9-2005 ELR 35 ELR 10577

ELR
NEWS & ANALYSIS

ARTICLES

Lingle, Etc.: The U.S. Supreme Court's 2005 Takings Trilogy

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Editors' Summary: The U.S. Supreme Court ruled on three takings cases in its 2004 term: Lingle v. Chevron U.S.A., Inc.; Kelo v. City of New London; and San Remo Hotel, Ltd. Partnership v. City & County of San Francisco. In Lingle, the Court struck down the "substantially advance" test set forth in Agins v. City of Tiburon. Kelo, which gained attention from the media and public, upheld the use of eminent domain for economic development purposes. And San Remo involved a relatively straightforward procedural issue. After describing and analyzing each of these cases, the author of this Article concludes that these cases reinforce the Court's takings jurisprudence that the Takings Clause imposes only modest constraints on government action.

In the 2004 term that just ended, the U.S. Supreme Court decided three takings cases: *Lingle v. Chevron U.S.A., Inc.*,[1] *Kelo v. City of New London*,[2] and *San Remo Hotel, Ltd. Partnership v. City & County of San Francisco*.[3] This Article provides a description and analysis of each case and also offers more general observations based on these decisions about where the Court appears to be headed with takings law and constitutional challenges to regulatory programs in general. The Article principally focuses on *Lingle* because that decision is the most significant of the three in terms of redefining takings law.[4] The Article spends relatively less time addressing *Kelo*, which, notwithstanding the media and political interest generated by the decision, basically reaffirmed long-standing precedent, and *San Remo*, which involved a comparatively straightforward procedural issue.

The headline for this term is that the government prevailed in every one of these takings cases. Measured against the ambitions of property rights advocates, as well as the successes they achieved in cases decided in the late 1980s and early 1990s,[5] this represents a remarkable turn of fortune. But what do these results actually say about the state of takings law in the Court, and what do they portend for the future?

I. *Lingle*

In *Lingle*, the Court "ate crow"[6] and admitted that it had been mistaken in announcing, 25 years earlier, that a plaintiff can assert a viable claim under the Takings Clause by alleging that a regulation fails to "substantially advance a legitimate state interest." This type of inquiry, the Court declared, belongs under the rubric of the Due Process Clause, not the Takings Clause. In addition to eliminating this problematic takings test, the decision goes a long way toward articulating a clearer, narrower vision of regulatory takings doctrine as a whole. It has been customary for years for academics to describe regulatory takings doctrine as a legal muddle.[7] After the Court's decision in *Lingle*, that description needs revision.

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1. 125 S. Ct. 2074, 35 ELR 20106 (2005).
2. No. 04-108, 2005 WL 1469529, 35 ELR 20134 (U.S. June 23, 2005).
3. 125 S. Ct. 2491 (2005).
4. I may be biased in my assessment of *Lingle*'s importance because I served as co-counsel for the state of Hawaii in that case. I also filed amicus briefs in the *Kelo* case (together with Prof. Thomas Merrill of Columbia Law School) on behalf of the American Planning Association and the National Congress for Community Economic Development, and in the *San Remo* case on behalf of the National Conference of Chief Justices.
5. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 24 ELR 21083 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 22 ELR 21104 (1992); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 17 ELR 20787 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825, 17 ELR 20918 (1987).
6. In a now famous remark during the oral argument in *Lingle*, Justice Antonin Scalia suggested that the Court might have to "eat crow" in the case.
7. *See, e.g.*, Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1, 1-2 (2003) (describing regulatory takings law as "famously incoherent"); Daniel A. Farber, *Public Choice and Just Compensation*, 9 Const. Comment. 279, 279 (1992) ("takings doctrine is a mess"); Charles M. Haar & Michael Allan Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 Harv. L. Rev. 2158, 2169-70 (2002) (comparing attempts to interpret the Takings Clause to the "physicist's hunt" for the elusive quark).

A. Background

In *Agins v. City of Tiburon*,[8] the Court declared that a regulation effects a taking if it "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."[9] Applying this two-part test, the Court concluded that a land use regulation limiting the density of development in a community at the northern end of San Francisco Bay did not constitute a taking. Apart from the fact that the regulation did not impose a severe, unfair economic burden on the owners, the Court said the ordinance served a legitimate governmental purpose by discouraging the "premature and unnecessary conversion of open-space land to urban uses"[10] and protecting residents "from the ill effects of urbanization."[11]

The *Agins* Court cited precious little authority—at least *takings* authority—for the "substantially advance" test. Instead, the Court principally relied on due process precedents. The Court cited *Nectow v. Cambridge*,[12] which had established, almost 50 years earlier, that a zoning restriction "cannot be imposed [under the Due Process Clause] if it does not bear a substantial relation to the public, health, safety, morals, or general welfare."[13] The *Agins* Court also cited *Village of Euclid v. Ambler Realty Co.*,[14] which upheld a municipal zoning ordinance against a due process challenge under a similar standard. The Court in *Agins* did not acknowledge that it was transplanting into takings doctrine a legal test rooted in the Due Process Clause, much less offer a justification for doing so.

While first articulated in *haec verba* in *Agins*, the substantially advance test was prefigured in the Court's decision two years earlier in *Penn Central Transportation Co. v. New York City.*[15] In that case, the Court rejected a takings claim based on the designation of Grand Central Terminal in New York City as a historic landmark. The Court in *Penn Central* articulated a three-factor takings inquiry that has since become the dominant framework for regulatory takings analysis. The inquiry focuses on: (1) the economic impact of the regulation; (2) the degree to which it has interfered with the owner's reasonable, investment-backed expectations; and (3) the character of the regulation. However, the Court also stated, referring back to the zoning cases of the 1920s, that it had upheld land use regulations where the restrictions promoted the public health or welfare. In addition, the Court cited *Goldblatt v. Hempstead*,[16] another land use case, as an example of a case in which this type of analysis had been applied, observing "it is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . ."[17] The Court had no reason to test this specific proposition in *Penn Central* because there was no actual dispute about whether historic preservation was a legitimate public purpose, or that the designation of Grand Central Terminal advanced that purpose. Nonetheless, *Penn Central* planted the seed for the substantially advance test later articulated in *Agins*.

In the years following *Agins*, the Court recited the substantially advance test in over one-half dozen other cases.[18] While the Court frequently referred to the test only in passing, the force of repetition served, as the Court later said in *Lingle*, to "ensconce" the test in the Court's takings jurisprudence. The only context in which the *Agins* formulation arguably had decisive significance was in the Court's decisions involving development "exactions." In *Nollan v. California Coastal Commission*,[19] the Court ruled that a government agency could impose a public access requirement on a property owner as a condition of receiving a development permit only if there was an "essential nexus" between the condition and the government's legitimate regulatory objectives. Later, in *Dolan v. City of Tigard*,[20] the Court added the requirement that the burden imposed by an exaction must be "roughly proportional" to the projected impacts of the development being addressed by the exaction. In both cases, the Court recited the substantially advance test, suggesting that the test related to or somehow supported the specific, relatively demanding tests for exactions established in those cases.

While the Court did little to develop the substantially advance test—at least outside the context of exactions—certain lower federal and state courts have relied on the substantially advance formulation to support findings of takings.[21] The U.S. Court of Appeals for the Ninth Circuit, at least partly in response to a concerted advocacy campaign mounted by the Pacific Legal Foundation,[22] repeatedly recognized and applied the substantially advance test, particularly in cases involving challenges to rent control laws.[23]

B. The Lingle *Case*

The *Lingle* case grew out of the state of Hawaii's longstanding effort to limit the consumer price of gasoline. Given its small size and geographic remoteness, Hawaii has long suffered from a lack of competition in certain markets,

8. 447 U.S. 255, 10 ELR 20361 (1980).
9. *Id.* at 260.
10. *Id.* at 261 (quoting CAL. GOV'T CODE ANN. §65561(b) (West Supp. 1979)).
11. *Id.*
12. 277 U.S. 183 (1928).
13. *Id.* at 188.
14. 272 U.S. 365 (1926).
15. 438 U.S. 104, 8 ELR 20528 (1978).
16. 369 U.S. 590 (1962).
17. 438 U.S. at 127.
18. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704, 29 ELR 21133 (1999); Dolan v. City of Tigard, 512 U.S. 374, 385, 24 ELR 21083 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016, 22 ELR 21104 (1992); Yee v. Escondido, 503 U.S. 519, 534 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 17 ELR 20918 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 17 ELR 20440 (1987); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126, 16 ELR 20086 (1985). *See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 647, 11 ELR 20345 (1981) (Brennan, J., dissenting).
19. 483 U.S. 825, 17 ELR 20918 (1987).
20. 512 U.S. 374, 24 ELR 21083 (1994).
21. *See, e.g.*, State ex rel. Shemo v. City of Mayfield Heights, 765 N.E.2d 345 (Ohio 2002); Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401 (Neb. 1994). *See also* Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004) (recognizing the substantially advance test, but concluding that the plaintiff failed to establish a taking under this test).
22. *See* Pacific Legal Foundation website on the Internet at http://www.pacificlegal.org (last visited July 12, 2005).
23. *See, e.g.*, Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997); Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004).

including gasoline. Hawaii Act 257 sought to protect gasoline consumers by, among other things, limiting the maximum rents that oil companies could charge independent dealers who leased stations from the companies.[24] The goal of the provision was to prevent oil companies from raising rents to a level where the independent dealers would be driven out of business. The state believed that maintaining a diverse group of independent dealers at the retail level would help promote competition and, in turn, protect consumers over the long run.

Chevron U.S.A., Inc., the largest oil company in Hawaii, sued the governor and state attorney general in federal court claiming that the rent cap imposed by Act 257 effected an unconstitutional taking and also violated the Due Process and Equal Protection Clauses. Because the Act permitted the company to charge more in rent in aggregate from its leased stations than it otherwise would have charged, Chevron stipulated that its economic return was adequate to meet any constitutional standard. The company nonetheless contended that Act 257 effected a taking on the theory that it "failed to substantially advance" the state's legitimate interest in protecting consumers. Specifically, the company contended that the law would be ineffective because companies would respond to the rent cap by increasing the wholesale prices they charged their dealers for gasoline and, if they could not recoup their lost revenues, the companies would simply cease establishing independent dealers. Ultimately, Chevron argued, Act 257 would likely have the perverse effect of increasing retail gasoline prices.

The district court granted Chevron summary judgment on its taking claim.[25] In addition to applying the substantially advance test, in accordance with Ninth Circuit precedent, the court rejected the state's argument that the court should employ a deferential standard in applying the test. Chevron then voluntarily dismissed its due process and equal protection claims without prejudice. On appeal, the Ninth Circuit ruled that the district court had properly applied heightened scrutiny but vacated the grant of summary judgment on the ground that the trial court had improperly short-circuited resolution of the factual dispute about whether the rent cap would actually lead to lower retail pieces.[26] Judge William Fletcher concurred, but disagreed with the majority regarding the applicable legal standard. He argued that Court precedents required that rent controls be evaluated using a deferential standard.[27]

On remand, the district court held a one-day evidentiary hearing at which the parties each presented a single expert economist to offer his opinion on whether Act 257 would be effective in protecting Hawaii's consumers. After weighing the conflicting testimony of the witnesses, and even going so far as to consider the demeanor of each witness, the court concluded that the economic predictions offered by the company's witness were "more persuasive" than those of the state's witness.[28] Accordingly, the district concluded that the Act would not substantially advance the state's goal of protecting consumers and thus effected a taking. On appeal once more to the Ninth Circuit, the state challenged the legitimacy of the substantially advance test and also argued that whatever the constitutional basis for the company's legal claim, the district court should have deferred to the rational economic judgment of the Hawaii Legislature in adopting the statute. The same panel that heard the case before held that both arguments were barred by law of the case,[29] with Judge Fletcher filing a dissenting opinion repeating his view that the court had applied the wrong standard of review.[30]

The state then filed a petition for certiorari in the Court. The petition presented two questions:

> 1. Whether the Just Compensation Clause authorizes a court to invalidate and enjoin state economic legislation on the basis that the law effects a "taking" because it does not "substantially advance a legitimate state interest," without regard to whether the challenged legislation diminishes the economic value or usefulness of any property[; and] 2. Whether, even if applicable in takings analysis, the "substantially advance a legitimate state interest" inquiry authorizes a court to conduct a *de novo* trial to determine if challenged legislation will achieve its goals, or whether the court should instead apply a deferential standard of review equivalent to that traditionally applied in reviewing economic legislation under the Due Process and Equal Protection Clauses.[31]

The Court granted the petition on October 12, 2004.

C. The Court's Decision

In its decision, issued on May 23, 2005, the Court unanimously reversed the Ninth Circuit. In a striking opening sentence, Justice Sandra Day O'Connor wrote: "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined." The Court then proceeded to rip the substantially advance test out of takings doctrine root and branch.

The Court first observed that there was "no question" that the substantially advance formulation had been derived from due process, not takings, precedents. The Court traced the *Agins* Court's reliance on the 1920s due process land use cases as authority for this ostensible takings test, offering no excuse for this transposition of legal doctrines.[32]

More fundamentally, the Court reasoned that the substantially advance test "is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause." The Court said that regulatory takings doctrine is designed "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, regulatory takings doctrine "focuses directly upon the severity of the burden that government imposes

24. Act 257, HAW. REV. STAT. §486H-10.4 (1998 Cum. Supp.).

25. Chevron USA, Inc. v. Cayetano, 57 F. Supp. 2d 1003 (D. Haw. 1998).

26. Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 31 ELR 20091 (9th Cir. 2000). The state filed an unsuccessful petition for certiorari based on this interlocutory ruling. *See* Cayetano v. Chevron USA, Inc., 532 U.S. 942 (2001).

27. *Chevron*, 224 F.3d at 1042-49.

28. Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182 (D. Haw. 2002).

29. Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004).

30. *Id.* at 858-61.

31. Brief for Petitioners at 3, Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 35 ELR 20106 (2005) (No. 04-163).

32. The Court acknowledged in *Lingle* that the *Penn Central* decision was mistaken in treating *Goldblatt* as supporting the substantially advance takings theory.

upon private property rights." But, "[i]n stark contrast" to the traditional focus of takings cases, the Court said, the substantially advances inquiry "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."[33] Likewise, the Court said, it sheds no light on "how any regulatory burden is *distributed* among property owners."[34] Thus, the Court concluded, "this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property."

In addition, the Court reasoned that the substantially advance test was inconsistent with regulatory takings doctrine because an inquiry into a regulation's "underlying validity" is "logically prior to and antecedent to the question whether a regulation effects a taking" requiring payment of compensation. The Takings Clause demands compensation when government takes private property for "public use," meaning, the Court said, that "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." If the government action is "impermissible," for example, because it "fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."

Finally, the Court reasoned that the *Agins* substantially advance test had to be rejected because it appeared "to demand heightened means-end review of virtually any regulation of private property." Such a heightened standard presented two problems in the Court's view. First, such an inquiry would require the courts "to scrutinize the efficacy of a vast array of state and federal regulations," a task for which the courts "are not well suited." Second, it would lead the courts to substitute their judgments for those of "elected legislatures," which are more directly responsive to the citizenry, and of "expert agencies," which are more competent to make these kinds of predictions.

The Court characterized as "remarkable, to say the least," the district court's approach of choosing between the opposing views of two expert witnesses without according any deference to the policy judgment of the Hawaii Legislature. The Court observed: "[W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here."

The Court stated that its repudiation of the substantially advance test did not alter the tests for exactions established in *Nollan* and *Dolan*. The Court acknowledged that it had drawn upon the substantially advance language in those cases. But, the Court said, those decisions did not actually involve application of this test. The Court in those cases did not ask whether the regulation advanced *some* legitimate public purpose, as would have been appropriate under the substantially advance test. Instead, the Court focused on whether the exactions advanced the *same* interest that the government could have advanced by denying the land use authorizations altogether. In addition, the Court explained that *Nollan* and *Dolan* involved challenges to adjudicative land use decisions, that is, "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." Because the landowners would undoubtedly have been entitled to compensation if the government had unilaterally imposed such an access requirement, the Court explained, *Nollan* and *Dolan* involved a specialized application of the doctrine of "unconstitutional conditions." *Nollan* and *Dolan*, the Court concluded, are "worlds apart" from the theory that a regulation can be held to effect a taking solely because it fails to advance a legitimate public purpose.

In a brief concurring opinion, Justice Anthony M. Kennedy wrote separately "to note" that the Court's decision "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process." He went on to observe, "[t]he failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry." Because Chevron had voluntarily dismissed its due process claim, Justice Kennedy said the Court had no occasion to consider whether Act 257 "represents one of the rare instances in which even [this] permissive standard has been violated."[35]

D. How Did the Court Get It So Wrong?

Given that the Court had so frequently repeated the substantially advance formula in the past—and now has unanimously repudiated the test—it is interesting to speculate on how the Court could have gotten it so wrong. No other example comes to mind in which the Court has embraced and then so dramatically repudiated a constitutional test.

There are various explanations for how and why the Court went down the wrong path, some mentioned by the Court itself in *Lingle*. First, following the Court's landmark decisions of the 1920s upholding the constitutionality of zoning, discussed above, the Court for many decades had largely abandoned the field of land use. Thus, when the Court faced a constitutional challenge to local land use regulation decades later in *Agins*, "it was natural to turn to these seminal zoning precedents for guidance." Furthermore, as discussed above, the confusion of takings and due process doctrines in *Agins* was prefigured by the Court's decision in *Penn Central*. Indeed, as the Court explained in *Lingle*, the co-mingling of these doctrines actually predated *Penn Central*, in the form of Court decisions that referred to deprivations of property without due process of law as "takings."[36]

Furthermore, in a gentle jab at the U.S. Solicitor General's office, which filed a forceful amicus brief in *Lingle* arguing for repudiation of the substantially advance test, the Court assigned some of the blame for the Court's confusion over the substantially advance inquiry to the amicus brief the United States filed in *Agins*. There is some justification for the accusation. Expressly co-mingling language from the *Euclid* and *Penn Central* decisions, the Solicitor General's brief in *Agins* laid out a two-part test for regulatory takings that plainly provided the foundation for the two-part test announced in that case.[37] Interestingly, neither the plain-

33. Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 35 ELR 20106 (2005) (emphasis in original).

34. *Id.* (emphasis in original).

35. *Id*. at 2087 (quoting Eastern Enters. v. Apfel, 524 U.S. 498, 550 (1998)).

36. *See, e.g.*, Rowan v. Post Office Dep't, 397 U.S. 782, 740 (1970).

37. The opening sentence of the Summary of Argument in the brief filed by the United States in *Agins* reads:

> Under principles set forth in this Court's decisions in *Euclid*

tiff landowners nor the defendant city in *Agins* embraced the idea that takings doctrine should include any type of means-ends inquiry.[38]

In view of this history, it is possible to ascribe the origins and short life of the substantially advance test to a simple confusion of legal categories. It seems far more likely, however, that something more substantive was going on. Ironically, it appears that both "liberals" and "conservatives" may, at different times, have found something to like in the notion that takings doctrine incorporated a due process-type means-ends analysis. If doctrinal coherence were the only objective in constitutional litigation, the *Agins* substantially advance test might never have arisen, but that plainly is not the case.

In the first place, the notion that takings doctrine incorporated a due process-type means-ends analysis likely appealed to liberals who wished to prevent the Takings Clause from becoming a major constraint on government regulatory authority. While the concept of regulatory takings is now firmly embedded in the law, it was a concept very much up for grabs only a few decades ago. For example, until only 20 years ago, the Court was still debating whether the Takings Clause even supported a direct claim for relief by an aggrieved property owner.[39] The issue was not definitively resolved until the Court's 1987 decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[40] Given this unsettled state of takings law, it is not surprising that government attorneys sought to associate takings claims with due process claims. In reaction to the excesses of the *Lochner* era,[41] the Court had resolved that the Due Process Clause required deferential judicial review of economic legislation. Associating takings claims with due process claims suggested that both types of claims should be evaluated using the same deferential standard. Accordingly, it made perfectly good sense for the U.S. Department of Justice under President Jimmy Carter to file an amicus brief in *Agins* taking the position that takings doctrine incorporated due process analysis. Following the Court's unanimous rejection of the taking claim in *Agins*, government lawyers could hardly have been dissatisfied with the somewhat confusing but ultimately seemingly helpful co-mingling of doctrines in that decision.

On a parallel track, conservative critics of the regulatory state were casting about for constitutional arguments with which to challenge regulations. For historical reasons, the controversy associated with the Due Process Clause made that provision an unattractive foundation for a judicial counterrevolution. Prof. Richard Epstein, in his seminal 1985 book, *Takings, Private Property, and Power of Eminent Domain*, had identified the Takings Clause as a possible alternate route to the restoration of searching constitutional review of economic regulation:

> [T]he Supreme Court . . . has set its thumb too heavily on the side of state power. . . . . [T]he rational basis test precludes any serious review of the fit between means and ends. What is needed is an intermediate standard that says, as did the court in *Lochner*, "The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate."[42]

Justice Antonin Scalia, appointed to the Court in 1986, six years after the *Agins* decision, was apparently the first to seize upon the fact that the *Agins* decision, ironically enough, provided an opening for attempting to implement at least a portion of Professor Epstein's agenda.[43] The key was that the *Agins* test, while it incorporated a due process-type means-ends analysis into takings doctrine, did not necessarily incorporate the exact replica of the then current rational basis test. In the 1920s zoning cases upon which *Agins* relied, the Court demanded a "substantial" relationship between governmental ends and means, terminology that suggested a somewhat more demanding standard of review than mere rational basis. That the decisions of the 1920s articulated a relatively demanding standard is consistent, of course, with the heightened scrutiny applied to economic regulation under the Due Process Clause across the board prior to the constitutional revolution of the 1930s. Thus, while the result might well have been inadvertent, the *Agins* Court not only imported due process thinking into takings law, but created an opening for applying a heightened standard not seen since the 1930s.

Justice Scalia, in his celebrated opinion for the Court in the 1987 *Nollan* case, seized this opportunity and ran with it. As the Court later explained in *Lingle*, the relatively de-

> *v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 [8 ELR 20528] (1978), a land use regulation such as a zoning ordinance is not deemed a taking without just compensation under the Fifth Amendment where the regulation is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (*Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 395) and does not deprive the owner of every reasonable beneficial use of his property.
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> Brief for United States, *Agins*, 1980 WL 339998, at *25.

38. The claimant property owners in *Agins* challenged the California court's description of a regulatory taking as a "wrongful" act, *see* Appellants' Brief, *Agins*, 1980 WL 339995, at **16-17, and insisted that a regulatory taking claim focuses instead on "whether the proper exercise of this proper power nonetheless worked a taking by reason of its impact on the regulated property." *Id.* at **18-19. Moreover, the plaintiffs explicitly accepted the validity of the city's zoning ordinance. *See id.* at *17 n.5. Likewise, the defendant city distinguished the issue of whether the ordinance served a legitimate government interest, which it considered a question of substantive due process, Appellees' Brief, *Agins*, 1980 WL 339996, at **16-18, from the separate question of whether the adverse economic impact of the ordinance resulted in a taking. *Id.* at **18-22.

39. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson County, 473 U.S. 172 (1985) (referring with some sympathy to the "theory" that the Due Process Clause provided the only constitutional basis for challenging allegedly excessively burdensome regulation).

40. 482 U.S. 304, 17 ELR 20787 (1987).

41. The *Lochner* era refers to *Lochner v. New York*, 198 U.S. 45 (1905), and other Court cases between 1897 and 1937 in which the Court struck down progressive state legislation as a violation of substantive due process.

42. Richard Epstein, Takings, Private Property, and Power of Eminent Domain 128 (1985).

43. In a now famous public discussion in the mid-1980s, Justice Scalia and Professor Epstein debated whether the Court should seek to expand constitutional protections for economic rights. *See* Scalia v. Epstein: Two Views on Judicial Activism by Supreme Court Justice Antonin Scalia and Professor Richard Epstein (Cato Institute 1985). Notwithstanding their disagreement during this debate, it seems apparent that at least by 1987, Justice Scalia was committed to implementing Professor Epstein's revisionist interpretation of the Takings Clause, though perhaps never in as thorough a fashion as the professor would have liked.

manding test applied to the exaction in that case did not depend on the substantially advance formulation. Nonetheless, Justice Scalia relied in part on this language to justify the relatively demanding standard developed in *Nollan*. In response to Justice William J. Brennan's objection that exactions should be reviewed under a rational basis standard, Justice Scalia stated:

> We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, . . . not that "the State '*could rationally have decided*' the measure adopted might achieve the State's objective." . . . [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical . . . .[44]

This seemingly sweeping language, though articulated in a somewhat backhanded way, provided the foundation for the efforts by conservative advocates over the following several decades to revive *Lochner* under the banner of takings.

Ultimately, of course, the frolic and detour represented by the substantially advance test has come to an ignominious end, and a fairly speedy one at that. With 20-20 hindsight, the test suffered from two fundamental flaws. As the Court explained in painstaking detail in *Lingle*, the substantially advance inquiry simply could not be made to fit into takings doctrine: not only did it suggest a line of inquiry that was foreign to the core concerns of regulatory takings law, it involved an analysis that was in fundamental conflict with takings doctrine. Equally important, given that the test had no actual foundation in takings law, it became apparent that the substantially advance test was simply a ruse for recreating under the rubric of takings a type of due process analysis that the Court had long repudiated when presented as a straightforward due process claim. The substantially advance test was a jurisprudential gimmick that both the force of logic and the Court's own sense of propriety demanded be rejected.

E. The Significance of Lingle

What is the long-term significance of *Lingle*? First and foremost, the decision eliminates an entire ostensible branch of regulatory takings liability. To be sure, the Court had never squarely relied on this test, outside the context of exactions, to uphold a finding of a taking. Some lower courts, perhaps sensing the doctrinal weakness of the substantially advance test, had held it at arm's length.[45] But, as discussed above, other federal and state courts had invoked this takings test, and those decisions have now been overruled. If the Court had ruled the other way in *Lingle*, takings doctrine would be very different than it is today.

The Court did not rule, of course, that means-ends analysis is impermissible under the U.S. Constitution; it simply ruled that this type of analysis must be conducted under the Due Process Clause rather than the Takings Clause. But this step has enormous practical importance. The substantially advance test was understood to support, as the Court itself explained in *Lingle*, the use of a heightened standard of review. Relegating the substantially advance test to the realm of due process means that means-ends review of regulation must be conducted using the rational basis test for review of economic regulation under the Due Process Clause.

The *Lingle* decision also brings a new, unifying clarity to regulatory takings doctrine as a whole. Ironically, the exercise of declaring the types of claims that are not within the scope of regulatory takings doctrine apparently helped the Court define, more sharply than ever before, what types of claims *do* qualify as potential takings claims. First, the Court explained that every theory of regulatory takings has a "common touchstone"; that is, it seeks "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." This overarching "functional equivalence" test, the Court explained, applies to takings claims based on physical occupations under *Loretto v. Teleprompter Manhattan CATV Corp.,*[46] takings claims based on denials of all economically viable use under *Lucas v. South Carolina Coastal Council*,[47] or takings claims under the multifaceted *Penn Central* framework. In all of these cases, regardless of whether a regulation results in a physical occupation or imposes an economic loss, the inquiry "focuses directly upon the severity of the burden the government imposes on private property rights."

In addition, the Court's decision implies a sharper, narrower definition of the "character" factor in the *Penn Central* analysis. Prior to *Lingle*, it had frequently been suggested that the failure of a regulation to advance a legitimate public purpose might be part of the character inquiry; on the other hand, it had been suggested that the importance of the public objective served by a regulation might figure into character and weigh against a finding of a taking. The Court's reasoning that analysis of the wisdom or efficacy of government action has no place in takings doctrine refutes the first suggestion, as does the Court's pointed statement that "the 'substantially advances' inquiry reveals nothing about the magnitude *or character of the burden* a particular regulation imposes upon private property rights."[48] By a parity of reasoning, since a valid takings claim "presupposes that the government acted in pursuit of a valid public purpose," the importance of the public purpose served by a regulation cannot logically be raised under the rubric of character as a defense to a takings claim. Just as the government could not deny liability in an eminent domain proceeding on the ground that the government is planning to build a very important school or road, the government could not deny liability in an inverse condemnation case on the ground that the government is seeking to accomplish some very important regulatory objective.

One recurring question in takings law has been whether legally invalid government actions, including ultra vires actions, administrative measures contrary to statute, or arbitrary or capricious actions, can support claims for compen-

44. *Nollan*, 483 U.S. at 835 n.3 (citing *Agins*, 447 U.S. at 260) (emphasis in original).

45. *See, e.g.*, Bamber v. United States, 45 Fed. Cl. 162, 165 (Fed. Cl. 1999). *Cf.* Seiber v. United States, 364 F.3d 1356, 1367-68, 34 ELR 20026 (Fed. Cir. 2004) (noting uncertainty in the Court's decisions, but finding it unnecessary to decide whether *Agins* established a distinct takings test).

46. 458 U.S. 419 (1982).

47. 505 U.S. 1003, 22 ELR 21104 (1992).

48. *Lingle*, 125 S. Ct. at 2074 (emphasis in original).

sation under the Takings Clause.[49] On the one hand, it can be contended that since a government action serving a public use is a precondition for a valid takings claim, an illegitimate government action, no matter how burdensome, cannot support a valid takings claim. On the other hand, this conclusion runs into the intuitively plausible argument that if a government action is sufficiently burdensome to constitute a taking, the fact that it was illegal as well should not excuse the taking. Courts have come down on both sides of this issue.[50] The decision in *Lingle*, in line with previous indications of the direction of the Court's thinking on this issue,[51] supports the view that a legitimate government action is a precondition for a valid takings claim. In the Court's words, "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."

In addition, the decision in *Lingle* helps resolve the debate over whether an injunction is an available remedy under the Takings Clause or whether financial compensation is the exclusive remedy for a taking. The Court plainly lent support to the latter view, stating that "[a]s its text makes plain, the Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power." In the same vein, the Court said that the Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."

Finally, the *Lingle* decision appears to bring greater clarity to the Court's *Nollan* and *Dolan* tests for exactions. The Court's repeated emphasis on the fact that those cases involved "adjudicative" government action supports the view that *Nollan* and *Dolan* do not apply to legislative measures. In addition, the Court's description of the analytical foundation for these decisions—that is, that they involved conditions that enforced in isolation, would have been per se takings—supports the argument that monetary exactions are outside the scope of *Nollan* and *Dolan*. Mere imposition of monetary liability, the Court has said, cannot be analyzed as a per se taking.[52]

The central question after the *Lingle* decision will be how to apply the "functional equivalence" standard in the context of a *Penn Central* case. Because the *Lucas* per se test covers the situation whether the value of the property has been literally destroyed, *Penn Central* logically applies to some separate category of cases when the economic burden is very severe but less than total. In the past, the Court has been reluctant to attempt to identify any specific threshold of economic impact sufficient to demonstrate a taking, instead suggesting that a mix of factors necessarily comes into play. In particular, *Lingle* highlights the continuing importance under *Penn Central* of whether the regulation interferes with investment-backed expectations. In *Palazzolo v. Rhode Island*,[53] the Court rejected the strict so-called notice rule, embraced by some courts, that barred a purchaser who bought property subject to an existing regulation from bringing a takings claim based on the restriction. Despite this ruling, the fact that a claimant has purchased with notice of the regulations remains a powerful, if not dispositive, factor weighing against a takings claim.[54]

Another factor—which apparently has been somewhat elevated in importance as a result of *Lingle*—is the degree to which a regulation applies broadly across the community instead of singling out a particular owner to bear an economic burden. As discussed, the Court in *Lingle* explained that the substantially advance inquiry was foreign to regulatory takings doctrine, in part because it provided no information about "how any regulatory burden is *distributed* among property owners."[55] On the same theme, the Court said: "A test that tells us nothing about the actual burden imposed on property rights, or how the burden is *allocated* cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation."[56] The economic premise underlying this approach is that since all members of the community benefit from restrictions that apply broadly across the community, there is less reason, in "fairness and justice," to provide compensation to property owners in that circumstance than when a regulation singles out one or a few owners to bear a burden.

Justice Kennedy's concurring opinion, though not directly focused on takings, warrants a brief comment. In a sense, Justice Kennedy states the obvious in insisting that *Lingle* does not foreclose the possibility that the Due Process Clause might provide a basis for successfully challenging "arbitrary or irrational" action. After all, the theory presented by the state and its amici before the Court was that the substantially advance inquiry represented a due process test rather than a takings test. Beyond that, however, Justice Kennedy hints that the type of substantive due process analysis he has in mind might be more demanding of government than traditional due process review. The only Court decision he cites in his concurring opinion is his concurring opinion in *Eastern Enterprises v. Apfel*.[57] In that case, Justice Kennedy implicitly applied a somewhat heightened standard of review to support a finding of a due process violation; moreover, in *Kelo*, decided one month after *Lingle*, in yet another of his concurring opinions, Justice Kennedy

49. *See generally* John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047 (2000).

50. Indeed, sometimes individual courts have disagreed with themselves on how to resolve this issue. *Compare* Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 28 ELR 21564 (Fed. Cir. 1998) (concluding that ultra vires government actions cannot constitute takings, but indicating that legally invalid government actions may be takings) *with* Rith Energy, Inc. v. United States, 270 F.3d 1347, 1352, 32 ELR 20253 (Fed. Cir. 2001) ("in a takings case we assume that the underlying governmental action was lawful").

51. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 231 (2003) (stating that a "condition" for any exercise of the government's taking power is that the government action serve a "public use," and equating this condition with the requirement that the government action be "legitimate").

52. *See* United States v. Sperry, 493 U.S. 52, 62 (1989) (rejecting the notion that monetary fees are "per se" takings). Indeed, in *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), a majority of the Court (Justice Kennedy and the four dissenters) indicated that a monetary assessment should not even be viewed as falling within the scope of the Takings Clause. *See also* Commonwealth Edison Co. v. United States, 271 F.2d 1327, 1340, 32 ELR 20322 (Fed. Cir. 2001) (the "mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment").

53. 121 S. Ct. 2448, 32 ELR 20516 (2002).

54. Indeed, on July 5, 2005, in the *Palazzolo* case itself, the Rhode Island Superior Court, on remand from the Court, rejected the takings claim, relying in part on the fact that the claimant purchased the property subject to preexisting regulatory constraints. *See* Palazzolo v. State, No. WM-88-0297, slip op. at 30 n.78 (R.I. Super. Ct. July 5, 2005).

55. *Lingle*, 125 S. Ct. at 2074 (emphasis in original).

56. *Id.* at 2078 (emphasis added).

57. 524 U.S. 498 (1998).

described his *Eastern Enterprises* opinion as applying "heightened scrutiny." Furthermore, in *Lingle* itself, Kennedy described the relevant inquiry as whether a regulation fails "to accomplish a stated or obvious objective," a formulation that suggests a somewhat more rigorous review than the traditional search for a "conceivable" public purpose.

II. *Kelo*

On the same day the Court heard oral argument in *Lingle*, it heard oral argument in *Kelo*, in which it upheld the use of eminent domain for economic development purposes.[58] However, in contrast to the unanimous result in *Lingle*, the Court split 5 to 4 in *Kelo*, with the Court producing a total of four different opinions. Also in contrast to the *Lingle* case, which brought the debate over the substantially advance inquiry to a definitive close, the *Kelo* decision, based on the level of subsequent media and congressional interest, appears to have ignited a new policy, if not legal, debate over the use of eminent domain for economic development purposes.

A. Background

As the Court explained in *Lingle*, "over a century of our case law interpreting" the Takings Clause supported the result in *Kelo*. Starting in the early years of the 19th century, the states, with consistent judicial support, delegated the power of eminent domain to privately owned turnpike, canal, and railroad corporations. Later, such delegations were extended to privately owned gas, electric, and telephone utilities. Perhaps the most expansive use of the eminent domain power was for the establishment of dams to supply hydropower for textile plants and other types of manufacturing operations.

Around the turn of the century, the Court, building largely on the earlier work of the state courts, upheld a series of exercises of the eminent domain power for natural resource development. These decisions rejected challenges to the use of eminent domain to construct a ditch to remove water from a drainage district,[59] to construct a ditch to bring water to irrigation districts,[60] and to build an aerial bucket line to transport minerals taken from a mine.[61] In all these cases, the Court upheld the use of eminent domain even though the public itself did not obtain title to the property, and the public had no general right of access to, or use of, the property.

Prior to *Kelo*, the leading Court eminent domain acquisition and retransfer cases—that is where the exercise of eminent domain results in transfer of ownership to a new owner—were *Berman v. Parker*[62] and *Hawaii Housing Authority v. Midkiff*.[63] *Berman* unanimously upheld a massive, congressionally authorized urban redevelopment project in Southwest Washington, D.C. The Court equated the scope of government eminent domain power with the full scope of the police power and said that so long as the governmental purpose was legitimate, the eminent domain power could be deployed to accomplish that purpose. "The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude."[64] The Court also rejected the plaintiff's objection that his property should not have been included in the redevelopment area, stating "the need for a particular tract to complete the integrated plan rests in the legislative branch."[65]

In *Midkiff*, the Court unanimously upheld the use of eminent domain by the state of Hawaii to break up a land oligopoly by requiring the handful of owners of large holdings in the state to sell property to leaseholders on residential lots. Echoing *Berman*, the Court said: "The public use requirement is . . . coterminous with the scope of the sovereign's police powers."[66] The Court acknowledged that there is a judicial role in enforcing the public use requirement, but said that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be prescribed by the Public Use Clause."[67] The Court also rejected the argument that less deference was due an act of a state legislature than an act of Congress (as in *Berman*), and ruled that it was beside the point that under the Hawaii legislation property title transferred directly from one private owner to another without intervening public ownership.

Against this background, one might suppose that the eminent domain power would not represent a fruitful area for legal reform. However, largely as a result of the focused and effective advocacy efforts of the Institute for Justice, cutting back on the power of eminent domain has become the latest libertarian cause célèbre. The Institute has been particularly active at the state level, where it has achieved some success.[68] Given the lack of any genuine issue about the appropriate legal standard in this type of case, the Institute's success on behalf of their clients in persuading the Court to grant certiorari in *Kelo* was quite an accomplishment. Even more remarkable was their success in attracting four votes for overturning over 100 years of Court precedent.

B. The Kelo *Case*

The *Kelo* case involved a challenge to the city of New London's proposal to redevelop a 90-acre area in an older part of the city for commercial, office, residential, and recreational purposes. The plan sought to capitalize on the announcement by the Pfizer pharmaceutical company that it planned to build a major research facility on an adjacent site. The city successfully negotiated the purchase of most of the approximately 115 separate properties in the redevelopment area, but the owners of 15 properties refused to sell. The redevelopment plan was the product of an intensive planning effort that included numerous public hearings and extensive input from state agencies. The city's plan, once the land acquisition was consummated, was to lease the area, subject to vari-

58. 2005 WL 1469529, at *1.

59. O'Neill v. Leamer, 239 U.S. 244 (1915).

60. Clark v. Nash, 198 U.S. 361 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

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

62. 348 U.S. 26 (1954).

63. 467 U.S. 229, 14 ELR 20549 (1984).

64. 348 U.S. at 33-34.

65. *Id.* at 35-36.

66. 467 U.S. at 240.

67. *Id.* at 241.

68. *See, e.g.*, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

ous contractual restrictions, to a developer who would carry out the city's redevelopment plan.

The dissenting property owners brought suit in Connecticut Superior Court alleging that the taking of their property would violate the public use requirement of the federal Takings Clause. Following a seven-day trial, the court granted an order prohibiting the taking of property in one portion of the redevelopment area but denying relief as to another portion. On cross-appeals, the Connecticut Supreme Court, by a margin of 4 to 3, relying heavily on *Berman* and *Midkiff*, upheld the city's planned use of eminent domain.[69] The three dissenting justices would have applied a heightened standard of review. While they agreed the redevelopment plan was designed to serve a valid public purpose, they argued that the city failed to present "clear and convincing" evidence that the planned redevelopment would be realized.

C. The Court's Opinions

Justice John Paul Stevens, the author of many of the important, recent Court regulatory takings decisions,[70] wrote the opinion for the Court, joined by Justices Stephen Breyer, Ruth Bader Ginsburg, Kennedy, and David H. Souter, upholding the city's use of the eminent domain power. Justice Kennedy also filed a separate concurring opinion. Justice O'Connor filed a dissenting opinion, joined by Chief Justice William H. Rehnquist and Justices Scalia and Clarence Thomas. Justice Thomas also filed a separate dissenting opinion.

The Court, following *Berman* and *Midkiff*, ruled that a government action serves a public use as long as it advances a public purpose, which the Court said should be defined broadly and with deference to the legislature's judgment. Based on the precedent discussed above upholding the use of eminent domain to support various forms of private development, the Court rejected as "incongruous" plaintiffs' argument that New London's redevelopment plan did not serve a public use. The Court also rejected plaintiffs' argument that courts should apply heightened scrutiny and demand a showing of a "reasonable certainty" that redevelopment will achieve its expected benefits. Apart from the fact that acceptance of this alternative argument would demand "an even greater departure from our precedent," the Court said this standard "would unquestionably impose a significant impediment to the successful consummation of many such plans."

The Court emphasized that the city sought to use eminent domain pursuant to a "carefully considered plan" for the area as a whole. In addition, the Court said that the plan had been the product of "thorough deliberation," including neighborhood meetings, several specific approvals by the city council, and state-level review of the plan. The Court distinguished the case of a "one-to-one transfer of property, executed outside the confines of an integrated development plan," and indicated that its approval of New London's use of eminent domain did not necessarily imply approval of more targeted uses of eminent domain. "While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot," the Court said, "the hypothetical cases posited by petitioners can be confronted if and when they arise." The Court offered a further qualification on its holding by indicating that it was "notable" that in *Kelo*, as in *Berman*, the private redeveloper would be "required by contract to use the property to carry out the redevelopment plan." The Court apparently believed that such contractual commitments to carry out the publicly approved redevelopment plan provided an additional assurance that eminent domain was being deployed to achieve a public purpose rather than to benefit new owners.

While Justice Kennedy joined in the opinion for the Court, he also filed a separate concurring opinion. First, Justice Kennedy stated that even though *Berman* and *Midkiff* established that a taking for economic development purposes should be upheld so long as it is rationally related to a legitimate public purpose, this did not mean that the Takings Clause did not prohibit "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits." To ferret out such misuses of the eminent domain power, Justice Kennedy said courts should apply "meaningful rational basis review" based on a through examination of the record. He said a court should strike down an exercise of eminent domain "that, by a clear showing, is intended to favor a particular party, with only incidental or pretextual benefits."

Justice Kennedy also left open the "possibility" that a more stringent standard of review might be appropriate in some "narrowly drawn category of takings" where "the risk of undetected, impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." He declined to offer "conjecture" about what sort of cases might justify heightened review, but listed various aspects of the *Kelo* case that persuaded him "no departure from *Berman* and *Midkiff*" was warranted. These included that "[t]his taking occurred in the context of a comprehensive development plan," the plan was meant to address "a serious city-wide depression," the "economic benefits of the project cannot be characterized as *de minimis*," the identities of most project beneficiaries "were unknown at the time the city formulated its plans," and the city followed various "procedural requirements" that facilitated review of the project's bona fides. Based on these factors, Justice Kennedy concluded that *Kelo* was certainly not the type of case "in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits so trivial or implausible, that courts should presume an impermissible private purpose."

Justice O'Connor filed a virulent dissent. Her basic concern was that the majority's approach provided no real means for enforcing the principle, to which all members of the Court subscribed, that the Takings Clause does not authorize a forced, naked transfer of property from A to B for no purpose other than to benefit B. Justice O'Connor objected that neither Justice Stevens nor Justice Kennedy offered a bright-line test for distinguishing between legitimate and illegitimate uses of eminent domain. More fundamentally, in her view, if incidental public benefit were sufficient to support a taking, then the fact that the taking was actually intended to benefit some private party would become irrelevant. Justice O'Connor acknowledged that some of the Court's language in *Midkiff* and *Berman* (including her own

69. *See* Kelo v. City of New London, 843 A.2d 500 (Conn. 2004).

70. *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216 (2003); Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 32 ELR 20627 (2002).

opinion in *Midkiff*) supported the majority's position, but she argued that this language was unnecessary to the actual results in those cases and should be disavowed.

To cabin use of the eminent domain power, Justice O'Connor proposed to read *Berman* and *Midkiff* as being based on a requirement that the "precondemnation use of the targeted property inflict[ ] affirmative harm on society." In *Berman*, in her view, the object was to "eliminate blight resulting from extreme poverty," whereas in *Midkiff* the goal was to eliminate "oligopoly resulting from extreme wealth." Both cases differed from *Kelo*, she said, where the properties being taken were not the source of "any social harm," but rather the taking was justified on the basis that the transfer of the property to new owners would "generate some secondary benefit for the public." Justice O'Connor charged that in moving away from the limitation ostensibly implicit in *Berman* and *Midkiff*, "the Court today significantly expands the meaning of public use." Justice O'Connor simply chose to ignore the pre-*Berman* cases that sanctioned use of eminent domain for economic development purposes.

Finally, Justice Thomas, in addition to joining Justice O'Connor's opinion, filed his own dissenting opinion. Following an ostensibly originalist approach to constitutional interpretation, Justice Thomas argued that the phrase "public use" should be given its "natural meaning" by permitting takings only if the government owns, or the public has a right to use, the property. He candidly admitted that this novel approach would require overturning essentially the entire body of Court precedent interpreting the phrase "public use." Contrary to Justice Thomas' view, dictionary definitions of the term public use do not preclude the longstanding view that eminent domain for a public purpose can serve a public use. In any event, at least for the time being, Justice Thomas has embraced an outlier position that has little practical significance. The irony of Justice Thomas' position is that in *Lingle* he joined in a unanimous opinion acknowledging that the Founding Fathers did not believe that the Takings Clause affected regulations at all. To be consistent, therefore, with his approach in *Kelo*, Justice Thomas should have called in *Lingle* for repudiation of the entire concept of regulatory takings!

D. The Implications of Kelo

The most remarkable aspect of *Kelo* is that the Court was so closely divided. As Justice O'Connor acknowledged in part, and as the majority opinion made clear, a contrary decision would have overruled over a century of Court precedent. The explanation for this decision may lie in the fact that the case in part involved owner-occupied homes. So far as I am aware, *Kelo* is the first case in the Court involving a challenge to the use of eminent domain for economic development purposes in which the property at issue was a home. A home has iconic significance in American society and, as Prof. Margaret Jane Radin has explained,[71] government action affecting a home interferes more directly with citizens' sense of personhood than other types of government action affecting property. Yet none of the decisions prior to *Kelo* turned on whether or not the property at issue was a home. And Justice O'Connor's proposed limitation on the use of eminent domain would protect all types of private property owners, not just homeowners. At the same time, insofar as Justice O'Connor reaffirmed that eminent domain is nonproblematic when the public holds title to the property, her approach would leave homeowners without any special protection outside the context of eminent domain for economic development. The sympathetic elderly homeowners in *Kelo* may help explain the sharp division in *Kelo*, but they do not help explain the minority's reasoning.

While the majority relied upon and reaffirmed *Berman* and *Midkiff*, *Kelo* actually places new limitations on the use of the eminent domain power for economic development purposes. *Kelo* speaks about the deference due government in its choices about when and how to use eminent domain, but the tone of the *Kelo* decision is far more restrained than the full-throated embrace of eminent domain in the earlier cases. For example, *Midkiff* stated that exercises of eminent domain are subject to review under a rational relation test; this formula is not specifically repeated in *Kelo*, replaced instead by a more ambiguous reference to the requirement of "deference." In addition, while both *Berman* and *Midkiff* stated that the eminent domain power is coincident in scope with the police power, suggesting that the eminent domain power can be used to advance any legitimate governmental purpose, no similar statement appears in *Kelo*.

The most important new limitation is the suggestion that the courts should uphold, or at least pay deference to, government exercises of eminent domain only when the authority is used to implement a comprehensive plan for an entire area developed with intensive public involvement and approved by responsible elected officials. Instructing by example rather than by mandate, the Court indicated that the fact that the city was implementing a comprehensive plan counted in its favor, providing a broad hint that communities would be ill-advised to take property unless it was consistent with an adopted plan. As if to underscore the need for planning by means of subliminal suggestion, the word "plan," "planning," or "planner" appears over 40 times in the majority opinion. Again instructing by example, the Court indicated that a point weighing in New London's favor was the fact that the developer of the redevelopment would be contractually committed to implement the city's redevelopment plan. A well-advised city would also follow this pointed advice.

One idea briefly alluded to in the Court's opinion is whether the level of compensation might be adjusted in certain circumstances above fair market value, the traditional measure of just compensation. The amicus brief of the American Planning Association and the National Congress for Community Economic Development argued that the level of compensation might be increased for certain property owners, homeowners in particular, whose subjective losses would not be fully compensated by payments based on fair market value. The Court simply observed that the issue was "important" but not directly raised by this case, leaving it for another day.

The *Kelo* case has served to scramble significantly the politics of the property rights issue, aligning groups such as the National Association for the Advancement of Colored People with libertarian property rights advocates and bringing environmentalists and developers together in defense of the eminent domain power for economic development purposes. Even though the United States participated as an ami-

71. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

cus curiae in support of the state of Hawaii in *Lingle* and urged the Court to jettison the frequently repeated substantially advance test, the United States declined to participate at all in the *Kelo* case, even though the city's position sought to uphold over a century of Court precedent. The case also creates anomalies in terms of the issues. *Kelo* appears to place libertarians on the side of the homeowner, even though the homeowner and the zoning protection she enjoys is a primary target of the property rights movement. On the other hand, property rights advocates, in arguing that "public use" should be interpreted as requiring actual public ownership, seem to be working against including private enterprise as a partner in the revitalization of our older cities. Who knew the takings issue could take such an interesting turn?

III. *San Remo*

The third takings case of the Court's 2004 term, *San Remo*,[72] will likely have little long-term significance for the evolution of regulatory takings doctrine—both because the case dealt with a relatively straightforward procedural question, and because the case raised the issue in such a highly convoluted and confusing fashion. The case arose from a San Francisco housing ordinance that required hotel owners who sought to convert long-term residency hotels to tourist use to mitigate the adverse effect of the conversion on the housing supply by providing replacement housing or paying into a designated fund to support housing development.

The basic issue in the case was whether a taking claimant, having unsuccessfully pursued a takings claim under state law in state court, could relitigate the exact same claim under federal law in federal court. The Ninth Circuit, in the *San Remo* case, ruled that the full faith and credit statute barred such duplicative litigation.[73] However, the U.S. Court of Appeals for the Second Circuit had reached the opposite conclusion,[74] and the Court granted certiorari to resolve the conflict.

Not surprisingly, the Court unanimously agreed that the Ninth Circuit properly ruled that the full faith and credit statute applied in these circumstances.[75] The plaintiffs argued that normal rules of preclusion should not apply because the Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*[76] requires a takings claimant seeking compensation from state or local government to pursue the claim in state court rather than federal court. Because *Williamson County* forces litigants to pursue their claims in state court involuntarily, plaintiffs argued, state court litigation of a taking should not bar subsequent assertion of the same claim under federal law in federal court. The Court rejected the argument, observing that it had held in other contexts that a litigant required to litigate an issue in state court *could* be barred from relitgating the issue for federal court, and that there was no good reason to create an exception to this principle in takings cases. The Court categorically rejected the argument that every litigant with a federal constitutional claim is entitled to litigate the claim in federal court.

The case was made particularly confusing by the fact that "the heart" of the plaintiffs' case was that the San Francisco housing ordinance effected a taking because it allegedly failed to "substantially advance" a legitimate state interest. While the *San Remo* case was being debated before the Court, of course, the Court was also considering the *Lingle* case, in which the Court ultimately decided to jettison the substantially advance inquiry altogether. In addition, the Court itself had ruled a claimant suing under the substantially advance theory was entitled to proceed in the first instance in federal court, notwithstanding *Williamson County*.[77] This position was based on the plausible theory (assuming the validity of the substantially advance test) that since a substantially advance claim seeks invalidation of the government action, not just compensation, *Williamson County* does not apply. Thus, in the main, plaintiffs' primary argument for creating an exception to ordinary preclusion rules—that *Williamson County* relegates takings claimants to state court against their will—did not even apply in this case; the plaintiffs in *San Remo* had *voluntarily* elected to litigate their substantially advance claim in state court. Notwithstanding these confusing difficulties, the Court reached the issue presented and ruled in favor of the city.

Ultimately, the significance of *San Remo* lies not in the question actually presented and decided by the Court, but rather in the fact that the case highlighted a separate issue raised by several of the plaintiffs' amici.[78] This issue is whether *Williamson County* correctly decided that a takings claimant suing state or local government must pursue the claim in state court rather than federal court. Chief Justice Rehnquist, in a concurring opinion joined by three other Justices, opined that *Williamson County* "may have been mistaken," and suggested that the Court might wish to reconsider *Williamson County* "[i]n an appropriate" case. It is fair to assume that this issue will percolate up to the Court sometime in the next several years.

IV. A Few General Observations

Several broad, cross-cutting themes about takings law emerge from the *Kelo* and *Lingle* decisions that are worthy of brief note.

A. Deference

The first theme is that the Takings Clause does not create an exception to the general principle of American constitutional law that the judiciary should generally defer to the judgments of elected officials on matters of public policy. In *Lingle*, the Court, in addition to ruling that means-ends analysis has no place in takings law, went out of its way to condemn the heightened scrutiny applied by the Ninth Circuit under the substantially advance test. The Court observed that it had "long eschewed such heightened scrutiny when addressing substantive due process challenges to govern-

72. 125 S. Ct. at 2491.

73. *See* San Remo Hotel, Ltd. Partnership v. City & County of San Francisco, 364 F.3d 1088 (9th Cir. 2004).

74. *See* Santini v. Connecticut Hazardous Waste Management Serv., 342 F.3d 118 (2d Cir. 2003).

75. The Court emphasized that it was only deciding the full faith and credit issue, and that it was not deciding whether the Ninth Circuit had properly applied California law of claim and issue preclusion on the facts of this case.

76. 473 U.S. 172 (1985).

77. *See* Yee v. Escondido, 503 U.S. 519 (1992).

78. Most notably in the Brief of Amicus Curiae Elizabeth J. Neumont et al., 2005 WL 176429 (filed Jan. 24, 2005).

ment regulation." The Court continued: "The reasons for deference to legislative judgments about the need for, and likely effectiveness of regulatory actions are . . . no less applicable" in the takings context.

To support the principle that heightened scrutiny of government regulation is inappropriate in substantive due process challenges, the Court cited *Ferguson v. Skrupa*[79] and *Exxon Corp. v. Governor of Maryland*.[80] *Skrupa*, in which the Court rejected a due process challenge to a Kansas statute making it illegal to engage in the business of debt adjustment except as an incident to the practice of law, contains one of the Court's strongest statements in support of the principle of judicial deference to legislative judgments:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . We are not concerned . . . with the wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.[81]

Exxon dealt with a Maryland statute that, like Act 257, sought to protect consumers from high gasoline prices but went beyond the Hawaii statute by flatly prohibiting oil companies from operating gas stations in the state. The Court unanimously rejected a due process challenge to the Maryland law, stating that "it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation."[82]

The majority sounded the same theme of deference in *Kelo* in rejecting the argument that the courts should demand a "reasonable certainty" that a redevelopment plan would succeed. Apart from relying upon the authority of *Midkiff*, the Court cited its decision in *Lingle*, issued just one month earlier, in which, the Court explained that "similar practical concerns (among others) undermined the use of the 'substantially advances' formula in our regulatory takings doctrine." Interestingly, the Court in *Midkiff* relied heavily on the decision in *Exxon*,[83] which the Court in *Lingle* found persuasive authority for rejecting heightened review under the substantially advance test.

Because the deference theme was so critical to the outcome in *Lingle*, it is interesting to speculate whether the outcome in *Kelo* was influenced by the fact that oral arguments in *Lingle* and *Kelo* were held on the same day. The majority in *Kelo* obviously viewed the cases as joined at the hip, reasoning that the justifications for judicial deference to legislative judgment applied equally in both cases. While the answer is obviously unknowable, it may well be that one of the *Kelo* majority, Justice Kennedy perhaps, was influenced by the inconsistency in approach between Justice O'Connor's opinion for the majority in *Lingle* and her concurring opinion in *Kelo*.

79. 372 U.S. 726 (1963).

80. 437 U.S. 117 (1978).

81. 372 U.S. at 730-31.

82. 437 U.S. at 124.

83. *See Midkiff*, 467 U.S. at 242.

B. The Generality of the Government Action

The second common theme in *Lingle* and *Kelo* is a clear indication of the Court's willingness to accord greater latitude under the Takings Clause to measures that apply to a broad cross-section of the community than to ad hoc, site-specific decisions. In *Lingle*, this theme emerges in the Court's dictum regarding the importance of the "generality" of a regulation under the *Penn Central* inquiry. It reemerges in *Kelo* where the Court indicated that a powerful factor weighing in favor of New London was that the taking implemented a comprehensive redevelopment plan, and reserved the question of whether a "one-to-one transfer," executed outside the context of a plan, might not survive constitutional challenge.

This distinction has appeared earlier in takings jurisprudence in the *Nollan* and *Dolan* exaction cases. In *Dolan*, the Court indicated that the type of exacting scrutiny demanded by these decisions could not properly be applied to general legislation.[84] *Lingle* reinforces the point by several times referring to *Dolan* and *Nollan* as cases dealing with adjudicative exactions.

At least two considerations appear to underlie this distinction. The first, discussed above, is that a broadly applicable regulation is more likely than not to create a "reciprocity of advantage" that eliminates in part, if not in whole, any economic burden imposed by regulation. The second consideration appears to be that a legislative measure is more likely than an adjudicative decision to have received a full airing in the political process, increasing the likelihood that the measure serves the broad public interest and that government powers are not being hijacked to advance some private interest at the expense of one or a few particular landowners. Even if as a doctrinal matter the legitimacy of government action is a logical precondition for a takings claim, the Court is apparently more willing to accord deference under the Takings Clause when it has added assurance that the government decision is the product of a deliberative political process.

C. Due Process and Equal Protection Claims

Another implication of *Lingle* and *Kelo* is that plaintiffs are increasingly likely to invoke the Due Process Clause and/or the Equal Protection Clause to challenge regulatory programs. *Lingle*, of course, directs plaintiffs to the Due Process Clause in lieu of the Takings Clause when the claim is based on allegedly illegitimate government action. Thus, *Lingle* overrules the position, adopted by some courts,[85] that state and local regulation is immune from challenge under the Due Process Clause on the ground that the Takings Clause effectively occupies the field.[86] Justice Kennedy's concurring opinion highlights the point that the standard of review under the Due Process Clause, though historically well settled, might be subject to further examination in the future. Finally, *Kelo* expressly identifies an equal protection claim as a possible alternative basis for challenging one-to-one property transfers outside the context of a com-

84. *See Dolan*, 512 U.S. at 391 n.8.

85. Armendariz v. Penman, 75 F.3d 1311, 1323-27 (9th Cir. 1996) (en banc).

86. *See, e.g.*, Consolidated Waste Sys., Ltd. Liab. Co. v. Nashville, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005).

prehensive plan. Given all these suggestive hints, and in light of the newly restricted version of regulatory takings doctrine embraced by the Court in *Lingle*, it is fair to assume that creative counsel will be devoting more and more attention to the Due Process and Equal Protection Clauses.

D. What Was She Thinking?

With her recent resignation from the Court, Justice O'Connor has been the just beneficiary of numerous plaudits for her distinguished service on the Court. It is fair to say, however, that the Justice's performance in this year's takings cases does not represent her best work. Justice O'Connor's opinion for the Court in *Kelo* represents a remarkable about-face from the unanimous opinion she wrote for the Court in *Midkiff* less than 20 years ago. Her efforts to distinguish and cabin *Midkiff* are thoroughly unconvincing. It may well be that the different results turn on the fact that *Midkiff* involved wealthy landowners rather than more sympathetic, middle-class individuals. If so, her approach is hard to defend in terms of legal principle. Equally baffling is Justice O'Connor's ringing endorsement in *Lingle* of the need for judicial deference to legislative judgments, and her willingness in *Kelo* to override the judgment of the New London City Council. Again, these different results may turn on the fact that *Lingle* involved an oil company plaintiff rather than a sympathetic individual citizen, as in *Kelo*. In any event, the majority in *Kelo* did a good job of demonstrating that Justice O'Connor's opinion for the Court in *Lingle* provided a powerful precedent in support of their position. Finally, in resting her approach in *Kelo* on the distinction between eliminating a harmful condition on the property and creating a valuable community benefit, Justice O'Connor revives the malleable harm-benefit distinction repudiated by the Court in *Lucas*,[87] a decision in which Justice O'Connor joined without qualification.

V. Conclusion

Upon analysis, none of the results in this year's trilogy of takings cases turns out to be especially remarkable. While the *Lingle* decision did significant surgery to takings law and greatly clarified the doctrine of regulatory takings as a whole, repudiation of the substantially advance test was the only logical outcome in the case, given the basic tenets of takings law. *Kelo*, notwithstanding the political furor surrounding the case, applied very well-settled precedent. The argument for "two bites at the apple" in *San Remo* bordered on the absurd and was properly rejected. Under any sensible reading, the Takings Clause should impose only a modest constraint on the ability of elected representatives to adopt rules and programs designed to advance the public welfare. This term's trilogy of cases reinforces this essentially conservative reading of the Takings Clause. The imminent appointment of new Justices to the Court may possibly reignite a judicial property rights revolution. But, at least for the time being, judicial adventurism using the Takings Clause has apparently met its limits.

87. 505 U.S. at 1003.