on the ground that it “renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.”<sup>75</sup> Paradoxically, however, at another point in the opinion, Justice Scalia appeared to embrace the legitimacy of Stevens’ approach in a backhanded

<sup>69</sup> *Id.* at 1073.

<sup>70</sup> *Id.* at 1072 n.7 (quoting THE FEDERALIST NO. 10, at 43 (James Madison) (G. Wills ed. 1982)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1074.

<sup>73</sup> *Id.* at 1075.

<sup>74</sup> *Id.* at 1075-76.

<sup>75</sup> *Id.* at 1028 n.14. Justice Scalia also argued, with considerable force, that Justice Stevens’ reliance on First Amendment cases to support his proposed principle was misplaced. “The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion,” he observed, “is a law that destroys the value of land without being aimed at land.” *Id.* He acknowledged that this characterization fit the ban on manufacturing of alcoholic beverages upheld in *Mugler v. Kansas*, 123 U.S. 623 (1887). “But,” he said, “a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.” *Id.*

way. To justify the Court's new *per se* rule he observed that, "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned."<sup>76</sup> Implicit in this statement is a recognition that, when an owner retains some economically viable use, regulation will typically both burden and benefit the owner, by restricting permissible uses but also making more valuable the uses that remain. In this fashion, ironically enough, outside the realm of the new *per se* takings category, the *Lucas* majority opinion actually supports the idea that the generality of a regulation should be a bulwark against takings claims.

A few years later, in *Dolan v. City of Tigard*,<sup>77</sup> Justice Stevens, in a dissenting opinion, expanded further on the theme of generality. *Dolan* involved a takings claim based on a requirement that a hardware store owner, as a condition of permission to expand her store, dedicate a portion of the property for a public bike path and a stream-side greenway. Building on its earlier ruling in *Nollan*, the Court ruled that the city could impose such "exactions" only if it could demonstrate a "rough proportionality" between the burdens imposed by the conditions and the projected impacts of development.<sup>78</sup>

Justice Stevens dissented on various grounds, arguing that the Court's proportionality test lacked support in prior precedent, was inconsistent with the parcel-as-a-whole rule, and threatened to revive the kind of intrusive judicial scrutiny of government decision-making that characterized the *Lochner* era. But, focusing on the issue of generality, he also criticized the majority for ignoring the substantial benefits that Ms. Dolan was likely to derive from the development conditions imposed on her property. Apart from the benefit of receiving permission to proceed with the expansion, the proposed greenway would have increased the carrying capacity of the stream during serious floods, conferring considerable benefits on all stream-side property owners, including Ms. Dolan herself.

Apart from his dissenting vote in *Penn Central*, the next (arguably) most surprising vote by Justice Stevens in a takings case is his decision to supply the fifth vote to support Justice Kennedy's opinion for the Court in *City of Monterey v. Del Monte Dunes*.<sup>79</sup> The case is especially noteworthy because it apparently is the first and only Supreme Court decision to directly uphold a just compensation award in a regulatory takings case. The principal legal issue in the case, prosecuted in federal court under 42 U.S.C. § 1983, was whether the plaintiff had properly been granted the opportunity to have a jury resolve several of the disputed issues. Reaching a narrow result based on the specific facts, the Court upheld the use of a jury to resolve certain issues. However, the Court

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<sup>76</sup> *Id.* at 1017-18 (quoting *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) & *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>77</sup> 512 U.S. 374 (1994).

<sup>78</sup> *Id.* at 391.

<sup>79</sup> 526 U.S. 687 (1999).

rejected the Ninth Circuit's use of the *Dolan* "rough proportionality" test to evaluate whether a use restriction effects a taking, ruling that *Dolan*, and implicitly *Nollan*, prescribe tests exclusively applicable to exactions. In addition, the Court deferred resolution of several other issues, including whether regulatory takings cases can generally be tried before juries, and whether an allegation that the city's actions failed to substantially advance a legitimate state interest stated a taking claim, the issue the Court ultimately resolved in *Lingle*.

It is reasonable to suppose that Justice Stevens voted to affirm the takings award in *Del Monte Dunes* at least in part because city officials had focused specifically on plaintiff's land and had not acted pursuant to any general ordinance or plan for the community. The Court emphasized that the theory of the case was that "the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city."<sup>80</sup> In this sense, Justice Stevens' vote to affirm in *Del Monte Dunes* is consistent with his vote to reverse in *Penn Central*. While the cases are otherwise quite different, both involved application of special restrictions to individual properties, rather than the enforcement of broad rules.

In *Palazzolo v. Rhode Island*,<sup>81</sup> Justice Stevens wrote another solitary dissent. The primary issue in the case was the validity of the so-called "notice rule" adopted by some lower federal and state courts. According to this rule, a purchaser with notice of a regulation at the time of purchase should be barred from pursuing a takings claim based on the regulation. The theory underlying the rule was that a takings claimant could not plausibly contend that his reasonable investment-backed expectations had been thwarted by a law in place at the time of purchase. The Court resolved the case by rejecting the notice rule, while at the same time strongly suggesting that a purchaser's notice of regulatory constraints remained an important (but not necessarily dispositive) factor in takings analysis.

In Justice Stevens' view, the Court sought to resolve an issue not actually presented by the case. His reading of the Court's opinion was that the takings claim was ripe, even though the plaintiff had not exhausted all possible administrative avenues for relief, because the theory of the case was that the state's coastal regulations, on their face, effected a taking. If that was the case, Justice Stevens argued, then the proper party to have brought the suit was the owner of the property at the time the regulation was originally adopted, not Mr. Palazzolo, who acquired the property after the regulation was already in place. Accordingly, in Justice Stevens' view, Palazzolo lacked standing to prosecute the takings claim and the case should have been rejected on that basis.<sup>82</sup>

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<sup>80</sup> *Id.* at 722.

<sup>81</sup> 533 U.S. 606 (2001).

<sup>82</sup> Justice Stevens made clear in a footnote that in a case properly raising the issue, he would agree with the position of a majority of the Court, most clearly articulated by Justice O'Connor in a concurring opinion, *see id.* at 632-36 (O'Connor, J., dissenting), that a purchaser's advance notice of a regulatory constraint should be a relevant factor in the takings analysis. *See id.* at 643 n.6. (Stevens, J., dissenting).

Parenthetically, Justice Stevens briefly addressed the topic of generality in commenting on how he would have resolved the case on the merits. He said that, in his view, even in the case of a “newly adopted regulation,” the regulation should not be deemed to effect a taking “if it (1) is generally applicable and (2) is directed at preventing a substantial public harm.”<sup>83</sup> He thought it was “quite likely” that a regulation prohibiting the filling of wetlands would meet these criteria. In support of these criteria, Justice Stevens cited the majority opinion in *Lucas*, in which the Court suggested that the government would not be liable for ordering the closure of a nuclear power plant astride an earthquake fault, and Justice Kennedy’s concurring opinion in *Lucas*, expressing the view that the common law of nuisance “is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”<sup>84</sup>

### III. THE ERA OF TRIUMPH

With the Court’s decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,<sup>85</sup> Justice Stevens switched from the (mainly) losing side in takings cases to the winning side. In *Tahoe* and in four subsequent Court decisions over the next three years, the government prevailed in each case. Justice Stevens was in the majority every time. He was the author of four of these decisions, *Tahoe-Sierra*, *Brown*, *Kelo* and *San Remo*, and his influence is apparent in *Lingle* as well.

In *Tahoe-Sierra*, the Court, by a vote of six to three, affirmed a Ninth Circuit decision rejecting a takings claim based on a thirty-two-month moratorium on development in sensitive areas surrounding Lake Tahoe. In many respects, *Tahoe-Sierra* was a highly favorable case for the government. Certainly in comparison with the regulation in *Lucas*, and even the less onerous regulation in *Palazzolo*, the moratorium in *Tahoe-Sierra* imposed a relatively light burden on property owners. In addition, for reasons that have remained obscure, plaintiffs sued on the theory that the moratorium constituted a *per se* taking under *Lucas*, and did not pursue a potentially more plausible claim under *Penn Central*. Lastly, *Tahoe-Sierra* involved a joint federal-state effort to protect one of the world’s great natural wonders, the bright blue waters of Lake Tahoe. For whatever combination of reasons, apart from the property rights stalwarts, Chief Justice Rehnquist and Justices Scalia and Thomas, the Court had little difficulty concluding that the takings claims had no merit.

One of the primary reasons Justice Stevens cited for rejecting the claims was that, “with a temporary ban on development there is a lesser risk that individual landowners will be ‘singled

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<sup>83</sup> *Id.* at 641 n.3.

<sup>84</sup> *Id.*

<sup>85</sup> 535 U.S. 302 (2002).

out' to bear a special burden that should be shared by the public as a whole."<sup>86</sup> "At least with a temporary moratorium," Justice Stevens wrote, "there is a clear 'reciprocity of advantage,' because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted."<sup>87</sup> Thus, Justice Stevens believed, whatever economic burden a moratorium imposed, it also provided all affected landowners with a corresponding benefit. Indeed, he suggested that in this case, based on experiences in other similar situations, "there is reason to believe property values often will continue to increase despite a moratorium."<sup>88</sup> "Such an increase makes sense in this context," he wrote, "because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state."<sup>89</sup> Of course, Justice Stevens' reasoning supports not only the economic fairness of a moratorium, but the fairness of development restrictions more generally, at least when affected owners retain some options for use of their property so that they can share in the economic benefits of community protections.

Justice Stevens' opinion in *Tahoe-Sierra* is also noteworthy because it allowed him to reclaim some ground lost in *First English*. The decision in *Tahoe-Sierra* expressly reaffirms the validity of the remedial holding in *First English*. But *Tahoe-Sierra* certainly limits the scope of that decision, and arguably undermines its reasoning. The plaintiffs in *Tahoe-Sierra* argued that *First English* supported their argument that a short-term moratorium justified a claim for compensation based on a "temporary taking" theory.<sup>90</sup> In *First English* the Court reasoned that a successful takings claimant was entitled to compensation for the interim period that a regulation held to be a taking was in effect by equating temporary enforcement of use restrictions with the kinds of temporary government occupations of private property held to be takings in prior cases. This reasoning at least suggested that any temporary restriction, not merely a restriction cut short by a judicial finding of a taking, might be deemed a compensable taking. Justice Stevens, writing for the Court in *Tahoe-Sierra*, rejected this potential line of reasoning by emphasizing, as he had in his dissent in *First English*, the fundamental distinction between occupations of private property and restrictions on the use of private property.

*Tahoe-Sierra* also placed a highly restrictive gloss on the *Lucas per se* rule. As discussed, Justice Stevens dissented in *Lucas*, harshly criticizing the new rule on the ground that it had no logical relationship to the key question in takings cases, that is, the relative generality of the government action. In *Tahoe-Sierra*, Justice Stevens reduced *Lucas* to virtual meaninglessness by declaring that it applies only when a regulation renders a fee interest in real property literally

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<sup>86</sup> *Id.* at 341 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 (1987)).

<sup>87</sup> *Id.* (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 316.

“valueless.”<sup>91</sup> Notwithstanding the (questionable) concession in *Lucas* that the South Carolina beach law rendered Lucas’ land valueless, few if any regulations actually have that effect in the real world. As a result, *Lucas* appears to have been transformed into a legal curiosity, largely eliminating the conflict between the *per se* rule of *Lucas* and the Stevens generality principle.

The Court’s 2003 decision in *Brown*, authored by Justice Stevens, is also consistent, in a tangential way, with a focus on the generality of the government action. The Court, by a vote of five to four, rejected a takings challenge to Washington State’s Interest on Lawyers’ Trust Account (IOLTA) program. The Washington program, like similar programs in other states, generates substantial funding for legal services for the poor from the interest earned on client funds held by private attorneys. In a prior case, *Phillips v. Washington Legal Foundation*,<sup>92</sup> the Court had ruled that the interest earned by IOLTA accounts represents the “property” of the clients. In *Brown*, however, the Court ruled that the program did not effect an unconstitutional taking without just compensation under the Takings Clause. Assuming for the sake of argument that use of the interest by the government effected a “taking,” the Court reasoned, plaintiffs were not entitled to compensation because, given the applicable legal regime, they would not have been able to earn any interest on the funds in the absence of the program. Under general banking regulations, on-demand checking accounts are ineligible to receive interest, unless the accounts are held by non-profit groups. The income generated by the IOLTA programs is based on the requirement that client funds be deposited in a designated IOLTA account managed by a nonprofit administrator, transforming funds that otherwise would be incapable of generating interest into funds that do generate interest. By contrast, the dissenters argued that, regardless of whether the plaintiffs could have reaped any interest absent the IOLTA program, the interest was their property and the government’s allocation of the funds to legal services constituted a taking which plaintiffs were entitled to challenge under the Takings Clause.

The differing analytic approaches in the Court’s opinion, authored by Justice Stevens, and in the dissenting opinion of Justice Scalia, are analogous to the debate over the degree to which the generality of the government action should be a factor in a takings case. Under Justice Stevens’ approach, the “fairness and justice” of the program was properly evaluated by considering the overall effect of government actions on the plaintiffs’ financial status. This is consistent with Justice Stevens’ approach of evaluating regulatory takings claims by considering both the burdens and the benefits associated with government action. On the other hand, Justice Scalia’s approach of focusing narrowly on the interest earned by IOLTA accounts is more consistent with a viewpoint that would place less emphasis on reciprocity of advantage in regulatory takings analysis.

*Brown* is also important in the evolution of the Court’s takings jurisprudence in another respect. Largely as an aside, the Court observed that one “condition” for the exercise of the taking power

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<sup>91</sup> *Id.* at 329.

<sup>92</sup> 524 U.S. 156 (1998).

is that the taking be for a “public use,” and this condition was satisfied because there was no doubt about the “legitimacy” of the use of IOLTA funds.<sup>93</sup> This premise implicitly repudiates the theory that the illegitimacy of government action, that is, the failure of a government action to “substantially advance” a legitimate purpose, can provide an affirmative basis for a takings claim. Thus, *Brown* presaged the repudiation of the substantially advance takings test just a few years later in *Lingle v. Chevron U.S.A.*<sup>94</sup>

In *Lingle*, the Court, in an opinion by Justice O’Connor, resolved the long-simmering debate over the “substantially advance” test by ruling that this formula “prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.”<sup>95</sup> The Court presented various reasons for repudiating the test, including that it had been derived from due process precedents, was inconsistent with the central concern in takings cases about the burdensomeness of government action, and was inconsistent with the premise of every takings claim that the government action must serve a legitimate “public use.” But the decision also reflects Justice Stevens’ preoccupation with the issue of the generality of a regulation. The Court observed that the “substantially advance” test did not fit in takings doctrine because it did not “provide any information about how any regulatory burden is *distributed* among property owners.”<sup>96</sup> A test that “tells us nothing” about how a regulation’s burden “is allocated” among the property owners in a community, the Court said, “cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.”<sup>97</sup> An owner subject to an effective regulation “may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation.”<sup>98</sup> On the other hand, the Court said, an ineffective regulation “may distribute any burden broadly and evenly among property owners,” demonstrating that the “substantially advance” test was “untenable” as a freestanding takings test.<sup>99</sup> Thus *Lingle* reinforces the principle that an important consideration in any takings case is whether and to what degree a regulation imposes a restriction broadly across the community.

*Lingle* also reinforces the teaching of *DelMonte Dunes* that the *Dolan* and *Nollan* tests are limited to the context of exactions. The Court acknowledged that both decisions invoked the “substantially

<sup>93</sup> 538 U.S. 216, 231-32 (2003).

<sup>94</sup> 125 S. Ct. 2074 (2005). The discussion in *Brown* about “public use” also presaged the Court’s ruling in *Kelo*, 125 S. Ct. 2655 (2005), that economic development can constitute a legitimate public use. Justice Sandra Day O’Connor’s decision to join in the Court’s opinion in *Brown* is difficult to square with her later vitriolic dissent in *Kelo*, as is her opinion in *Lingle*, which emphasized the importance of judicial deference to the political branches on economic policy matters. See *id.* at 2667 (responding to Justice O’Connor’s dissent in *Kelo* by observing that her criticism of the majority position in that case is inconsistent with the opinion for the Court she authored in *Lingle*).

<sup>95</sup> *Id.* at 2083.

<sup>96</sup> *Id.* at 2084.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

advance” formulation, but observed that neither decision actually applied that test. In addition, the Court emphasized that each case involved a type of “unconstitutional condition,” because the conditions at issue, if imposed unilaterally, would unquestionably have constituted *per se* physical takings.

Justice Stevens’ latest significant contribution to the Court’s takings jurisprudence is *Kelo v. City of New London*,<sup>100</sup> upholding the city’s use of eminent domain to promote a downtown redevelopment project in an older New England city. *Kelo* does not deal with the question of whether a government action rises to the level of taking; instead, it deals with the distinct question of whether an acknowledged taking serves a “public use.” Thus, *Kelo* raises different issues from those raised by a regulatory takings case. Nonetheless, the generality versus particularity of the government action comes into play in this context as well.

*Kelo* reaffirms the longstanding proposition that “the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*.”<sup>101</sup> At the same time, the Court held that the use of eminent domain to promote a legitimate public purpose, such as urban redevelopment, is not improper simply because new private owners will end up owning the property. For the purpose of distinguishing between proper and improper uses of eminent domain, Justice Stevens said that one important criterion should be whether the power is being executed within “the confines of an integrated development plan.”<sup>102</sup> “As with other exercises in urban planning and development,” he observed, the City of New London was “endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts.”<sup>103</sup> Given the “comprehensive character” of the city’s plan, Justice Stevens said, as well as the thorough, deliberative process through which it was adopted and implemented, it was appropriate to resolve the legitimacy of the government’s action not by reference to individual properties, but rather “in light of the entire plan.”<sup>104</sup> Viewed from this perspective, there was no question that the taking in *Kelo* served a public use.

The requirement of a planning process articulated in *Kelo* serves as a safeguard against “faction” in the same fashion that the generality of a regulatory program protects against faction in the regulatory takings context. The fact that a city’s exercise of the eminent domain power is in accord with a community plan provides significant assurance that a particular owner is not being unfairly singled out to bear the burden, albeit compensated, of having to sell property against his will. In both types of cases, it is the generality of the government action that helps save it from challenge under the Takings Clause.

In an ironic sense, Justice Stevens’ reliance on the City of New London’s planning process creates a full circle with the Court’s *Penn Central* decision. In *Penn Central* the majority attempted

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<sup>100</sup> 125 S. Ct. 2655 (2005).

<sup>101</sup> *Id.* at 2661.

<sup>102</sup> *Id.* at 2667.

<sup>103</sup> *Id.* at 2665.

<sup>104</sup> *Id.*

to rebut the dissenters' objection that the landmarks law singled out particular property owners by arguing that the designation decisions were at least made in the context of a careful planning process that justified the city's selection of specific structures for designation. *Kelo* is distinguishable from *Penn Central*, in the sense that *Penn Central* dealt with the question of whether a regulation rose to the level of a taking mandating payment of compensation, whereas *Kelo* dealt with the question of whether a compensated taking served a public use. Nonetheless, Justice Stevens' reliance on a comprehensive plan in *Kelo* appears to echo the Court's reasoning in *Penn Central*. In addition to moving the Court on the takings issue, Justice Stevens' views may also have evolved over time. No doubt he would still consider *Penn Central* a difficult and troubling case. But it is a nice question whether Justice Stevens, if he had it to do all over again, would dissent in *Penn Central*.<sup>105</sup>

#### CONCLUSION

In a few short years, the Supreme Court has accomplished a remarkable reworking of its takings jurisprudence. The chief elements of this reform include lopping off the endlessly confusing "substantially advance" inquiry; narrowing the *Lucas per se* rule to practical irrelevance; providing a neat, narrow definition of the scope of the *Dolan* and *Nollan* tests; and creating at least the beginnings of a predictable *Penn Central* analysis focused in significant part on the generality versus the particularity of the government action.<sup>106</sup> While other members of the Court contributed in important ways to this effort,<sup>107</sup> Justice Stevens above all others paved the way for and then executed this remarkable transformation of takings doctrine.

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<sup>105</sup> The other Supreme Court takings case decided in the 2004 term year, *San Remo Hotel, LP v. City and County of San Francisco*, 125 S. Ct. 2491 (2005), in which Justice Stevens once more wrote the opinion for the Court, resolved that a takings claimant required to litigate a takings claim in state court under *Williamson County* is not entitled to relitigate the same claim under federal law in federal court. The Court's opinion discussed the relatively technical question of whether the Court should craft an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause. The Court declined to create such an exception, without offering guidance on how takings claims should be resolved on the merits. Perhaps the most important aspect of *San Remo* is the concurring opinion of Chief Justice Rehnquist, joined by three other Justices, suggesting that *Williamson County* may have been mistaken in establishing the state-litigation requirement in the first place.

<sup>106</sup> For a recent and particularly thoughtful application of the principle of generality in the context of wetlands regulation, see the opinion of Judge Henry Saad of the Michigan Court of Appeals in *K & K Construction, Inc. v. Department of Environmental Quality*, 267 Mich. App. 523 (Mich. Ct. App. 2005).

<sup>107</sup> Justice Kennedy, in particular, deserves credit for masterfully managing the Court's reassessment and ultimate repudiation of the "substantially advance" test, beginning with his thoughtful concurring opinion in *Eastern Enterprises*, his agonizingly constructed opinion for the Court in *DelMonte Dunes*, finally leading to the Court's decision in *Lingle* overthrowing the test.

# Public-Private Redevelopment Partnerships and the Supreme Court: *Kelo v. City of New London*

Marc B. Mihaly\*

## INTRODUCTION

Public opposition to the Court's decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) ("*Kelo*") holds interest not only for its intensity but for its breadth. As expected, property rights groups and libertarian think tanks excoriated the majority opinion and celebrated the dissents. More interesting is the reaction of the rest of the population. Though with less animus than the organized political right, Americans of most political persuasions found the majority decision wrong-headed and oppressive.

What good, they asked, could come of the validation of this exercise of the power of eminent domain—the condemnation, with no finding of blight, of a group of well-kept single-family homes in a small, functioning single-family community in order to facilitate creation of a corporate industrial and office campus? Who could imagine a more oppressive use of the police power, a more convincing replay of the elitist, and perhaps racist legacy of urban renewal? The universality of this response hardly escaped the notice of legislators. In the months since the opinion, members of Congress, state legislators, and even councilpersons in charter cities have introduced measures containing palliatives or correctives to the perceived abuse.

What accounts for the breadth and the depth of this response? No doubt much is a tribute to the success of the political right in defining the way we view ourselves. From the New Deal into the 1980s, a positivist view of government prevailed. Since then, assiduous work by many on the right, including many of the key amici curiae in *Kelo*, has reframed the debate. The government provides for people every day, but the media rarely reports on those programs, and the concept that government can work a powerful good now lies generally outside the nation's collective, conscious thought (except apparently, for a latent desire in cases of natural disaster). It is not surprising then that the potential evils of redevelopment, one of the most powerful roles assigned to government, makes an easy target, while the virtues of redevelopment remain obscure.

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The opinions in *Kelo* reflect in one way or another this political sway. Each drafting Justice found herself or himself confronted with the two powerful Supreme Court precedents that sit astride all discussion of redevelopment, *Berman v. Parker*, 348 U.S. 26 (1954), upholding the use of eminent domain as part of redevelopment in the District of Columbia, and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), validating the use of condemnation to undo the ancient Hawaiian feudal oligarchy through redistribution of its land. The holding and the rhetoric of *Berman* echo, without apology, the positive approach to government dominant in the decades after the New Deal. *Midkiff*, written by Justice O'Connor herself, restates positively Hawaii's legislative goals and defers to its legislative fact-finding. In stark contrast, the recent *Kelo* treatment of *Berman* and *Midkiff* reflects today's negative view of government: The *Kelo* majority opinion relies on these cases, but without acknowledging, much less reiterating their pro-redevelopment conviction. The *Kelo* dissents, embarrassed or disgusted, labor to distinguish *Berman* and *Midkiff* or overturn them entirely.

But, without diminishing the success of the political right in framing the debate, more is needed to explain both the popular and judicial response to the *Kelo* decision. Simple ignorance of the transformed and transforming nature of city-center land-use development lies at the heart of the pervasive popular reaction to the *Kelo* decision. Redevelopment has failed to make its case. Most Americans enjoy the fruits of revitalized urban cores, but they do not understand how the transformation occurred. Nor do they know that the very nature of land development in the city center has evolved, altering both public and private roles, erasing traditional boundaries between what is a public use and what is a private use, and between what is government owned and what is privately owned.

This essay contends that the Justices of the Supreme Court share that ignorance. Justice O'Connor's dissent invokes concepts, categories, and rules rendered inapposite and un-administrable by the practice of modern public-private development partnerships. Justice Thomas' policy complaints are forty years out of date, and the America it would reinstate lies in the irretrievable past. Whether these Justices and those who joined them are the victims of lack of comprehension or animated by the exigencies of a property rights-driven orthodoxy, their dissents in *Kelo* repeat a pattern in other key conservative land-use opinions which misconstrue or omit entirely an examination of the policy foundations, nature, methods, and pragmatic record of the governmental program at stake in the case.

The majority opinion, a tepid piece of rote reliance on precedent and deference,<sup>1</sup> fails to perform the function of holding the dissents up to the light of modern development realities,

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<sup>1</sup> In a rare case of judicial self interpretation, the majority's lack of enthusiasm for its holding is confirmed not only by the tone and content of the opinion, but by the author of the opinion himself. In a public speech a few months after the opinion, Justice Stevens indicated he disagreed with the condemnation as a matter of policy, but felt compelled by precedent to reach the conclusion he did. Linda Greenhouse, Supreme Court Memo; Justice Weighs Desire v. Duty (Duty Prevails), N.Y. TIMES, Aug. 25, 2005, at A1.2 *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2660 (2005).

because, the author believes, the majority Justices do not understand the underlying process they rule upon. If the majority understood the practice of land use today, it could have articulated how the regime advocated by the dissents would do violence to the planning and contractual process that has recreated the modern American center city—a new regime that is the product of hard-won sophistication among city officials, regulators, and public and private development advocates.

### I. BAD FACTS MAKE BAD LAW: *KELO* IS NOT MODERN PUBLIC-PRIVATE REDEVELOPMENT

Much of the popular reaction to *Kelo* rests on the specter of Suzette Kelo being forced out of her home, a fact pattern recited in both the majority and dissenting opinions. The majority tells us that petitioner Wilhelmina Dery has lived in her home all her life, and that Suzette Kelo has made extensive improvements to her house and prizes its water view.<sup>2</sup> Justice O'Connor adds that Dery's home has been in her family for over 100 years, and that her son lives next door in a house bestowed upon him as a wedding gift.<sup>3</sup> It is difficult to imagine more perfect plaintiffs to sound a case against redevelopment. And, that may be why the case reached the high court.

This fact pattern, however, could hardly be less representative of what occurs throughout the land in redevelopment.<sup>4</sup> Condemnation itself is rare. Most landowners in redevelopment projects either negotiate a sale to the city or redevelopment agency or “participate” in the project, that is they themselves redevelop their properties in a manner consistent with the redevelopment plan, often in partnership with other landowners and with the assistance of public financing. Redevelopment and economic development agencies are reluctant to use condemnation because the total costs of acquisition, including legal fees, run higher than fair market value, generally by about a third.

More important, though, is the rarity of residential condemnation. The great majority of condemnation actions are aimed at undeveloped land, land in “holding uses,” such as underutilized parking lots and warehouses, or other commercial uses. For example, while redevelopment has played a major role in San Francisco since the inception of the concept, the Redevelopment Agency has utilized condemnation as a tool infrequently, and more than three decades have passed since the last residential condemnation in the city.

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<sup>2</sup> *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2660 (2005).

<sup>3</sup> *Id.* at 2671 (O'Connor, J., dissenting).

<sup>4</sup> The terms commonly used to describe what both the majority and dissents call “economic development” (as in “are economic development takings constitutional?”) is “redevelopment” or “public-private redevelopment,” reflecting the intent of government to correct the failure of the market alone to bring an area back to life after a substantial period of economic decline. The language of the phrase “economic development” implies the dissents’ conclusion, namely a process operating simply to create new forms of economic wealth. This essay employs the more accurate terms.

In those few situations where condemnation is used, and in those even far fewer that involve residential land, an infinitesimal number would involve condemnation of a cluster of single-family residences in a functioning residential neighborhood. Residential condemnation for redevelopment, when it does occur, seeks to acquire and demolish residential tenements that are dangerously deteriorated, often owned by absentee landlords who have refused for decades to keep them up and often been the object of repeated efforts to enforce code. In most states, by law, the replacement projects will include more new low- or very low-income apartments than necessary to replace those demolished. This is because the very same political majority that objects to the *Kelo* decision elects city councils. Those councilpersons generally own homes. Most agencies, appointed by those city councils rule out residential condemnation for political reasons, even where it might benefit the community. In many states, redevelopment or economic development statutes make residential condemnation difficult absent the consent of the affected residential community.<sup>5</sup>

The reader of the *Kelo* opinions learns none of this from the majority opinion or dissents. We are not told that condemnation of the *Kelo* and *Dery* houses is an anomaly in this country, nor that Ms. *Kelo* could have participated in the formation and adoption of the plan, or even whether she did. The opinions do not mention New London's allocation of ten million dollars for relocation assistance, nor that the plan for redevelopment provides for the construction of eighty new housing units in an new urban neighborhood. And we certainly are not told, even by the majority, that in many states the condemnation could not have proceeded without the likely consent of a committee representing Ms. *Kelo* and her neighbors.

## II. THE IMPORTANCE OF EMINENT DOMAIN DESPITE ITS RARE USE: THE HOLDOUT

In a reference made largely for rhetorical effect, Justice O'Connor states, "Petitioners are not hold-outs; they do not seek increased compensation, and none is opposed to new development in the area. There is an objection in principle . . ." <sup>6</sup> This facile remark glosses over much of the entire terrain of redevelopment.

Modern, government-assisted economic redevelopment is a specific solution to land-use markets' failure to address urban poverty. A century of trial-and-error approaches to the stubborn persistence of economic decline and social impoverishment in large areas in central cities has led

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<sup>5</sup> In California, for example, no residential condemnation may proceed unless the Redevelopment Plan so specifies, and either a Project Area Committee of local residents and businesses must approve the plan with the express residential condemnation power or the local government cannot adopt the plan except by a 2/3 vote of its governing body, typically four votes out of a five-member council. Cal. Civ. Proc. §§ 1245.350, 1245.240 (West 2005); see also DAVID F. BEATTY ET AL., REDEVELOPMENT IN CALIFORNIA 89, 136 (2d ed. 1995).

<sup>6</sup> *Kelo*, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting).

both the public and private sectors to conclude that a major obstacle to economic revitalization of urban cores is “over-subdivision,” where old land use patterns leave the artifact of multiple small lots under different ownerships that the unassisted market, even over time, cannot assemble into lots of a shape and size that would accommodate contemporary land uses. If the private sector attempted to redevelop such a deteriorated area, some owners would sell or join as partners in a revitalization effort, but others would simply hold out for a higher price, one that rendered an already pioneering project financially impossible. The effort would collapse. Thus the “holdout” lay at the center of the problem.

Redevelopment, as conceived in the 1940s and 1950s, was an attempt to solve the land-assembly problem. Once a redevelopment plan was formulated, a governmental agency could condemn the lots, assemble them into economically functional parcels, and resell them for development consistent with the plan. Dealing with the “holdout” was the heart of the concept of redevelopment.

It still is. Although condemnation is rare and expensive, the latent authority to condemn encourages the transactions necessary to effectuate the plan for redevelopment. Without condemnation, a single holdout knows it can torpedo an entire project. The expense of condemnation gives some bargaining power to the holdout, but the legal availability of condemnation ensures that the sale will occur at something approaching market value. Some state condemnation statutes structure the process to encourage settlement near true fair market value, for example, by offering condemnee owners reimbursement of their attorney’s fees, but only if the eventual judgment amount lies within the range of the condemnee owners’ first settlement offer.

If this seems coercive, it is because it *is* coercive, and that is the heart of the concept—the center of the power that has been used for both good and ill. The forced sale of Ms. Kelo’s home certainly conjures up the evil, but, as discussed above, these facts are not representative of what typically occurs. Here are two more typical and recent examples.

The Ferry Building in San Francisco lies at the base of Market Street along the Embarcadero, a boulevard running along San Francisco Bay. The imposing, two-story Beaux Arts structure with a colonnade, a two-story internal gallery, a roof supported by iron buttresses, and topped by a landmark clock tower, served for nearly a century as the hub of the City’s passenger ferry service. Commuters landed on its edge, purchased tickets, and shopped within. Shipping offices occupied much of the building. By the 1990s the building was in disrepair, a condition repeated on pier after pier along the waterfront as bridges replaced ferries and container cargo replaced break-bulk shipping, the latter infeasible in downtown San Francisco because of the absence of vacant acres of “back land” for truck and rail facilities. Divided from the immediately adjacent downtown office-core by an elevated freeway, the waterfront languished for more than two decades. Piers lay vacant or underused, offered for lease at lower and lower prices, often without takers.

In the 1990s, the City of San Francisco, through its Port and Redevelopment Agency, embarked on an ambitious redevelopment effort made much easier by the demolition of the waterside elevated freeway that had been damaged in the 1989 Loma Prieta earthquake. Ferry travel revived as

a commuter option, and housing and commerce again had become viable downtown uses. The City invested state, federal, and city funds to rebuild the dilapidated industrial waterfront Embarcadero roadway that had lain hidden underneath the elevated freeway, creating a palm tree-lined pedestrian, rail, bus, and automobile multi-modal boulevard. The Port built parks, negotiated for a new cruise terminal, and anchored the redevelopment at the southern end with a new baseball park, privately financed and built, but supported in part by city tax-increment financing. At the geographic and design center of this effort lay the Ferry Building itself, to be restored pursuant to Secretary of Interior historical preservation standards.

This effort comprises what the *Kelo* Court calls “economic development.” Years of area committee work and public hearings produced a design. The renovated Ferry Building would house ferry passenger facilities and an urban marketplace tenanted by small Bay Area food businesses and restaurants. The Port of San Francisco would vacate its offices on the second floor, leaving the space available for rent as private office space. The City hoped that the office space, with many waterfront views, would rent at a sufficient premium to cover the cost of the historic renovation and the public spaces, and make up potential deficits from the small-scale, locally based retail operation.

The City and its Port carried out the proposed redevelopment. Today, the renovated San Francisco waterfront is one of the most heavily used public spaces in the Bay Area. Market rate and low-income housing is under construction. Tens of thousands of workers and tourists walk or ride transit along the Embarcadero to ball games on summer days and evenings. New restaurants have sprung up, and private developers have produced thousands of new residential units along the Embarcadero and near the ball park. The Ferry Building itself, restored and rebuilt, has won national planning awards and local acclaim, and is today in heavy use. Ferry commuters mingle with downtown residents in the urban market. The project finances appear to work, though, at this time of this writing, with less margin and certainty than the City and the project developer would prefer.

Yet the Ferry Building project would never have happened without the power of eminent domain. For many years, an old San Francisco institution, the World Trade Club, shared the dilapidated second floor with the Port staff under a long-term lease from the Port. Its faded dining room hosted many civic events. As the plans for the renovation matured, it became clear that the World Trade Club had to relocate to allow the creation of office space in the second floor, the only true revenue-generating use and the hoped for economic engine of the project. The Port offered generous terms and relocation. The Club refused, not for financial reasons, but instead basing its stance on the same “principle” as Ms. Kelo: it simply did not want to move. No amount of patient negotiation or relocation efforts would change the stance of the Club’s board of directors. And beyond a certain point, financial inducements, even if they had been effective, were impossible due to the marginal project economics. Finally, the Port moved to condemn the lease. Then, in the context of initiation of the condemnation case, settlement ensued, the Port moved the Club into comparable quarters nearby, and the Ferry Building project moved forward. Site assembly in this situation meant acquisition of the leasehold. The site assembly, the historic renovation, and the consolidation of the Embarcadero

renovation project would all have failed without the power of eminent domain.

Nearby on the same Embarcadero lies another version of economic development, more purely private, yet just as dependant on the use of eminent domain for redevelopment. The clothing company, the Gap, headquartered in San Francisco since the company's inception, found its corporate headquarters no longer physically sufficient or suitable for its corporate campus needs. A long and fruitless search for a downtown location of sufficient size led the company to determine to abandon San Francisco. Faced with the loss of 1200 jobs downtown, the Redevelopment Agency found a large site for the Gap headquarters on the Embarcadero. The Gap agreed to help defray some costs of the Embarcadero renovation, and as mitigation for open space impacts, to construct and dedicate to the City one of the park areas on the water's edge as called for in the Port's Waterfront Plan. The Redevelopment Agency successfully negotiated the purchase of most of the land necessary for the project. Near the conclusion of the effort, the owner of a corner parcel, a strategic 13,600 square feet of the 90,000 square-foot site, suddenly became enamored of his parking lot and refused to accept even a generous above-market value price. This was a financial holdout. The project stopped until the Agency condemned the site.

These public-private redevelopment experiences tell a story different from the facts in *Kelo*. Yet these are the typical scenes of redevelopment. New public facilities, often in tandem with new affordable housing, rise on vacant or under-utilized sites, producing uses and amenities that reinvent the urban center. Millions of Americans live, work and recreate in these areas. It is these projects, efforts such as the Ferry Building and the Gap headquarters, that the legal approach of the *Kelo* dissents would render impossible to carry out. Not difficult—impossible.

### III. THE DISSENT'S DISTINCTIONS BETWEEN PUBLIC USE AND PRIVATE USE NO LONGER FUNCTION IN THE MODERN URBAN DEVELOPMENT CONTEXT

Broad concepts concerning the nature of real-estate development underlie the *Kelo* dissents, some express and some not. Most are inaccurate. Fortunately the dissents did not prevail. But, especially in light of the lukewarm majority and changes likely on the Court, they could prevail. And, even if they do not, the same misconceptions influence the current debates over proposed legislation, which would enact to one degree or another the dissenters' position. We examine in this section the dissenters' assumptions and lay out the corresponding reality.

The case turns, of course, on the meaning of "public use" for which eminent domain is constitutionally permissible. O'Connor's dissent parses public use to create three categories. Two, she tells us are "relatively straightforward and uncontroversial."<sup>7</sup> They are:

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<sup>7</sup> *Id.* (O'Connor, J., dissenting).

First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium.<sup>8</sup>

She characterizes these two categories as “public ownership” and “use-by-the-public,”<sup>9</sup> and we will as well. Although the words of her opinion could hardly be more clear, their substance oversimplifies reality to the point of misrepresentation, as discussed below.

*A. “Use-by-the public”: The Problematic Distinction Between Public Land Use and Private Land Use*

At the outset, what does “use-by-the-public”<sup>10</sup> mean to the dissent? Justice O’Connor, as just quoted above seems to use the common meaning of “available for the public’s use.” Justice Thomas likewise talks of the public’s “legal right to use the property.”<sup>11</sup> Justice O’Connor’s phrase “often common carriers”<sup>12</sup> would seem a bit limiting, as are two of the three examples (the railroad and public utility). Without the stadium, one might indeed wonder if the Court intended the class to be far narrower than is usually meant by “public use” in planning and zoning terms, perhaps limited to regulated monopolies.

Her stadium example, however, appears to confirm that for her the concept means what it usually means in the land use context; that is, it includes both classic public land uses and private uses operated for a profit and open to the subset of the general public willing and able to pay the price of entry. Such uses include theaters, movie houses, shopping centers, smaller stores, restaurants, hotels, and also perhaps spas and resorts open to the public on day-use basis. Each of these uses serves anyone who pays for the use (reserving only the right to exclude troublemakers, and even that right is circumscribed). While it is unclear whether the dissent would embrace this logical extension given the ideologically driven nature of the opinion and its imprecision, this essay assumes the dissenters would accept this common meaning of the term.

The unraveling of the dissent’s logic begins with the concept, now well developed, of

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<sup>8</sup> *Id.* (citations omitted).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2679 (Thomas, J., dissenting).

<sup>12</sup> *Id.* at 2673 (O’Connor, J., dissenting).

“mixed use.” Commencing in the late 1960s, architects, urban planners, and developers set about rethinking development patterns created by traditional “Euclidian”<sup>13</sup> zoning ordinances which separated uses into distinct zones, and formed the legal backbone of suburbia. These new thinkers hoped to replicate the development patterns of older cities, creating something more vital than the use-segregated, monolithic developments of the decades before. They focused on the desirability of mixing uses together to create social and economic synergies. The reaction evolved slowly, and included in its earlier versions the new town concept, and by the 1990s, the New Urbanist movement. These critics, urbanists, and practitioners believed housing types should be intermixed, and housing should be commingled with commercial uses and with open space. Appropriate types of heavy commercial or light industrial uses could be intermixed as well in ways that brought jobs close to housing.

New regulatory concepts such as the Planned Unit Development overlay and the Specific Plan supplanted traditional single-use zones, especially in urban centers. These concepts freed private developers to mix uses more intensely than ever and also to invent new land uses which defied the traditional Euclidian categories. Since the early 1990s this trend has accelerated such that nearly all urban development is of a “mixed-use” or “new-use” nature. In a quiet land use revolution, Americans are growing used to living, recreating, and working in these mixed use/new use environments. Readers may recognize these examples in their own communities:

- A structure with a public indoor plaza, a food court, and an arcade with shops.
- A single structure that includes a public plaza, combined with the lobby to a hotel tower and the lobby of a residential multi-family tower. Restaurants inside the building are open to the public and provide food service to the hotel and take-out service to the residential tower. Gym, massage, and day care facilities are shared by the hotel and residential users, and are open to the public.
- An older, derelict shopping center redeveloped into a mixed use development (a process called “refill”) that includes public spaces at ground level, on parking podiums, on the mezzanine, and on rooftops, some landscaped. New buildings contain shops, community meeting rooms, a movie theater, and an all-purpose theater available for

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<sup>13</sup> A concept named for the Supreme Court case which upheld the basic zoning power, *Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926) (granting the states the power to determine if a zoning scheme is necessary for the “public health, safety, morals, or general welfare”). This invention could be just as well named for Euclid himself, the Greek mathematician credited with the invention of geometry. In this Euclidian world, land areas are divided into zones, each with a primary use, such as residential, commercial, or light industrial, essentially pre-permitted in the zone, subject subsequently only to non-discretionary approvals such as the issuance of a building permit.

rent for civic uses, all on ground level. Shops are on the mezzanine, and housing above. All uses share the parking.

- A renovation of an old warehouse into a project with ground floor restaurants, retail on the first and second levels, low- and very low-income units on the third floor, and a fourth floor of “loft” living/work residences and penthouse apartments.
- A new shopping center with a central spine, partially indoor and partially outdoor, that is developed as a central park, anchored at one end by a department store and at the other by structure that contains ground floor retail and restaurants, and an entry foyer for a second floor public library and city hall. Structured parking serves all the uses.
- A structure containing, in one undivided space, a series of small open shops, a restaurant and bar, and a bowling alley.
- A single structure containing offices, shops, and a public school.

Developments such as these are no longer the exception; they are sprouting everywhere—in the center city, suburbia, in “edge cities,” in large cities and smaller cities. The public enjoys these models and their attention makes them prominent economic success stories. And for that same reason, redevelopment and public-private development aimed at revitalization of distressed areas look to these models as well.

The mere perusal of this list both asks and answers the obvious question raised by the *Kelo* dissents. How, in this new land use world, can one find the “bright line” dividing the prohibited use of eminent domain exercised for development of private uses from the permitted use of eminent domain for redevelopment of public uses? The answer of course is that one cannot. The dissents’ rule is simply unworkable.

Eminent domain is a tool for land assembly. Agencies negotiate to acquire on a parcel-by-parcel basis. Failed negotiation leads to condemnation. The boundaries of the individual parcel are a historical artifact that has little or no relationship to the “footprints” of the ultimate uses. The point of the redevelopment is the creation of a new use pattern which the prior parcelization would not support. Thus, even if uses in the ultimate development were separated and vertically uniform, one could not necessarily assign one parcel proposed for condemnation to one ultimate land use fate that could be then labeled “public” or “private.”

But these modern land uses are decidedly not separated or vertically uniform. Public uses are intermingled with private uses in the same development, in the same building, and even the same space. How should we characterize a condemnation to acquire the space that includes shops and the city hall, or the space that includes shops and residential space? The dissents’

bright line is no longer a line at all, but a muddle, a test inapplicable to most urban development situations.

*B. "Public Ownership": The Problematic Distinction Between a Government Project and a Private Project*

The O'Connor dissent would also allow, in blanket manner, condemnation in aid of all projects where the private property is transferred to "public ownership." Again, the dissent gives us a short list of examples: "a road, a hospital, or a military base."<sup>14</sup> These are, in fact, uses the government has traditionally owned. Again, the dissents oversimplify; governmental ownership has evolved to include many uses previously considered private, and private ownership now embraces many uses traditionally viewed as public.

The simplest and most common example is the long-term ground lease. Many clearly private uses are built on land owned by the public and leased to the developer and subsequent user. For example:

- Apartments are built on land owned entirely by a governmental entity which leases the land to a developer to build and operate the structure; the developer leases back the low-income units to the housing authority.
- A city enters into a long-term ground lease with a private company which contracts to develop an office building on the site. The term of the lease is substantially less than the useful life of the building, which will revert to the city when the ground lease expires. The building is built to city specifications so that, at the end of the lease, the city can locate city offices in the building.

In each case the use is private (for now) and the land is public. Is this a private or public land use under the test articulated by the *Kelo* dissents?

However unclear the answer may be, the increasing sophistication of the public-private relationship adds to the uncertainty. During the last several decades those engaged in the design of the institutions and instruments to carry out redevelopment and other public-private development partnerships have given much thought to the respective capabilities of the public and private sectors. Agencies appreciate the private sector's access to capital and its capacity to accept risk. Developers have come to understand that government has planning powers, legitimacy, and fiscal attributes to contribute to a project that a private party does not.

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<sup>14</sup> *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

The last decades have seen an examination of each stage in the life of a project to determine whether its attributes are more efficiently performed by the private or public entity. Projects move through concept planning, development planning, zoning, subdivision, engineering, land acquisition, grading and utility installation, construction of structures (“vertical development”), sale and leasing, and maintenance. For each stage for each project, public and private negotiators wrestle with defining the best allocation of the components of responsibility: specifically, which entity directs it, which pays for it, and which performs it.

The result transcends anything that could be memorialized in a government plan or zoning ordinance. It is instead embodied in a contractual relationship between the public and private entities. At that point it is much too simple to talk about “ownership” as a measure of anything. The bundle of sticks associated with land ownership has been deliberately broken apart and replaced with a pattern of contractual responsibilities that, given the nature of the deal, allocates to the respective public and private parties the specific elements of assembly, clearance, construction, maintenance, and control they are best equipped to perform. Typical patterns might include:

- A mixed-use development, planned and conceived by a city, built by a developer, where the public open spaces are planned by the city, constructed by the developer, and transferred to a home-owners association which must allow public use pursuant to adopted covenants, conditions, and restrictions (“CC&R’s”).
- A large redevelopment where the city owns part of the property and private parties own the rest. The city, which has low carrying costs, agrees, for valuable consideration reflected elsewhere in the deal, to acquire the private property and hold it until the market is ready to absorb the planned uses. The property is held for more than a decade.
- After a public-selection process, a city enters into a contract with a large developer who will serve as master developer of an area. The city owns the land. The city creates the master plan and zoning. The developer pays for the subdivision planning and engineering. The developer and city jointly hold public forums and jointly staff a public-advisory board selected by the city, the expenses of which are paid by the developer. The developer advances the funds for and builds the “backbone” infrastructure. The city floats bonds and buys the infrastructure from the developer. The city holds the land until ready for sale to the developer. The developer takes and owns the land on which a hospital, a stadium, and a public school are built by the developer. The school is leased back to the city. The city retains the land under multi-family mixed income rental housing, which the developer builds and turns over to the city ownership. The developer maintains and manages the housing pursuant to a contract with the housing agency.

These kinds of relationships are the rule, not the exception. As discussed above, parcels that may be condemned cut through these projects in random ways, embracing different uses. Which condemnation is to acquire a project for “public ownership”? The O’Connor opinion complains that the majority approach would “wash out any distinction between private and public use of property.”<sup>15</sup> That has already occurred by simple evolution of the land-use model.

#### IV. GRAPPLING WITH “AFFIRMATIVE HARM ON SOCIETY”: IDEOLOGY OVER REALITY

Justice O’Connor then addresses what she calls a third category of condemnation which her dissent tells us is addressed by *Berman* and *Midkiff*. She begins with an admission somewhat strange in light of what is to come:

But “public ownership” and “use-by-the-public” are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.<sup>16</sup>

Up to this point, Justice Douglas (the author of *Berman*) would no doubt concur. The category to which Justice O’Connor refers is redevelopment, a concept *Berman* firmly endorsed as a tool for use in America’s urban landscape. But then she extracts a rule that limits both *Berman* and her own prior opinion in *Midkiff* to what she now construes as their facts. There is no substitute here for her own language: “In both those cases, the extraordinary, pre-condemnation 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.”<sup>17</sup> The opinion thus would limit the use of condemnation in aid of redevelopment to situations where the existing use inflicts an “affirmative harm on society.”<sup>18</sup>

What does “affirmative harm on society” mean? Justice O’Connor’s dissent, in her urgency to distinguish, without overruling *Berman* and her own *Midkiff*, characterizes those opinions as permitting condemnation only to eliminate an “extraordinary” pre-condemnation use; “extraordinary”<sup>19</sup> being

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<sup>15</sup> *Id.* at 2671 (O’Connor, J., dissenting).

<sup>16</sup> *Id.* at 2673.

<sup>17</sup> *Id.* at 2674.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

something on the order of the horrible slums (“extreme poverty”) referenced in *Berman* and the extraordinary aristocracy referenced in *Midkiff* (“resulting from extreme wealth”).<sup>20</sup> By implication only, it appears that the facts in *Kelo* would not pass the test.

But they do pass the test, such as it is. No findings of blight were made in this case because none was required by law. But the facts in *Kelo* constitute the elements that typically lead to exercise of the redevelopment power in states where a finding of “blight” is required, and would support the finding. An area potentially attractive due to location (such as on the waterfront) suffers long-standing stagnation or worse; no market exists for uses in the area, banks will not lend, and so developers will not redevelop. The human cost is high: existing businesses fall into patterns of substandard performance due to lack of customers and inability to finance purchase of machinery, make building repairs, or undergo improvements; houses are abandoned; apartment buildings stand half empty;<sup>21</sup> residents are unemployed or must travel long distances outside the area to find work; the area is not safe. In sum, the unassisted market fails to function.

Redevelopment attacks the problem by generating an area-wide plan, and then facilitating both catalyst public improvements and pioneer private development. These early projects must be thoughtfully selected to ensure strategic investment of scarce public funds. Early infrastructure thus often focuses on parks and new attractive streets which serve as on-the-ground evidence to lenders and developers that the area is changing. The agency selects pioneer projects, or builds upon pioneer projects underway, seeking private development that will provide quality jobs, attract secondary beneficial uses, and promote the renewed visibility of the area. Thus, the City of New London’s first infusion of public capital followed a typical and rational pattern: it focused on developing a plan, and then a park, and its first pioneer private project, already underway—a research facility—is job-intensive, highly visible, and will in the words of the majority, “draw new business to the area, thereby serving as a catalyst for the area’s rejuvenation.”<sup>22</sup>

The majority opinion commences with a recital (albeit characteristically brief and bland) of the facts leading to redevelopment, describing a city designated by a state agency as “distressed” after decades of economic decline, unemployment nearly double the state average, and actual decreases in population. The dissenting Justices do not acknowledge, much less address, these conditions. The truncated factual recitation in Justice O’Connor’s opinion begins with the petitioners and skips directly to the Pfizer development. She does not mention the economic decay, unemployment, or population loss. The only reference to the underlying purpose of redevelopment is in a brief clause on the mission of

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<sup>20</sup> *Id.*

<sup>21</sup> The record reveals a high percentage of vacant housing, and an eighty-two percent vacancy rate for non-residential structures. Sixty-six percent of these structures were in fair or poor condition. Brief for the Respondent at 3, *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655 (2005) (No. 04-108).

<sup>22</sup> *Kelo*, 125 S. Ct. at 2659.

the New London Development Corporation (immediately followed by a sentence informing us that the Corporation's Board is not elected). She selects as her only mention of the redevelopment plan a quote that the redevelopment was designed to "complement the facility that Pfizer was planning to build."<sup>23</sup>

Justice Thomas' recitation is more pronouncedly political. All we would know from his opinion is that the case involves "a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation."<sup>24</sup>

Why do the *Kelo* dissents ignore the stated public purpose of this redevelopment? After a careful read these opinions, why would one still have no knowledge of the goals of redevelopment, the processes, and the procedural protections developed over the last three decades, and the supporting facts in this case? Because the idea structure of a Fifth Amendment ideologue demands it. In a world-view fixed on the property rights of individuals, government program (indeed, any collective action) holds no interest or, for that matter, relevance. Thus, these two dissents look at the redevelopment world from the bottom up, that is from the eyes of the landowner alone, because these judges believe that their only obligation, as guardians of the Constitutional "rights" of the property owner, is to ask and answer what this all this means for the condemnee. And once a need or desire is converted into a "right," such as the dissent's creation of Suzette Kelo's "right" to be free from the exercise of eminent domain, then there is no point to discussing whether her need should be accommodated, and no need to balance her needs against others' needs, individual or collective.<sup>25</sup>

#### V. THE PROBLEMATIC DISTINCTION BETWEEN PUBLIC AND PRIVATE GAIN

The Court's misperception of the nature of modern, public-private redevelopment goes beyond the dissents' confusion over use, ownership, and blight. The majority opinion, the concurrence, and the dissents share an outdated, nostalgic perception of the fundamental relationship between the public and private sector.

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<sup>23</sup> *Id.* at 2671 (O'Connor, J., dissenting). As discussed below, working with a pioneer developer early in project formation is desirable.

<sup>24</sup> *Id.* at 2677 (Thomas, J., dissenting).

<sup>25</sup> This determined ignorance of governmental purpose is no stranger to Justices Rehnquist and Scalia. An early version emerges in Justice Rehnquist's dissent in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). One could read his dissent there and emerge from the effort knowing nothing of historic preservation or the New York City ordinance. Justice Scalia takes the same approach in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where he is joined in the majority by Justices Rehnquist, White, Powell, and O'Connor. Nowhere in that opinion is there discussion of the pattern of privatization of the California coast such that members of the public could drive for dozens of miles along the coast, unable to reach the beaches they could see. Nor does the opinion discuss the California Coastal Initiative, the Coastal Act, the operative statute, or the theory and nature of public access regulation.

These Justices share the view that government does not possess the legal authority to acquire property from one citizen merely to transfer it to another.<sup>26</sup> Why? What is wrong with the government taking private property to transfer it to another private party? The answer is common to all the opinions: a fear that government will act as an agent of private rather than public power. The majority admits that use of eminent domain to transfer property from one citizen to another for the sole reason that the second “will put the property to a more productive use and thus pay more taxes” would “raise a suspicion that a private purpose was afoot.”<sup>27</sup> Justice Kennedy’s concurrence dwells on judicial remedies to this possibility.

The dissents, of course, focus almost entirely on the possibility of takings for such impermissible private purposes, and put a political gloss on their discussions. Justice O’Connor tells us the beneficiaries of the majority rule will be “citizens with disproportionate influence and power in the political process, including large corporations and development firms.”<sup>28</sup> Justice Thomas quotes her language with approval and adds race as an issue: “Urban renewal projects have long been associated with the displacement of blacks[.]”<sup>29</sup>

#### *A. A Brief Defense of Redevelopment*

Some of the charges of abuse are undoubtedly true. A full discussion of the merits of redevelopment is beyond the ambit of this essay. Suffice it to say that as is the case with any large, complex undertaking, it has its success stories and its failures, its friends and enemies. We make a few observations. One is that none of the Justices knows much about this area, as their opinions make clear. The difference among them lies in their reaction to this ignorance. The majority refuses to take sides, seeking refuge in precedent. The dissents, as we have seen, do take sides on this complex social issue, and they do so without reference to facts or opinions that were the subject of judicial fact finding or judicially noticed or, in most cases, noticeable.

Much of the secondary literature cited by the dissents and many of the amici supporting their view take aim at redevelopment defects that have been eliminated or ameliorated in most states decades ago. It is certain that advocates for social justice in the 1960s recognized the elitist and racist purposes to which many federal urban renewal funds were dedicated, inventing a nickname for urban renewal, “Negro Removal”; the most scathing critiques written were published in that period.<sup>30</sup> Urban renewal had its

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<sup>26</sup> *Kelo*, 125 S.Ct. at 2667–68; *id.* at 2670–71 (Kennedy, J., concurring) (explaining that there may be cases where the transfers are “suspicious” and will require courts to apply a demanding level of scrutiny to determine if the transfer is for “an impermissible private purpose”); *id.* at 2677 (O’Connor, J., dissenting).

<sup>27</sup> *Id.* at 2667–68.

<sup>28</sup> *Id.* at 2677 (O’Connor, J., dissenting).

<sup>29</sup> *Id.* at 2687 (Thomas, J., dissenting).

<sup>30</sup> See, e.g., YERBA BUENA HARTMAN, LAND GRAB AND COMMUNITY RESISTANCE (1974); JANE JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC

catastrophic failures, although in many cases the critical literature focuses on the number of jobs and housing units destroyed without mentioning the number of new housing units and new jobs created.

Today, however, in most cities, no housing unit can be removed without the application of strict requirements that inhabitants of residential units taken be relocated into units of similar quality and job accessibility. Many states and cities require one-for-one or more than one-for-one replacement of low-income housing demolished inside any redevelopment area. Many metropolitan redevelopment agencies are run by and substantially staffed by racial minorities. Elected project area committees are representative of the local affected community. Today redevelopment is responsible for a large percentage of all the low- and very low-income housing produced. Most of the nation's low-income housing advocates would disagree with the policy perspective of the dissents and their amici.

Finally, note that condemnees are often better off than those displaced by private development. The picture-postcard *Kelo* plaintiffs are long-time homeowners. They are not typical condemnees. To the extent the exercise of eminent domain touches residential uses, the residential displacees are almost entirely tenants, not owners. Tenants have fewer rights in the United States than in any industrialized nation, a fact that does not appear to concern Justice Thomas. Most poor tenants are on month-to-month leases and may be evicted on thirty days notice. Regardless of the term of their lease, in many states (in contrast to negotiated commercial leases) sale of the residential building terminates the leases of all the renters. Thus, where a private developer negotiates a sale with the owner of a multi-family residential building, the residents are on the street in a month with no recourse or relocation rights. Those same residents fare much better if the building is condemned by a redevelopment agency providing relocation assistance and equal or improved affordable replacement housing.

*B. The Evolution of the Public-Private Relationship: The Dissents' Worst Fears Meet Reality*

Of more import however, is the majority and the dissents' failure to grasp a fundamental change in the way public-private development occurs, a change that alters the concern over the use of eminent domain for private purposes. It is not that corruption has ceased, or that in many cities, politics are not in fact dominated by elites. Rather, the average case, the now typical large redevelopment project, is undertaken in a manner that renders almost quaint the very concept of distinct, clearly separable "public" gain and "private" gain. It is worth examining the outlines of this relationship between a public entity and the dissent's "large corporations and development firms,"<sup>31</sup> a relationship which Justice Thomas merely characterizes as "suspiciously agreeable."<sup>32</sup>

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INTERVENTION (1965). The critique continued through the 1980s and to some extent into the 1990s but was largely retrospective. See HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* (1st ed. 1962); HERBERT J. GANS, *THE URBAN VILLAGERS* (2nd ed. 1982).

<sup>31</sup> *Kelo*, 125 S.Ct. at 2677 (O'Connor, J., dissenting).

<sup>32</sup> *Id.* at 2678 (Thomas, J., dissenting).

Most large area redevelopment poses enormous fiscal challenges. Replacement of antiquated infrastructure, often high demolition costs, and a strong local-community desire for a healthy public benefit package overwhelm likely revenues from possible market uses. Cities and their agencies (referred to here as “city” or “cities”) struggle with how to bridge the gap, and in successful projects usually come up with a federal contribution for regional or backbone infrastructure, grants, and creative public financing. Tax-increment financing, for example, is such a bootstrapping device. Bonds are issued now on the basis of pledge of the “increment” between current property tax revenues and the increased tax revenues generated when new uses hopefully increase the value of the land and improvements. Even after the application of these techniques, the economics of these projects are often marginal. In most situations, the redevelopment, while hoping to revitalize a depressed area by creating jobs and new infrastructure to serve the public, also poses major development risk.

Cities recognize that while they can facilitate or oversee much of the redevelopment, they are not equipped to take on many aspects of the effort. They can provide a conduit for grants, issue public debt, and since they often own the subject land outright, they can hold land for long periods without actual cash outlays for the debt service as a developer would likely incur. While city officials might welcome a profit, in most cases the public development goals are more important to the city than the need to make money. But cities or redevelopment agencies typically cannot accept market and development risk, and often cannot front high “predevelopment” expenses, that is the costs of planners, economists, engineers, and attorneys necessary to work through the details of the project proposal; and they are ill suited to perform the vertical development.

The typical city, recognizing the reciprocal advantages of a relationship with a private developer, may advertise for a “master developer.” The master developer will assist the city in planning, perform due diligence reviews concerning site issues such as contamination, and assist in the preparation of estimates of the cost of removal of old infrastructure and the cost of new project infrastructure and improvements, as well as eventually find and manage relationships with developers of sub-areas within the project. The request typically asks for experience and financial capability.

Public advisory committees often advise the city council on the selection process and the selection itself. Competing development teams make presentations to the council in open session. On the basis of these, the council selects one developer with whom to negotiate the documents that would guide a permanent relationship. This exclusive negotiation period may be short or take several years, depending on the size of the project. The negotiators ordinarily meet in private and make interim reports to the council in executive session.

During the exclusive negotiation period, the developer usually fronts all of its “predevelopment costs” (planners, engineers, economists, and attorneys) and all or a portion of the city’s as well. For a large project area, these costs run into the millions of dollars. This is high-risk money for the developer because the city, while obligated to negotiate for the full period in good faith,

has no obligation to consummate the relationship; if the negotiations fail, the developer has lost the fruit of its work. If the city and developer teams reach agreement on key issues, the relationship matures to a set of contractual documents which the council then hears in open session. If, after public hearing and testimony, the council agrees, the contracts are signed, the obligations mature, and the project commences.

For significant redevelopment efforts the negotiation of these contractual documents is contentious and the issues are difficult. What emerges is a relationship sufficiently complex to defy summary presentation, a fact of life typical of many aspects of public-private relationships in an advanced economy, but often frustrating to busy city managers, preoccupied councilpersons, and many members of the public. The course of each negotiation is different, but, especially for large project areas, the elements are similar. The parties first attempt to reach a mutual understanding of the project economics. They spend many months developing engineering estimates of project costs such as infrastructure and performing market studies to determine the likely revenues from the sale of land and sale or rental of buildings. This effort, when reasonably complete, allows the construction of a hopefully mutually agreed-upon economic model of the development, a spreadsheet commonly called a “pro-forma.”

As they build the pro-forma, the city and the developer negotiate a reasonable rate of profit for the developer, based on the risk associated with the developer’s contributions. That profit is usually measured as the developer’s internal rate of return (IRR). The parties argue about the level of each sort of risk—regulatory risk (which the city asserts it will mitigate through the contract under negotiation), construction risk (the risk of cost overruns can be quite high), market risk (the risk that the rental and sales markets will change), and interest rate risk (the risk that interest rates will change).

These discussions produce an allocation of risk. The city may, for example, decide to take some of the regulatory risk by agreeing to pay back predevelopment funds advanced by the developer if the project approvals are not forthcoming. The city may agree to appropriate ways to take some portion of the market risk, for example, to assemble the property and hold it at no cost to the developer until the market has reached sufficient maturity that the developer, in its sole discretion, purchases it for development or resale. As an additional way to assume some of the market risk, the city may agree to issue tax-increment financing as soon as the bond market permits, and repay the developer some or all of the predevelopment costs.

The value of these city concessions is calculated or “monetized” and, in return, the city would typically require that the developer assume specific risks, for purely financial reasons, to insure that the project moves forward and to incentivize the developer to keep its money in the project. The city might, for example, require that the developer take the land for the backbone infrastructure early, engineer and build it according to a schedule in order to “prime the pump” regardless of whether the market is present for development at that time. Similarly, the contract might require the developer to develop at its own cost key public benefits, such as parks and

community facilities, and dedicate them to the city. These negotiations also often produce a profit-sharing arrangement. In many situations the developer has a right to the excess of project revenues over project costs up to a certain IRR, and after that, the parties divide profits according to an agreed formula.

The draft contract allocates financial and performance rights and obligations. The deal documents for a typical large project consume the space of several or many large binders. These documents define the relationship, and what is it really? The relationship that emerges from these arduous negotiations is actually in the nature of a complex partnership. In some situations it takes that legal form (typically a “joint venture”). In either case, for example, the city might contribute tax-increment financing, tax relief, substantial in-kind predevelopment costs, and the land either for free or at below market value (“written down”). The developer makes a large initial cash infusion prior to the sale of bonds for most of the predevelopment costs, contributes the remaining cash required after public financing for most of the predevelopment, demolition, and construction of the infrastructure and improvements. The developer takes the market risk, and is charged with the sale or lease of the revenue-producing elements.

In light of this complex reality, how fare the archetypes underlying the rule that the government must never condemn the land of A to give it to B? Where is the line between public and private? Has not the creative effort of modern public-private redevelopment, dedicated to maximizing efficiency of role, destroyed the very concepts? This is no longer a regulatory world in which government exercises a reactive, police-power role and the developer plays the protagonist. This is instead a contractual world, where the elements of the traditional roles are broken apart and rearranged with much refinement to reflect the needs and attributes of each party. The government typically is the project protagonist, affirmatively pushing the redevelopment to achieve public benefits. This public-benefit package often achieves major public goals such as the production of low-income housing, creation of new jobs for a lower-income community, construction of new parks and recreational facilities, and needed infrastructure. The developer is more of an agent of the public, performing specified tasks for a return which allows it to function and attract the necessary private capital to make the project succeed. In some cases, this agency relationship is formalized such that the developer simply performs its obligations for a negotiated fee. Whatever the form, public gain and private gain intertwine.

#### CONCLUSION

The Courts that produced *Berman* and *Midkiff* would have employed judicial deference to legislative efforts and respect for the changing nature of the police power to sidestep entirely the unrealities of the *Kelo* opinions discussed in this essay. Relying on *Berman*, O'Connor herself wrote in *Midkiff* that “the Court has made clear that it will not substitute its judgment for a legislature’s

judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”<sup>33</sup>

How then does one explain the change in the Court, the tepid majority, and the change in Justice O’Connor? The explanation, though not the excuse, this essay contends, lies in all that has been discussed above. Justice O’Connor could, and the other Justices would, with no special land use expertise, grasp the unusual concentration of power in *Midkiff*. The feudal remnant that owned so much of Hawaii’s land represented a concept hostile to both capitalism and individual liberty. It is easy for an American conservative, even a property rights advocate, to find in her ideological orthodoxy a home for Hawaii’s effort to extirpate the oligarchy so the modern land-use market could function.

The same cannot be said for redevelopment. The *Kelo* Justices do not grasp the context or the program. The movement towards new forms of capitalism that partners with the state has no place in their belief structure. The majority does not comprehend the new concepts and the dissents are utterly uncomfortable with the heart of the public-private relationship, or do not care. The Court lives in the past when the public and private roles were crisply separate. They do not understand how much the public has benefited from the commingling of those roles. They would prefer to return to an era when government built roads and parks with general fund money derived from property taxes, and the private market built the houses and shops.

The ignorance of the *Kelo* court is a sad commentary on the failure of thoughtful land-use experts to communicate a policy idea beyond its immediate practitioners, a failure especially poignant because much of this entire sea change in land use comes at the urging of thoughtful conservatives who have spearheaded, intellectually and in practice, the movement to remake government in ways that imitate qualities found in the private sector, and to bring to government land-use planning an understanding of economics and the operation of markets.

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<sup>33</sup> *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

# ***Lingle* and *Kelo*: The Accidental Tourist in Canada and NAFTA-Land**

L. Kinvin Wroth\*

## INTRODUCTION

At the end of its 2004 term the United States Supreme Court decided two important cases on governmental “takings” of private property. This essay offers some preliminary thoughts on the relationship of those decisions to the varying approaches to public acquisition of private property in the United States and Canada and under the international regime of the North American Free Trade Agreement (NAFTA).

### I. *LINGLE, KELO* AND THE FIFTH AMENDMENT

*No person shall... be deprived of... property, without due process of law; nor shall private property be taken for public use, without just compensation.*<sup>1</sup>

The Takings Clause of the Fifth Amendment, set forth above, expressly confers a right to “just compensation” if two other questions are appropriately answered: (1) When is property “taken” so as to invoke the right to that compensation? (2) What uses are sufficiently “public” to permit a government to take private property? An extensive jurisprudence has developed around these questions. In *Lingle v. Chevron U.S.A. Inc.*<sup>2</sup> and *Kelo v. City of New London*,<sup>3</sup> the Supreme Court dealt with the questions in ways that brought fresh, if not universally applauded, clarity to the inconsistent and incomplete judicial interpretations with which they had become encrusted.

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\* Professor of Law and Director of the Land Use Institute, Vermont Law School. With apologies to Anne Tyler, *The Accidental Tourist* (New York, 1985). The author wishes to thank his colleagues, Oliver Goodenough and Janet Milne, for their insightful comments on drafts of this essay; John J. Weil, Vermont Law School, '06, for his research on Canadian and NAFTA issues; and Jennifer L. Turnbull, Vermont Law School, '06, for her essential editorial assistance.

<sup>1</sup> U.S. CONST. amend. 5 (the “Takings Clause”).

<sup>2</sup> 125 S. Ct. 2074 (2005).

<sup>3</sup> 125 S. Ct. 2655 (2005).

## A. Lingle

*Lingle* was a challenge by Chevron, Hawaii's largest gasoline refiner and marketer, to a legislative act capping the rent that oil companies could charge retail dealers who leased company-owned service stations. The cap provision was part of a larger scheme to address retail gasoline-market concentration by protecting independent dealers through restrictions on oil-company ownership and leasing of service stations. Chevron sought both a declaratory judgment that the cap violated the Takings Clause and an injunction against application of the cap to Chevron's stations. The district court and court of appeals, relying on the standard announced by the Supreme Court in *Agins v. City of Tiburon*,<sup>4</sup> held that the cap violated the Takings Clause because it did not "substantially advance" Hawaii's interest in preventing market concentration. The Supreme Court reversed.<sup>5</sup>

A unanimous Court, in an opinion by Justice O'Connor, held that the *Agins* "substantially advance" test is not the appropriate standard for determining whether a regulatory measure effects an uncompensated taking that violates the Fifth Amendment. Recognizing that "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property,"<sup>6</sup> Justice O'Connor laid out three categories of "regulatory takings" that decisions of the Court have recognized since the concept was first articulated in the 1922 decision of *Pennsylvania Coal Co. v. Mahon*.<sup>7</sup> The first two categories were characterized as "*per se* takings": (1) Where the regulation imposes permanent physical invasion, "however minor" (a "*Loretto*" taking);<sup>8</sup> (2) Where the regulation "completely deprive[s] an owner of 'all economically beneficial us[e]'" (a "*Lucas*" taking).<sup>9</sup> The third category, "*Penn Central*" takings, embraced those where the regulation has sufficient impact in some other way—(a) some economic impact, particularly interference with "investment-backed expectations"; or (b) an effect on individual property interests rather than an adjustment of "the benefits and burdens of economic life to promote the common good."<sup>10</sup> These

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<sup>4</sup> 447 U.S. 255 (1980).

<sup>5</sup> 125 S. Ct. at 2077-80, 2085.

<sup>6</sup> *Id.* at 2081, citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (seizure and operation of coal mine to prevent strike), and *United States v. Gen Motors Corp.*, 323 U.S. 373 (1945) (occupation of private warehouse).

<sup>7</sup> 260 U.S. 393 (1922) (Holmes, J.).

<sup>8</sup> 125 S. Ct. at 2081, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (requiring that landlords permit cable companies to install facilities in apartment buildings).

<sup>9</sup> *Id.*, quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in the original) (addressing coastal zone regulations prohibiting any development of property adopted after owner purchased lots).

<sup>10</sup> *Id.* at 2082, quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (holding that denial of permit to build on top of designated historic landmark, where transfer of development rights would have been permitted if sought, was not a taking). The Court cited *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-618 (2001) (finding that rejection of petition to fill salt marsh was not a taking where property retained substantial development value), *id.*, at 632-634 (O'Connor, J., concurring), as an example of the *Penn Central* factors in action. 125 S. Ct. at 2082.

three categories “aim[s] 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 upon the severity of the burden that government imposes upon private property rights.”<sup>11</sup>

By contrast, said the Court, though the *Agins* “substantially advances” test has been treated as an additional test for identifying a compensable regulatory taking, the test, when properly analyzed in context, sets forth a due process standard. It was derived from the earliest zoning cases, which were challenges to the exercise of the police power decided on substantive due process grounds. The test thus goes to the reasonableness of the governmental action as a means of achieving a legitimate governmental purpose. Unlike the *Loretto/Lucas/Penn Central* regulatory takings tests, the *Agins* test, by not focusing on the magnitude of the impact or its allocation among property interests, does not serve the purpose of the Takings Clause as applied to regulatory actions.<sup>12</sup> In sum, a regulation that would survive a due process/police power inquiry must still be determined to be a taking under the functionally oriented *Loretto/Lucas/Penn Central* tests. The Takings Clause is about compensation, not about the validity of governmental action. The Clause “presupposes that the government has acted in pursuit of a valid public purpose.”<sup>13</sup> Conversely, if the governmental action does not meet the due process test, or is not a “public use” within the meaning of the Takings Clause, “that is the end of the inquiry. No amount of compensation can authorize such action.”<sup>14</sup> Whatever its merits might have been as a due process challenge, *Chevron’s* claim on the facts did not establish a compensable taking.<sup>15</sup>

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<sup>11</sup> 125 S. Ct. at 2082.

<sup>12</sup> *Id.* at 2082-84.

<sup>13</sup> *Id.* at 2084.

<sup>14</sup> *Id.* Justice O’Connor made clear that prior cases using the “substantially advances” test were not overruled and, indeed, could be rationalized because “in no case have we found a compensable taking based on such an inquiry.” *Id.* at 2086. She distinguished *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), both previously classified as *Loretto* physical invasion cases, *supra*, text at note 8, as “land-use exaction” cases, conditioning grant of a development permit on dedication of a public easement. *Id.* The “substantially advances” test was used in those cases to decide “whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether” in order to determine whether insistence on the dedication was an unconstitutional condition because grant of the permit was insufficiently related to the property taken. *Id.* at 2087.

<sup>15</sup> *Id.* at 2085. *Chevron* had not argued a due process violation; in any event, the Court noted that the district court had employed a heightened scrutiny that had long been rejected in economic regulation cases. *Id.* Justice Kennedy, in a brief concurrence, *id.* at 2087, noted that the decision “does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process,” citing *E. Enter v. Apfel*, 524 U.S. 498, 539, 550 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (noting “the rare instances in which such a permissive standard has been violated”).

### B. Kelo

In *Kelo*, the City of New London, Connecticut, and appropriate state agencies, spurred by the intentions of Pfizer, Inc., to build a \$300 million pharmaceutical research facility in the city, had approved an “integrated development plan” for a ninety-acre shoreline area adjacent to the Pfizer site.<sup>16</sup> The area consisted of 115 private parcels and a thirty-two-acre parcel formerly occupied by a United States naval facility and now partly occupied by a state park. The plan provided for mixed uses, including eighty new residences; a new U.S. Coast Guard museum; a public walkway linking the state park and other uses; an “urban village” containing a hotel, restaurants, and shops; a 90,000 square-foot research and development office facility adjacent to the Pfizer site; recreational marinas and other water-dependent commercial uses; and parking and other retail and office uses. Certain parcels were to be leased to a private developer for subsequent leasing to as-yet-unknown tenants. The purpose of the plan was to take advantage of Pfizer’s arrival by creating jobs, increasing tax revenue, stimulating downtown revitalization, making the city more attractive, and creating leisure and recreational opportunities in a city that had been designated by the state as economically distressed. The city was able to negotiate for the purchase of most of the properties in the area but had to initiate condemnation proceedings against nine individuals owning fifteen properties.<sup>17</sup> The owners sought injunctive relief against the condemnation, claiming that it would violate the public use provision of the Takings Clause.<sup>18</sup> Ultimately, the Connecticut Supreme Court held that all of the takings were for a public use under Connecticut’s municipal development statute and Constitution, as well as the Fifth Amendment, and that the takings were “reasonably necessary” to achieve the public use and served “reasonably foreseeable needs.”<sup>19</sup>

The United States Supreme Court in a five-to-four decision, with Justice Stevens writing for the majority, affirmed the decision below. Citing *Berman v. Parker*,<sup>20</sup> *Hawaii Housing Authority v. Midkiff*,<sup>21</sup> and earlier decisions, Justice Stevens noted that the meaning of “public use” in the Fifth Amendment had evolved from the idea of a use open to the general public to a notion of “public purpose.”<sup>22</sup> That term had been defined broadly to reflect significant deference to the legislature in many situations where the goals of a taking included economic development and the ultimate beneficiaries included private parties.<sup>23</sup> Applying this approach, Stevens found that, in light of the comprehensive nature

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<sup>16</sup> *Kelo v. City of New London*, 125 S. Ct. 2655, 2659 (2005). For a description of the redevelopment plan, see *id.* at 2659-60.

<sup>17</sup> *Id.* at 2660.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2660-61. The Connecticut decision is *Kelo v. City of New London*, 843 A.2d 500 (2004).

<sup>20</sup> 348 U.S. 26 (1954) (condemnation of blighted residential area for both public and private redevelopment).

<sup>21</sup> 467 U.S. 229 (1984) (transfer of title from lessors to lessees to reduce concentration of land ownership).

<sup>22</sup> 125 S. Ct. at 2662-63.

<sup>23</sup> *Id.* at 2661-65.

of the plan, its range of purposes, the extensive deliberative process used in its development, and the deferential nature of the scope of review, the New London plan served a public purpose and the takings satisfied the public use requirement.<sup>24</sup> In so deciding, he rejected arguments for adoption of a rule that economic development could not constitute a “public use” for Fifth Amendment purposes or, alternatively, that in the case of a taking for economic development there must be a heightened standard of review, “a reasonable certainty” that the public benefits sought would occur.<sup>25</sup> Both of his positions reflected the established principle of deference to legislative judgment. In particular, he found that the “reasonable certainty” test would have involved inappropriate scrutiny of the legislative judgment, like the “substantially advances” test rejected in *Lingle v. Chevron U.S.A. Inc.*, as a substantive due process notion.<sup>26</sup>

In a vigorous dissent, Justice O’Connor, distinguishing the authorities relied upon by the majority, focused on the economic development aspects of New London’s plan, the portions of it that would benefit private interests, and its impact on individual property owners. She rejected arguments that a lesser standard of review would impose sufficient limits on private benefit and that the comprehensiveness of the plan and its process sustained its character as serving a public purpose.<sup>27</sup> Dissenting separately, Justice Thomas urged a reconsideration of *Berman* and *Midkiff* and a return to a narrower original understanding of the meaning of “public use.”<sup>28</sup>

### C. The Fifth Amendment

*Lingle* and *Kelo* read together remove a creeping anomaly from the jurisprudence of the Takings Clause. Both decisions deal with the often cloudy relationship of that provision to due process limitations on the police power. While the federal government may legislate only pursuant to the specific powers conferred by Article I, Section 8, of the Constitution, as amplified by the Necessary and Proper Clause, the police power is a broad residual power of state governments to act for the public health, safety, and general welfare, subject to the minimal due process limitation that such actions must be rationally related to those legitimate governmental interests.<sup>29</sup> *Lingle* reasserted the

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<sup>24</sup> *Id.* at 2665.

<sup>25</sup> *Id.* at 2667.

<sup>26</sup> *Id.* at 2667-68; see text, *supra* at notes 2-15 (discussing *Lingle*), Justice Kennedy, in concurrence, emphasized the relationship of the majority’s deferential test to the due-process/equal protection rational basis test commonly applied to economic regulation. *Id.* at 2669-70 (Kennedy, J., concurring). He noted, however, that a higher standard of review might be appropriate if factual circumstances, not present here, suggested a pre-textual public benefit that might mask an intention solely to benefit private parties. *Id.* at 2670.

<sup>27</sup> *Id.* at 2671-77 (O’Connor, J., dissenting).

<sup>28</sup> *Id.* at 2677-87 (Thomas, J., dissenting).

<sup>29</sup> See, generally, JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 11.10, 11.13 (7<sup>th</sup> ed. 2004). The federal government has a “police power” for regulation on federal property, including the District of Columbia. *Id.* § 11.10, n. 2.

fundamental purpose of the Takings Clause, holding that even in the context of regulatory takings the focus should be on the impact on the owner, not on the appropriateness of the government's action. A police power/due process type of inquiry about the relationship of governmental action to governmental purpose was proper in determining whether there was a "public use" or purpose, not in determining whether there had been a taking. The Court thus removed a "police power-plus" factor from the takings equation, which under the *Agins* "substantially advances" test had required the Court to consider the purpose question twice—in both the "public use" and takings determinations. *Kelo* reaffirmed earlier decisions holding that takings satisfied the public use requirement if they were legitimate exercises of the police power.<sup>30</sup> In so holding, the majority of the Court rejected another "police power-plus" test that would have subjected the states' actions to a more rigorous level of scrutiny where economic development was the purpose. For all practical purposes, under *Kelo* it is now clear that governmental action that may be a taking requiring compensation is legitimate if it satisfies the standard for a valid exercise of the police power.<sup>31</sup>

In sum, *Lingle* and *Kelo* mean that, if governmental action is not warranted by the police power because it does not satisfy the due process rational relationship test, it is not a public use and the government cannot undertake the action even if it compensates the affected property owner. The owner's remedy in such a case may be an action for violation of the Due Process Clause under Section 1983 of the Civil Rights Act.<sup>32</sup> If the action satisfies the police power standard, then it is a public use to which a court must apply Takings Clause principles to determine whether the action is a taking and thus compensable.

## II. O CANADA . . . .

"[T]he prohibition 'Thou shalt not steal' has no legal force upon the sovereign body."<sup>33</sup>

In Canada, governmental takings of private property are considered under the more elegant rubric "expropriation." The above and oft-quoted words of Mr. Justice Riddell, in a decision

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<sup>30</sup> See *Berman v. Parker*, 348 U.S. 26, 31, 35 (1954) *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241-42 (1984), discussed *supra*, text and notes 20-21. Though not noted by the majority, both decisions equated the public use requirement with the police power (applicable to the federal government in *Berman* because the taking was for redevelopment in the District of Columbia; see *supra* note 29).

<sup>31</sup> Justice Kennedy would apply a higher standard of review to a pretextual public benefit whether or not the governmental action was a taking. *Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (Kennedy, J., concurring).

<sup>32</sup> 42 U.S.C. § 1983. See, e.g., *Woodwind Estate, Ltd. v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000) (allowing due process claim under 42 U.S. § 1983 against town for improper motive or bad faith in denial of subdivision plan); see, generally, JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS §§ 18.01-18.03 (Supp. 2005).

<sup>33</sup> *Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275, 279 (Riddell, J.), *aff'd*, [1910] 43 O.L.R. 474 (Ontario P.C.).

holding that no compensation was owed for an expropriation in which a statute denied it, overstate, but describe, the Canadian bottom line.<sup>34</sup> Under principles of parliamentary sovereignty derived from the unwritten British Constitution, Canada's federal Parliament and provincial legislatures may infringe individual rights that are not protected by the 1982 Canadian Charter of Rights.<sup>35</sup>

The starting point for analysis is the Constitution Act of 1867, the constitutional framework of Canadian federalism, which distributes governmental powers between the federal and provincial governments.<sup>36</sup> The general plan of the 1867 Act is that the powers of both levels of government are limited to those expressly granted in sections 91 and 92 of the Act. Section 91 enumerates specific federal powers and contains a residual power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters" that are not exclusively of provincial jurisdiction (the "POGG" Power).<sup>37</sup> The specific provincial powers enumerated in section 92 include, in section 92(13), exclusive power to "make Laws in relation to . . . Property and Civil Rights in the Province."<sup>38</sup> Though the "Fathers of Confederation" intended to establish a strong national government, nearly a century of interpretation of the 1867 Act by the British Privy Council left many of the federal powers (including the POGG Power) narrowly confined and gave broad scope to the provincial Property and Civil Rights Power.<sup>39</sup> If there is no Charter of Rights protection of particular individual interests, the only limits on the exercise of those powers are found in the interplay of federal and provincial powers, legislative wisdom and prudence, and judicially enforceable principles of the common law and statutory interpretation.

The Charter of Rights contains no express or implied "due process" protection of property or other economic rights and no provision that, like the Takings Clause, would impose a requirement of "public use" or compensation for a governmental appropriation of private property.<sup>40</sup>

<sup>34</sup> *Id. See, e.g.*, 1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 28-12, n.58 (4th edn. 1997, supp. 2004); *Authorson v. Canada (A.G.)*, [2003] S.C.R. 40; John A. H. Clay, *Expropriation: A Federal Tool*, CAN. ADMIN. L. & PRAC. 1, 5 (2001-2002); ERIC C.E. TODD, THE LAW OF EXPROPRIATION AND COMPENSATION IN CANADA 34 (2d ed. 1992).

<sup>35</sup> Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I (Can.), enacted as Schedule B, Canada Act 1982, ch. 11 (U.K.); *see, generally* HOGG, *supra* note 34 12.1, 12.2. Indeed, in a survival of principles of parliamentary sovereignty, many of the Charter protections may be overridden by an express legislative declaration. Canadian Charter of Rights, § 33; HOGG, *supra* note 34 12.2(b).

<sup>36</sup> Originally enacted as the British North America Act, 1867, 30 & 31 Vic., c. 3 (U.K.), renamed the Constitution Act, 1867, in the Constitution Act, 1982, § 53(2), Part VII (Can.), enacted as Schedule B, Canada Act 1982, ch. 11 (U.K.). *See generally* HOGG, *supra* note 34, §§ 1.2, 5.3.

<sup>37</sup> Constitution Act, 1867, § 91.

<sup>38</sup> *Id.*, § 92(13).

<sup>39</sup> The appellate jurisdiction of the Privy Council ("the 'wicked stepfathers of confederation' ") ended in 1949, but the spirit of its decisions persists. HOGG, *supra* note 34, § 5.3(c).

<sup>40</sup> *See* 1 P. *id.* at 28-11 to- 28-13; TODD, *supra* note 34, at 31-38. The statutory Canadian Bill of Rights, R.S.C. 1985, App. III, contains a due process clause that has been held to protect only procedural rights and, in any event,

Thus, the scope and purposes of expropriation must be divined from the interlocking provisions of the 1867 Act. Expropriation must be for a purpose within one of the powers allocated to the respective levels of government in sections 91 and 92. The federal power to expropriate has been closely confined to the heads of section 91, with only a slight leeway under the POGG Power.<sup>41</sup> The provincial expropriation power, based not only on specific section 92 powers but on the Property and Civil Rights Power under section 92(13), has a broader and less defined reach.<sup>42</sup> Within this framework, an expropriation may only be challenged as *ultra vires*, that is, beyond the constitutional or statutory power of the expropriating government or agency. Though there is no due process limit on governmental action, the courts have been careful to distinguish expropriation from the tort of abuse of public office, for which damages may be awarded if, for example, an effort to take land or diminish its value is undertaken in bad faith.<sup>43</sup>

Mr. Justice Riddell evidently sought to soothe any pain engendered by his comment in *Florence Mining Co.*<sup>44</sup> a few years later, when he assured the Iowa Bar Association that “In Canada, nobody at all is afraid that his property will be taken from him; it never is, in the ordinary case.”<sup>45</sup> This comment describes a Canadian sense of security that has a non-constitutional source: Despite the breadth of legislative power, as a matter of sound policy and judicial interpretation, rather than constitutional right, payment of compensation for expropriation of property is the rule. Authorization to expropriate for particular purposes is conveyed in specific federal and provincial legislation and, by delegation, in municipal bylaws. General federal and provincial expropriation laws provide a process and standards for the determination and award of compensation when the government expropriates property in accordance with the applicable act and for payment of

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applies only to the federal government and lacks entrenched constitutional status. It has been expressly held not to import the Takings Clause. HOGG, *supra* note 34, at 28-12; *infra*, text at notes 50-51. There is, in fact a “takings clause” in Article 952 of the revised Quebec Civil Code, S.Q. 1991, c. 64, § 952, which provides: “No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in consideration of a just and prior indemnity.” In *Société Asbestos v. Société nationale de l’amiante* (1981), 128 D.L.R. (3d) 405 (Que. C.A.), the court noted that the predecessor of this article, Article 407 of the Quebec Civil Code of 1866, lacked the constitutional status of the provision of the French Code Napoleon (1803) from which it was taken and that, as permitted by Article 1589 of the 1866 Code, a subsequent specific legislative provision for the timing of payment superseded the requirement of Article 407 that the indemnity be “previously paid.”

<sup>41</sup> See HOGG, *supra* note 34, at § 28.5(a).

<sup>42</sup> See *id.* at § 28.5(b) TODD, *supra* note 34, at 31-32.

<sup>43</sup> See, e.g., *Alberta (Minister of Public Works, Supply, & Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.) (holding that Crown officers’ intentional imposition of development freeze for *ultra vires* purpose was abuse of public office). See generally, Raymond E. Young, *Canadian Law of Constructive Expropriation*, 68 SASK. L. REV. 345 (2005).

<sup>44</sup> *Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275, 279, text, *supra*, at notes 33, 34.

<sup>45</sup> William Renwick Riddell, *The Constitutions of the United States and Canada*, 32 CAN. LAW TIMES 849, 871 (1912), quoted in David. Schneiderman, *NAFTA’s Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 523 at n.137 (1996).

consequential damages for injury to land occasioned by public action other than a taking (“injurious affection”).<sup>46</sup>

When governmental action not covered by such a statute is judicially determined to be an expropriation, the courts follow a principle of statutory construction adopted from the British common law that the right to compensation will be presumed unless the statute expressly indicates that no compensation is to be paid.<sup>47</sup> Nevertheless, it still remains true, as suggested by Mr. Justice Riddell in *Florence Mining Co.*,<sup>48</sup> that compensation may be denied if the expropriating government so ordains. For example, in *Authorson v. Canada*, the Supreme Court of Canada upheld federal legislation expressly barring the payment of interest accrued on disabled veterans’ pensions prior to January 1, 1990, as an expropriation not barred by the statutory Canadian Bill of Rights.<sup>49</sup> The Court declined to read the American doctrine of substantive due process into the Bill of Rights.<sup>50</sup> In *R. v. Appleby*, the New Brunswick Court of Appeal upheld federal legislation requiring the publisher of a book in Canada “at his own expense” to send two copies of the book to the National Librarian as an expropriation within the power of Parliament. Defendant had argued that the Takings Clause of the Fifth Amendment should be read into the Canadian Bill of Rights.<sup>51</sup> Thus, Canadian expropriation law in appropriate circumstances permits what would be an anomaly, if not an oxymoron, under U.S. law: An uncompensated taking.

#### *A. Constructive or De Facto Expropriation*

The presumption of compensation is of most significance in cases of constructive or *de facto* expropriation, which by definition arise outside the statutory expropriation framework.

<sup>46</sup> See TODD, *supra* note 34, at 7-14, 26-29. As to “injurious affection” (“not an emotion but an effect,” quoting *Edwards v. Minister of Transp.*, [1964] 2 Q.B. 134, 144 (Harlan, L.J.)), see *id.* at 328-93 (explaining that even if an owner’s land has not been expropriated, the owner may claim compensation in certain situations, for “injurious affection” caused to the land from the government’s lawful activities on neighboring land).

<sup>47</sup> *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, citing *A.G. v. De Keyser’s Royal Hotel*, [1920] A.C. 508, 542 (H.L.); *R. British Columbia v. Tener*, [1985] S.C.R. 533; see also *Rock Res., Inc. v. British Columbia*, [2003] 229 D.L.R. (4<sup>th</sup>) 115 (B.C.C.A.); *Steer Holdings Ltd. v. Manitoba* (1992), 99 D.L.R. (4<sup>th</sup>) 611 (Man. C.A.). See generally 357-63 (2005); 1 P. HOGG, *supra* note 34, at 28-9 to 28-11; TODD, *supra* note 34, at 35-38.

<sup>48</sup> *Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275, 279, discussed *supra*, text at notes 32, 34.

<sup>49</sup> *Authorson v. Canada (A.G.)* (2003), 227 D.L.R. (4<sup>th</sup>) 385.

<sup>50</sup> See text, *supra* at notes 12-15, 29-31 for discussion of the American doctrine of substantive due process. As to the Canadian Bill of Rights, see *supra* note 35.

<sup>51</sup> *R. v. Appleby* (1976), 76 D.L.R. (3d) 110 (N.B. A.D.). For cases finding the presumption rebutted in provincial legislation, see, e.g., *Canadian Pac. Ry. v. City of Vancouver* (2004), 237 D.L.R. (4<sup>th</sup>) 40 (B.C.C.A.); *B.C. Med. Serv. Ass’n v. R.* (1984), 15 D.L.R. (4<sup>th</sup>) 568 (B.C.C.A.).

Canadian law in this area is founded on two leading decisions by the Supreme Court of Canada.<sup>52</sup> In *Manitoba Fisheries Ltd. v. R.*,<sup>53</sup> the federal government had given a monopoly of freshwater fishing to a Crown corporation (an entity created by and acting as agent of the Crown). The new entity did not acquire plaintiff's physical assets but absorbed all of its suppliers and customers. The Supreme Court held that plaintiff should receive compensation for the loss of business and good will, which had been acquired by the Crown. Citing *Manitoba Fisheries*, the Court held in *British Columbia v. Tener*<sup>54</sup> that a series of provincial acts that deprived plaintiffs of the right to access mineral deposits that they owned in a provincial park under a previous Crown grant required compensation, even though plaintiffs remained in possession of the mineral deposits. The Crown had reacquired a portion of its earlier grant, enhancing the value of the park. In both cases, since there was no formal statutory expropriation provision, the right to compensation was based on the presumption of compensation.

In subsequent cases, the courts have read these decisions to require not only a deprivation of beneficial use but an acquisition of an interest by the Crown as a condition for compensation. For example, in *Mariner Real Estate Ltd. v. Nova Scotia*,<sup>55</sup> the Nova Scotia Court of Appeal held that a designation of plaintiffs' property as "beach" under the provincial Beaches Act and a refusal of building permits for houses with concrete foundations did not deprive them of all reasonable use and did not amount to an acquisition of the land by the Crown entitling them to compensation under the provincial Expropriation Act. Declining to follow regulatory takings decisions of the U.S. Supreme Court because of their Constitutional basis, the court described its function as merely interpreter of the Expropriation Act, which it said, following *Manitoba Fisheries* and *Tener*, required deprivation of "all reasonable private use," not merely the loss of the economic value of the land. Moreover, the acquisition must be of an actual property interest, not merely an enhancement of value of the Crown's property. The court distinguished in this regard *Lucas v. South Carolina*<sup>56</sup> on the grounds that the U.S. Supreme Court had recognized regulatory takings under the Fifth Amendment for deprivation of economic value without the taking of a property interest. While other cases have softened the principle at the edges, no decision has abandoned the two prongs of virtually complete

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<sup>52</sup> See generally, Young, *supra* note 43, at 357-63; Clay, *supra* note 34, at 12-13; TODD, *supra* note 34, at 24-25, 165-68; HOGG, *supra* note 34, at 28-11.

<sup>53</sup> [1979] S.C.R. 101.

<sup>54</sup> [1985] S.C.R. 533; see also *Rock Res., Inc., v. British Columbia* (2003), 229 D.L.R. (4th) 115 (following *Tener* as to personal property); *Casamiro Res. Corp. v. British Columbia (A.G.)* (1991), (A.G.), 80 D.L.R. (4th) 1 (B.C.C.A.).

<sup>55</sup> 177 D.L.R. (4th) 696.

<sup>56</sup> 505 U.S. 1003 (1992) The court also noted the statement in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) that the purpose of the Takings Clause was to prevent individuals from bearing burdens that in fairness should be borne by the public, but stated that the task of Canadian courts was the narrower one of determining whether an expropriation was justified by statute. The court did, however, look with favor on the requirement of ripeness asserted in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997).

deprivation and acquisition.<sup>57</sup> As a result of this approach, land use and planning decisions generally are viewed as “regulatory” and do not result in compensation even when the burden on the owner is significant.<sup>58</sup>

### *B. Public Use or Purpose*

In effect, the limited federal POGG Power because of its residual nature, and the provincial Property and Civil Rights Power because of its great breadth, serve the police power function of the Fifth Amendment’s public use requirement. Most cases in which expropriation is challenged do not address the issue of public purpose. They involve purposes that are clearly within the powers of the expropriating authority, and the issue is whether the government action is an expropriation.<sup>59</sup> As noted above, the limit on expropriation powers is not found in due process or Taking Clause protection but in the ability to challenge an expropriation as *ultra vires* the expropriating government or agency. Provincial or federal expropriations are subject to this challenge if they are in conflict with the powers of the other level of government. Thus, direct challenges to expropriation legislation often raise issues of federalism.

For example, in *Reference Re Upper Churchill Water Rights Reversion Act 1980*,<sup>60</sup> the Supreme Court of Canada held *ultra vires* a Newfoundland act that provided for reversion to the province of all rights in a 1961 lease of hydro-electric resources to the Churchill Falls Corporation, repeal of the lease act, and expropriation of all of the corporation’s power-generation facilities. Compensation was to

<sup>57</sup> See, e.g., *A & L Investments Ltd. v. Ontario* (1997), 152 D.L.R. (4th) 692 (holding that legislation voiding rent increases was not an expropriation because government obtained no property); see generally, Young, *supra* note 43, at 353-57.

<sup>58</sup> See, e.g., *Alberta (Minister of Public Works, Supply, and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.) (holding that development freeze in greenbelt area for later use as transportation corridor was not expropriation); *Manitoba Ltd. v. Manitoba* (2002), 214 D.L.R. (4th) 37 (Man. C.A.) (holding that denial of permit as inconsistent with park management plan was not expropriation); *Re Brighton (Municipality of) Official Plan Amendment No. 20, 46 O.M.B.R. 78* (Ont. Mun. Bd. 2003) (finding that a plan amendment resulting in designation of land as environmental protection is not expropriation and citing and distinguishing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), as to quantum of diminution required); *Harvard Inv. Ltd. v. Winnipeg* (1995), 129 D.L.R. (4th) 557 (Man. C.A.) (determining that historic property designation was not an expropriation), (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)); *Steer Holdings Ltd. v. Manitoba* (1992), 99 D.L.R. (4th) 61 (Man. C.A.) (holding that legislation general in nature but specifically designed to stop plaintiff’s development was a “taking away” but not an expropriation because there was no acquisition by province).

<sup>59</sup> See, e.g., *British Columbia v. Tener*, [1985] S.C.R. 533 (provincial park); *Steer Holdings Ltd. v. Manitoba* (1992), 99 D.L.R. (4th) 61 (Man. C.A.) (planning and zoning); *B.C. Med. Servs. Ass’n v. R.* (1984), 15 D.L.R. (4th) 568 (B.C.C.A.) (regulation of medical profession); *Roberts v. Newfoundland & Labrador* (2005), 255 D.L.R. (4th) 673 (N.L.C.A.) (public hospital); *Alberta (Minister of Public Works, Supply, & Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.) (development freeze).

<sup>60</sup> [1984] 1 S.C.R. 297.

be paid only to secured creditors and to shareholders for diminution in the value of their shares. The Newfoundland act did not provide compensation for the corporation's facilities. Thus, the act could not be sustained under section 92(13) of the 1867 Constitution Act, because, by rendering the corporation unable to fulfill its contractual commitments to supply power to Hydro-Quebec, a Quebec entity, it affected property and civil rights outside the province.<sup>61</sup> The Quebec Court of Appeals, in *Société Asbestos v. Société nationale de l'amiante*, held that Quebec legislation providing for the expropriation of the property of the Asbestos Corporation was *intra vires*, that is, a valid exercise of the provincial power under section 92(13). The legislation did not affect the structure and other potential activities of the federally incorporated Société Asbestos and primarily affected facilities and resources within the province, with only an incidental effect on inter-provincial trade and commerce, over which there was federal power under section 91(2) of the Constitution Act.<sup>62</sup> In addition to challenges based on federal-provincial distribution of powers, governmental actions may also be challenged as *ultra vires* because they are beyond the powers delegated by the federal or provincial government to a municipality or other entity.<sup>63</sup> With the focus thus on distribution or delegation of power, expropriation for the benefit of private interests has not been an issue where governmental action is *intra vires*.<sup>64</sup>

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<sup>61</sup> See also *Munro v. National Capital Comm'n.*, [1966] S.C.R. 663 (holding that POGG power sustained expropriation to create a green belt, because act was not "in relation to provincial property and civil rights"); *R. v. Appleby* (1976), 76 D.L.R. (3d) 110 (N.B.A.D.) (upholding expropriation as within POGG Power), discussed *supra*, text at note 51.

<sup>62</sup> *Société Asbestos v. Société nationale de l'amiante* (1981), 128 D.L.R. (3d) 405 (Que. C.A.) The court interpreted the Quebec legislation to apply only to property and resources within the province, thus avoiding the issue that led to the conclusion that the legislation in *Upper Churchill Water Rights*, [1984] 1 S.C.R. 297, text *supra* at notes 60-61, was *ultra vires*.

<sup>63</sup> See, e.g., *Canadian Pac. Ry. v. City of Vancouver* (2004), 237 D.L.R. 40 (B.C.C.A.) (determining that designation of former rail corridor as public thoroughfare was not *ultra vires* provincial Planning Act); *McAfee v. Irving Ref. Ltd.* (1970), 17 D.L.R. (3d) 729 (N.B. A.D.) (finding expropriation for pipeline right of way within province permissible under § 92(13) of Constitution Act, 1867); *But see Steer Holding Ltd. v. Manitoba* (1992), 99 D.L.R. (4th) 61 (Man. C.A.) (explaining that if zoning bylaw is disguised confiscation, owner should seek declaration that it is *ultra vires*); *Columbia Estate Co. Ltd. v. Burnaby* (1974), 49 D.L.R. (3d) 123 (B.C. Supr. Ct.) (reserving private land for later parking use through a zoning bylaw was *ultra vires*); *Tegon Devs. Ltd. v. Edmonton* (1977), 81 D.L.R. (3d) 543 (Alta. Supr. Ct. A.D.), *aff'd sub nom. Edmonton v. Tegon Devs. Ltd.*, [1979] 1 S.C.R. 98 (1978) (holding that development freeze pending historic designation was *ultra vires* the provincial Planning Act).

<sup>64</sup> See, e.g., *Newman v. Toronto (City of)* (1998), 1998 CarswellOnt. 6347 (Ont. Joint Board) (considering property expropriated under urban redevelopment plan to be resold or leased to private interests); *Magee v. Calgary* (1979), 103 D.L.R. (3d) 686 (Alta. Q.B.) (upholding expropriation of private land for lease to private developer where private use was sufficiently subordinate to public use); *Mangin v. Windsor* (1978), 1978 Carswell Ont. 506 (Ont. S.C.D.C.) (upholding expropriation from one developer to allow second developer to construct housing project); *McAfee v. Irving Ref. Ltd.* (1970), 17 D.L.R. (3d) 729 (N.B. A.D.) (analyzing expropriation of private land for refining company's pipeline right of way). *Cf. Florence Mining Co. v. Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 275.

### C. *Lingle* and *Kelo* in Canada?

In sum, though there is no Takings Clause to limit expropriation in Canada, there are other significant limits on the practice. Expropriation may be undertaken by express statutory action or may be constructive, but only if property is rendered useless to the owner and the government acquires some interest in it. If an action is deemed to be expropriation, then compensation is either provided expressly by the expropriating statute or the right will be presumed in the absence of an express statutory denial of compensation. If an action does not meet the definition of statutory or constructive expropriation, then there is no right to compensation unless expressly provided by statute. However, the common-law torts of injurious affection and abuse of office provide remedies if governmental action causes actual damage to property or is confiscatory or undertaken in bad faith.

Despite academic concerns that NAFTA would import American takings jurisprudence wholesale into Canadian expropriation law,<sup>65</sup> Canadian courts have continued to show a marked disinclination to follow U.S. Takings Clause decisions. The *Lingle* categorization of regulatory takings may nevertheless offer guidance for decisions on constructive expropriation. Cases in which the Canadian courts have found constructive expropriation would fit into the first two *Lingle* categories: permanent physical invasion and deprivation of all economically beneficial use. The utility of the third category, where the impact of the regulation on individual property interests outweighs its contribution to the common good, is problematic in view of the strong Canadian tradition of upholding regulatory actions, particularly the regulation of land use, though it may provide a rationale for addressing expropriation issues in other areas. As to *Kelo*, despite the different Constitutional framework from which it arises, its underlying rationale is consistent with the Canadian approach. While expropriation in Canada must find its ultimate basis in an express power of the federal or a provincial government, those powers, like the police power scope given to public use in *Kelo*, are broadly stated and define the whole realm of proper public purposes. Deference is given to legislative determinations that governmental action is within those powers.<sup>66</sup>

An important common feature of *Lingle* and *Kelo* may be more instructive. The two cases together clearly assign the due process inquiry to the determination of public use and posit a police

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<sup>65</sup> Schneiderman, *supra* note 45, discussed further, *infra*, text at note 86.

<sup>66</sup> One recent Canadian comment expressed concern that *Kelo* would be understood as sanctioning use of expropriation to aid land-assembly schemes for private development. The effect would be to allow developers to avoid paying "last man standing premiums" to holdouts, because the usual compensation rules preclude consideration of increases in value caused by the impact of the land assembly process. Jeffrey W. Lem, Annotation on *Roberts v. Newfoundland & Labrador (Minister of Transportation & Works)* (2005) 255 D.L.R. (4th) 673 (N.L.C.A.). As to the usual rule, see, e.g., *Re Weidman and Minister of Pub. Works* (1979), 99 D.L.R. (3d) 472 (B.C.C.A.); TODD, *supra* note 34, at 158-62. However, avoidance of the premium would seem to be an appropriate exercise of governmental powers when an ultimate public benefit comparable to that found in *Kelo* is the purpose of the expropriation.

power reasonable-relation standard for that determination. The effect is to place new emphasis on the purpose of the Takings Clause to redress harm to the owner without regard to the extent of the governmental benefit achieved.<sup>67</sup> This focus may suggest a basis for Canadian courts to move away from the present requirement in constructive expropriation decisions that the government have acquired the interest that the property owner has lost. The *Lingle/Kelo* shift of the focus from the governmental benefit to the owner's loss makes clear the distinction between an action that is invalid because it exceeds governmental power and one that is compensable because it injures a property interest. While the Canadian decisions do not recognize any substantive due process protection of property rights that is relevant to expropriation, it is also fundamental that governmental action that is *ultra vires* is invalid. Indeed, a deliberate *ultra vires* action may give rise to damages in tort. With these protections of the property owner in place, the Canadian courts could well follow the spirit of *Lingle* and *Kelo* and begin to treat the "constructive" nature of the expropriation as rendering the requirement of acquisition constructive as well. The emphasis would be on the degree of impairment of the property owner's interest. If it is significant and the government has acted *intra vires*, the government has by definition acquired a benefit because its proper purpose has been served. The taking is then compensable unless compensation is expressly denied in the regulatory scheme.

### III. MEANWHILE, IN NAFTA-LAND . . . .

*No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.*<sup>68</sup>

#### A. Article 1110

Article 1110 of the North American Free Trade Agreement, set forth above, was adopted effective in 1994 by Canada, Mexico, and the United States, as part of Chapter 11, which implements

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<sup>67</sup> See text, *supra* at notes 29-32; see, e.g., *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2082 (2005) (goal is "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 [defining regulatory takings] focuses upon the severity of the burden that government imposes upon private property rights").

<sup>68</sup> North American Free Trade Agreement art. 1110(1), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

the NAFTA objective of substantially increasing “investment opportunities in the territories of the Parties.”<sup>69</sup> Section A of Chapter 11 provides a variety of specific protections that a Party must provide for investors of another Party, including the requirements of Articles 1102-1104 that investors be accorded the better of the treatment accorded a Party’s own nationals or foreign nationals.<sup>70</sup> Article 1105(1) provides that treatment of investments must be “in accordance with international law, including fair and equitable treatment and full protection and security.”<sup>71</sup> Article 1110(1), set forth above, prohibits expropriation of an investment except as provided therein. Paragraphs (2)-(6) of Article 1110 include requirements that compensation be at fair market value at the time of expropriation and that it “be paid without delay and be fully realizable.”<sup>72</sup> “Investment” is defined as including a corporate or other enterprise; equity, debt, and other interests in an enterprise; real estate or other tangible or intangible property acquired or used for economic benefit; and certain contract interests arising from the commitment of resources to economic activity.<sup>73</sup> Section B of Chapter 11 provides a procedure under which an individual investor may submit to binding arbitration a claim that a Party has breached a protection provided by Section A.<sup>74</sup> Arbitration tribunals consisting of three arbitrators are to decide such claims “in accordance with this Agreement [NAFTA] and applicable rules of international law.”<sup>75</sup> Awards are to “have no binding force except between the disputing parties and in respect of the particular case.”<sup>76</sup> Limited judicial review of an award is available in the domestic courts of the state where the Tribunal has sat.<sup>77</sup>

Article 1110(1) resembles the Takings Clause of the Fifth Amendment in structure, and with good reason. It is drawn in large measure from the language of a series of Bi-national Investment Treaties (BITs) that the United States developed and entered into beginning in 1982. The intention was to provide American investors in what were by and large undeveloped nations with significant protection against expropriation. The BIT terms in large part reflected the triumph of the distinctively American view of governmental appropriation of private property embodied

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<sup>69</sup> NAFTA, *supra* note 68, art. 102(1)(c).

<sup>70</sup> *Id.*, arts. 1102-1104.

<sup>71</sup> *Id.*, art. 1105(1).

<sup>72</sup> *Id.*, arts. 1110(2), (3).

<sup>73</sup> *Id.*, art. 1139. “Enterprise” is defined in *id.*, Art. 201, to mean for-profit or nonprofit entities, privately or governmentally owned, “including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.”

<sup>74</sup> *Id.*, arts. 1115-1138.

<sup>75</sup> *Id.*, art. 1131(1).

<sup>76</sup> *Id.*, art. 1136(1).

<sup>77</sup> Chapter 11 is silent on the question of judicial review of an award, but judicial review is available under two of the three arbitration regimes that Article 1120 makes available. *Id.* arts. 1122, 1136(3), (7). *See generally*, Cheri D. Eklund, *A Primer on the Arbitration of NAFTA Chapter 11 Investor-State Disputes*, 11 J. INT’L ARBITRATION., Dec. 1994, at 135.

in the jurisprudence of the Takings Clause.<sup>78</sup> So dominant did that view seem as a principle of international law that the American Law Institute substantially adopted it in the *Restatement of the Foreign Relations Law of the United States* in 1965.<sup>79</sup> A provision virtually identical to Article 1110(1) appeared in the Canada-United States Free Trade Agreement, NAFTA's immediate predecessor.<sup>80</sup> Comparable provisions are found in recent international agreements, and in pending drafts of others.<sup>81</sup>

The provisions of Chapter 11 allowing an individual investor to initiate arbitration directly with a Party state, also derived from the BITs, are contrary to the more usual practice under international agreements, in which only the Party states may proceed on behalf of their citizens for whatever remedies may be provided.<sup>82</sup> In ways evidently not anticipated by the drafters, this grant of individual standing has raised significant concerns that investor interests will make use of the arbitration procedure to override, and ultimately discourage, police power regulation, particularly at the sub-national level, that has a significant impact on investment. Though the domestic expropriation or takings law of Canada, Mexico, and the United States varies considerably, these concerns would ultimately have an impact on each of them.

### B. The Parties and NAFTA Jurisprudence

In Canada, as Part II of this paper notes, the law of expropriation, lacking a constitutional basis, is considerably less friendly to property owners than is takings law in the United States.<sup>83</sup> Mexican expropriation law, under the influence of NAFTA and a new national focus on globalization, is in a state of transition toward a more investor-friendly posture. It is founded on Article 27 of the

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<sup>78</sup> As to the development of the BIT program and the expropriation provisions, see Kenneth J. Vandavelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L LAW 621, 642-58 (1993); Kenneth J. Vandavelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 231-36 (1988).

<sup>79</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-92 (1965), revised, with addition of requirement that taking not be discriminatory, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1) (1987). Neither ALI provision includes the requirement of Article 1110(1) that the taking be "in accordance with due process of law," but see generally RESTATEMENT (THIRD), § 711.

<sup>80</sup> Canada-United States Free Trade Agreement art. 1605, Jan. 2, 1988, 27 I.L.M. 281 (1988).

<sup>81</sup> See Matthew C., Porterfield, *International Expropriation Rules and Federalism*, 23 STANF. ENVTL. L.J. 3, 41-68 (2004); Free Trade Area of the Americas Ch. XVII, art. 13, , 3d draft, Nov. 21, 2003, available at [http://www.ftaa-alca.org/FTAADraft03/ChapterXVII\\_e.asp](http://www.ftaa-alca.org/FTAADraft03/ChapterXVII_e.asp) (last visited Dec. 11, 2005); Dominican Republic-Central America-United States Free Trade Agreement chapter 10, art. 10.7 (2005) available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/asset\\_upload\\_file328\\_4718.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file328_4718.pdf).

<sup>82</sup> See Vandavelde articles cited, *supra* note 78. The Canada-United States Free Trade Agreement, *supra* note 80, provides only for dispute settlement between the Party states. See *id.*, arts. 1608, 1806, 1807.

<sup>83</sup> See generally *supra* notes 59-67 and accompanying text.

Constitution of 1917, which permits expropriation only for a public use and with compensation fixed at the property's current tax valuation through an expedited judicial proceeding. Article 27 also expressly permits limitations on private property when necessary in the public interest, as well as more specific regulation of the use of natural resources to assure equitable distribution of public wealth, well-balanced development, and improvement of living conditions. Such limitations, which have included environmental and other land use restrictions, do not require compensation if they are of general applicability and do not transfer ownership.<sup>84</sup> The history of Article 27 and its application suggest that it was a significant factor in discouraging foreign investment in Mexico. Indeed, a principal goal of NAFTA was reduction of the threat of expropriation as a barrier to investment in that country.<sup>85</sup>

The initial Canadian fear that NAFTA would lead to the importation of American takings standards and concepts into Canadian domestic law has not been realized.<sup>86</sup> Instead, the reasoning in the relatively small number of final decisions by NAFTA tribunals in claims based on Article 1110 has given rise in both Canada and the United States to a more serious and focused concern. Commentators fear that the provision of Article 1110(1) providing compensation for "a measure tantamount to ... expropriation," together with other provisions of Chapter 11, the establishment of international law as the rule of decision, and the lack of precedential value for tribunal decisions, mean that investors will raise, and tribunals will recognize, claims of constructive expropriation that go beyond even the open-ended American law of regulatory takings. The result would be discrimination in favor of foreign investors and against domestic interests. The further concern is that to avoid this effect, if state or provincial and local land use and other regulations are found to be expropriations in sufficient number and at sufficient cost, the respective national governments may seek to limit the scope of sub-national regulation or impose requirements of compensation on it. The effect would be to chill police power regulation that, as a matter of domestic policy, may have significant benefits in areas such as health and safety and environmental protection.<sup>87</sup>

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<sup>84</sup> MEX. CONST. art. 27 & art. 27(VI), translated in GIBBERT H. FLANZ & PATRICIE H. WARD, 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (2004); See J. Martin Wagner, *International Investment, Expropriation, and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 516 (1999); Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 U.C.L.A. L. REV. 35, 49-51, 54-57 (2003). Article 27 is supplemented by the 1936 Law of Expropriation, D.O., Nov. 25, 1936, available at <http://www.cddhcu.gob.mx/leyinfo/pdf/35.pdf>, which sets forth a broad definition of public use to include such purposes as takings to avoid exploitation of natural resources or accumulations of monopolized wealth. *Id.*

<sup>85</sup> *Id.* at 49-93.

<sup>86</sup> See Schneiderman, *supra* note 4500. See generally *supra* note 65 and accompanying text.

<sup>87</sup> See, e.g., Naveen Gurudev, Comment: *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L.J. 399, 403-27 (2005); Porterfield, *supra* note 81, at 43-68; Vicki Been and Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 40-86 (2003); Howard Epstein, *NAFTA, Other International Agreements and Local Government Jurisdiction—Comments on United Mexican States v. Metalclad Corp.*, 34 MUN. PLANNING L. REP. (3d) 44 (2003).

The jury, so to speak, is still out on the question whether NAFTA tribunal decisions to date do in fact indicate a threat to domestic law and policy that warrants change. Since 1997, notice of arbitration has been filed in at least twenty-nine claims involving Article 1110. Final decisions have been made in ten of these claims, one was settled during the arbitration process, eight are pending before tribunals, in eight no tribunal has been established, and in two the notice has been withdrawn.<sup>88</sup> Concern has focused on *Metalclad Corp. v. Mexico*, ironically a case that demonstrates the effectiveness of Chapter 11 from the viewpoint of a foreign investor in Mexico.<sup>89</sup> A hazardous waste landfill had been constructed in Mexico by a U.S. company under Mexican federal and state permits but a municipal permit was denied without notice and the governor of the state created an “ecological zone” in the area, thus rendering the landfill useless. The NAFTA tribunal found both actions “tantamount to” an expropriation under Article 1110, reading that language broadly to include any interference with use that had a significant impact.<sup>90</sup> The tribunal had sat in Canada. On appeal by Mexico, the British Columbia Supreme Court (a trial court) found that the first action involved a violation of Article 1105 that was beyond the tribunal’s jurisdiction, but held that it could not review the tribunal’s legal conclusion as to the scope of “tantamount” and so upheld the second finding.<sup>91</sup> The other nine final decisions have all denied the expropriation claim, giving “tantamount to expropriation” a narrower reading than the *Metalclad* tribunal had proposed. Several found a violation of other provisions of Chapter 11. Despite the formal lack of precedential value for Chapter 11 decisions, the tribunals have begun to cite and analyze prior tribunal decisions<sup>92</sup>

A recent Canadian decision at the trial court level rejected arguments that the provisions of Chapter 11 violate various constitutional guarantees, including those of equality. The court accepted

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<sup>88</sup> There is no official publication or compilation of tribunal decisions. Documents, including tribunal awards, may be accessed on a number of web sites. See, e.g., <http://www.state.gov/s/l/c3439.htm>; <http://www.dfait-maec.gc.ca/tna-nac/NAFTA-e.asp>; <http://www.naftaclaims.com> (all last visited on Dec. 2, 2005).

<sup>89</sup> See Del Duca, *supra* note 84, at 85-93.

<sup>90</sup> *Metalclad, Inc. v. Mexico* (2000), available at [www.state.gov/s/l/c3439.htm](http://www.state.gov/s/l/c3439.htm).

<sup>91</sup> *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359, (B.C.S.C.).

<sup>92</sup> See *Azinian v. Mexico* (1999), available at <http://www.state.gov/s/l/c3750.htm> (cancellation of concession contract was not expropriation); *Pope and & Talbot, Inc. v. Canada* (2002), available at <http://www.state.gov/s/l/c3747.htm> (Art. 1105 violated; interference not substantial enough to be expropriation); *S.D. Myers v. Canada* (2002), available at <http://www.state.gov/s/l/c3746.htm> (violations of Arts. 1102, 1105; temporary interference is not expropriation); Federal Court of Canada dismissed AG’s appeal, 1/13/04; *Mondev Int’l Ltd. v. United States* (2002), available at <http://www.state.gov/s/l/c3758.htm> (claim under Art. 1110 time-barred); *Methanex Corp. v. United States* (2005), available at <http://www.state.gov/s/l/c5818.htm> (state ban of MBTE additive was regulation, not expropriation); *Loewen Group v. United States*, (2003), available at <http://www.state.gov/s/l/c3755.htm> (judicial actions were not expropriation); *Feldman v. Mexico* (2002), <http://www.state.gov/s/l/c3751.htm> (tax on exports was not expropriation); *GAMI Invs., Inc. v. Mexico* (2004), available at <http://www.state.gov/s/l/c7119.htm> (investor’s loss from expropriation of corporate assets was not expropriation); *Waste Mgmt., Inc. v. Mexico* (2004), available at <http://www.state.gov/s/l/c3753.htm> (breach of contract did not violate Art. 1105 and was not expropriation).

the government's position that many of the challenges were at best premature.<sup>93</sup> The commentators, both Canadian and American, however, have seen in the language and approach of the NAFTA tribunal decisions ground for their concerns. The tribunals have not only defined "investment" broadly (as NAFTA requires) but have ignored limiting features of U.S. takings jurisprudence, such as the rejection of constructive severance, the reasonableness of the claimant's expectation or reliance, and procedural requirements of exhaustion and ripeness. Tribunals have also not followed the Canadian requirements that expropriation involve a transfer of interest to the expropriating governments and that compensation is only payable by express statutory provision or as a result of the common-law presumption.<sup>94</sup>

These concerns have given rise to a variety of proposed cures. Proposals range from NAFTA amendments that would clarify or eliminate the provision of compensation for measures "tantamount to expropriation" to the adoption of a system of precedent and, perhaps, of internal review that would allow the development of standards through a "common-law" process. Such a system might shore up the breadth of NAFTA's express provisions with concepts derived from the American regulatory taking cases.<sup>95</sup> All such proposals would force the governments of the Parties to tread a delicate line between sustaining the protections for their own investors abroad that Chapter 11 was meant to assure and heeding the complaints of domestic interests that traditional regulatory authority is seriously impaired when those protections are invoked by foreign investors at home. Ironically, this problem has arisen for the United States only with the advent of NAFTA because the nations upon which the United States imposed similar BIT provisions lacked the economic capacity to be a source of significant investment in the United States.

### C. Lingle, Kelo, and NAFTA

Given NAFTA's direction that claims under it are to be decided "in accordance with this Agreement and applicable rules of international law,"<sup>96</sup> tribunals in Article 1110 proceedings have made little direct reference to U.S. Takings Clause decisions. In this situation, it would

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<sup>93</sup> Council of Canadians v. Canada (A.G.), 2005 Carswell Ont. 2973 (Ont. S.C.J.), available at 2005 W.L. 1594597.

<sup>94</sup> See Gurudevan, *supra* note 87, at 411-19; Edward J. Sullivan & Kelly D. Connor, *Making the Continent Safe for Investors: NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution*, 36 URB. LAW 99, 119-128 (2004); Porterfield, *supra* note 81, at 43-68; Been & Beauvais, *supra* note 87 at 59-86; Epstein, *supra* note 87, text accompanying notes 10-53; Ethan Shenkman, *Could Principles of Fifth Amendment Takings Jurisprudence Be Helpful in Analyzing Regulatory Expropriation Claims Under International Law?*, 11 N.Y.U. ENVTL. L. J. 174, 182-97 (2002).

<sup>95</sup> See Gurudevan, *supra* note 87, at 427-33; Porterfield, *supra* note 81, at 86-89; Been & Beauvais, *supra* note 87, at 128-43; Epstein, *supra* note 87, text accompanying notes 127-31; Shenkman, *supra* note 94, at 182-97.

<sup>96</sup> NAFTA, *supra* note 68, art. 1131(1).

seem that *Lingle* and *Kelo* would not have significant impact on tribunal decisions. The fact that there is no formal system of precedent between tribunal decisions further limits the possibility. Nevertheless, the similarity of the substantive framework of NAFTA and the Fifth and Fourteenth Amendments, together with the basic instinct to decide like cases alike, may mean that, as the NAFTA jurisprudence develops, U.S. concepts will find their way into the mix as an articulation of the principles of “this Agreement and applicable rules of international law.” As previously noted, Article 1110 closely parallels the Takings Clause. Certainly those tribunal decisions that have read the phrase “tantamount to . . . expropriation” as not extending the concept of expropriation beyond regulation that significantly diminishes an investor’s interest are consistent with U.S. regulatory takings jurisprudence.

Commentators have pointed out that other provisions of Chapter 11 have their parallels in the Bill of Rights as well. Thus, Articles 1102-1104 require that a Party accord the investors of another Party the more favorable of the treatment that it accords its nationals and the most favorable treatment that it accords the nationals of any other state. These provisions have the effect of the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment. Article 1105 is a kind of Due Process Clause, requiring a Party to accord “fair and equitable treatment and full protection and security” to investments of another Party’s investors, regardless of how domestic investors are treated.<sup>97</sup> In addition, Articles 1101(4) and 1114 recognize a Party’s right to take domestic measures for certain police power purposes, expressly including environmental measures, though these measures must be consistent with Chapter 11.<sup>98</sup>

It is in the context of this group of Chapter 11 provisions that *Lingle* and *Kelo* could have an effect—assuming that NAFTA tribunals will look to the Takings Clause framework by analogy. In Part I of this paper, I have suggested that the significance of those two cases for U.S. Takings Clause law is that they have clarified the relationship between the Takings Clause and other provisions of the Fifth and Fourteenth Amendments by in effect creating a two-tiered decision-making process.<sup>99</sup> Governmental action taken to serve the public health, safety, or general welfare pursuant to the police power must first be tested by the standards of due process or equal protection: Does the action, or a discrimination pursuant to it, bear a rational relation to the police power purpose? An action must pass that test before the question whether it is in fact a taking will be determined. Similarly, in a NAFTA Chapter 11 proceeding, though Articles 1102-1105 are expressly incorporated as standards defining a permitted, compensable, expropriation in Article 1110(1)(b) and (c), *Lingle* and *Kelo* counsel that these standards can effectively and properly be abstracted from the

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<sup>97</sup> *Id.* arts. 1102-1105; see Been & Beauvais, *supra* note 87, at 40-41.

<sup>98</sup> NAFTA, *supra* note 68, arts. 1101(4), 1114.

<sup>99</sup> See *supra* Part I.

expropriation decision. If the challenged governmental action fails the tests of Articles 1102-1105, then any proposed or consummated expropriation is void. The appropriate remedy under Article 1135(1) is monetary damages for any incidental harm from the proposal to expropriate, or restitution of property, or money damages in lieu of restitution, if the property has in fact been expropriated. If the governmental action satisfies Articles 1102-1105, then, following *Kelo*, it is “for a public purpose.” Only then do the questions arise whether the action is in fact an expropriation, and, if it is, what is the appropriate measure of compensation.

Concededly, this use of *Lingle* and *Kelo* would not directly address concerns that Article 1110 threatens the domestic police power regimes of the Parties. That concern can only be met by the kinds of revisions of the agreement itself that commentators have suggested. To the extent that such revisions require the insulation of police power regulation from the reach of Chapter 11, they invoke the tension between legitimate domestic regulation and inappropriate trade barriers that is inherent in all international trade agreements.<sup>100</sup> Application of *Lingle* and *Kelo* might lower the tension, however, by more clearly separating the trade barrier issues from the expropriation issues. If the focus in Article 1110 proceedings is on the impact of governmental action that is otherwise proper under Chapter 11, tribunals will be in a better position to determine whether regulation other than an actual taking of possession or ownership has sufficient impact on the investor to be an action “tantamount to . . . expropriation.”

#### IV. CONCLUSION

*Lingle* and *Kelo* show U.S. takings law in the course of a continuous process of refinement and clarification, reaffirming the police power basis of the public use requirement and the need to define a taking of property in terms of its impact on the owner. A direct comparison of this distinctively American jurisprudence with Canada and NAFTA is rendered difficult, and suggestions that it might influence those treaties are rendered problematic by profound differences among the legal frameworks and the legal cultures involved. In contrast to the United States, Canada's constitution retains a limited form of parliamentary sovereignty in a tightly interlocked distribution of power between the national and provincial governments. Property rights are protected neither by a generic Due Process Clause nor a specific Takings Clause. NAFTA at first blush seems to establish an expropriation regime comparable to the U.S. law of takings. NAFTA, however, is a quasi-constitutional instrument, and Chapter 11 is intended to protect foreign investors as part of a more

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<sup>100</sup> See, e.g., “The Tuna/Dolphin Case,” General Agreement on Tariffs and Trade Dispute Settlement Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) (holding that U.S. could not ban imports of tuna caught by methods that violated U.S. Marine Mammal Protection Act); see, generally, JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 414-48 (2000); BRIAN McDONALD, *THE WORLD TRADING SYSTEM: THE URUGUAY ROUND AND BEYOND* 257-68 (1998).

general regime of international trade protections. Its framework provides no real balance between property protection and the traditional police power regimes of domestic law and no mechanism for striking such a balance. Nevertheless, this essay presumes to suggest that, without direct reference to *Lingle* and *Kelo*, Canadian courts and NAFTA tribunals can observe and follow their direction: Excess of governmental power in a purported expropriation should be restrained through substantive protections akin to the Due Process Clause. Decisions to allow compensation for expropriation should focus on the impact of governmental action on the owner's rights.