''Poor Relation'' Once More: The Supreme Court and the Vanishing Rights of Property Owners

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I. Introduction

In three cases during its 2004–2005 term—*Lingle* v. *Chevron U.S.A., Inc.*,[1] *Kelo* v. *City of New London*,[2] and *San Remo Hotel v. City and County of San Francisco*[3]—the Supreme Court addressed related issues pertaining to the constitutionally protected rights of property owners. The justices sought to clarify aspects of their confused and contested takings jurisprudence. Unfortunately, the Court followed its recent trend of curtailing ownership rights in the face of economic regulations and governmental acquisition by eminent domain.[4] After a line of cases that began to put teeth into the Takings Clause of the Fifth Amendment, the Court seems to have lost its way and backtracked. For all their once bright promise, therefore, property rights decisions of the Court under Chief Justice William H. Rehnquist are ending, to paraphrase T.S. Eliot, with a whimper, not a bang.[5]

The Court has not demonstrated a sustained commitment to meaningful enforcement of individual property rights. Notwithstanding

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

[2]125 S. Ct. 2655 (2005).

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

[4]See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002); Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003).

[5]''The Hollow Men,'' in T.S. Eliot, The Complete Poems and Plays, 1909–1950, 56–59 (1952).

scholarly and journalistic talk of a ''conservative'' Rehnquist Court,[6] the justices have been unwilling to break free of the New Deal constitutional hegemony that radically weakened traditional judicial solicitude for economic rights.[7] Despite some piecemeal moves to enhance the protection afforded property owners by reinvigorating the Takings Clause,[8] the overall record of the Rehnquist Court on economic liberties has been disappointing and marked by lost opportunities.

II. Historical Framework

To understand this term's trilogy of property rights decisions in context, it will be helpful to briefly review the historical role of property rights in our constitutional order. The conviction that private property was essential for self-government and political liberty was long a central tenet of Anglo-American constitutionalism.[9] Heirs of that tradition, the Framers of the Constitution and Bill of Rights were motivated in large part by the desire to establish safeguards for property. They felt that property rights and liberty were indissolubly linked. ''Perhaps the most important value of the Founding Fathers of the American constitutional period,'' Stuart Bruchey observed, ''was their belief in the necessity of securing property rights.''[10] Thus, James Madison asserted at the Philadelphia convention that ''the

[6]As the more liberal justices have gained ascendancy, the Rehnquist Court in recent years has disappointed conservatives and libertarians in a series of high-profile cases including those involving college affirmative action programs, limits on campaign contributions, the scope of congressional commerce power, and the rights of property owners.

[7]James W. Ely Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (2nd ed. 1998). See also Walter Dellinger, The Indivisibility of Economic Rights and Personal Liberty, 2003–2004 Cato Sup. Ct. Rev. 9, 13 (2004) (concluding that ''the New Deal Court swept far too broadly in repudiating the protection of economic liberties'').

[8]See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994); Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

[9]Ely, *supra* note 7, at 10–58. For a sweeping study that stresses the necessity of private property as a prerequisite for individual liberty, see Richard Pipes, Property and Freedom (1999).

[10]Stuart Bruchey, The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic, 1980 Wis. L. Rev. 1135, 1136.

primary objects of civil society are the security of property and public safety.''[11]

From the beginning of the New Republic, courts curtailed legislative infringement of property and contractual rights. In 1795 in *Vanhorne's Lessee* v. *Dorrance*[12] Justice William Paterson, who had been an important member of the constitutional convention, revealingly declared that ''the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and unalienable rights of man.''[13] As is well known, there was a close affinity between the jurisprudence of John Marshall and the defense of economic rights. The property-conscious dimensions of Marshall's constitutionalism primarily found expression in a famous string of cases broadly construing the Contracts Clause.[14] Other prominent antebellum jurists stressed the association between private property and political liberty. As Justice Joseph Story explained:

> [I]n a free government almost all other rights would become utterly worthless, if the government possessed an uncontrolled power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers.[15]

Industrialization and urbanization posed new challenges to the legal system in the decades following the Civil War. Adoption of the Fourteenth Amendment in 1868 created new avenues for federal judicial review of state legislation. The Supreme Court began in the late nineteenth century to scrutinize regulatory legislation under the Due Process Clause.[16] More important for our purposes, however, was the extension of the just compensation principle to the states.

[11]1 The Records of the Federal Convention of 1787, at 147 (Max Farrand ed., 1937).

[12.] 2 U.S. (2 Dall.) 304 (C.C. Pa. 1795).

[13.] *Id*. at 310.

[14]See Charles F. Hobson, The Great Chief Justice: John Marshall and the Rule of Law 72–110 (1996); James W. Ely Jr., The Marshall Court and Property Rights: A Reappraisal, 33 J. Marshall L. Rev. 1023, 1029–47 (2000) (discussing the Marshall Court's Contracts Clause jurisprudence).

[15]3 Joseph Story, Commentaries on the Constitution of the United States 664 (1833).

[16]Ely, *supra* note 7, at 82–100.

In 1833 in *Barron* v. *Baltimore*[17] the Court had ruled that the Bill of Rights, including the Fifth Amendment, was binding only on the federal government.[18] In the leading 1897 case of *Chicago, Burlington and Quincy Railroad Company* v. *Chicago*,[19] however, the justices held that the payment of compensation when private property was taken for public use was an essential element of due process as guaranteed by the Fourteenth Amendment.[20] Attesting to the high standing of property rights, the *Chicago Burlington* case marked the initial move to incorporate specific provisions of the Bill of Rights into the Fourteenth Amendment's Due Process Clause.

The Supreme Court, during the tenure of Melville W. Fuller as chief justice (1888–1910), established several other vital bedrock principles governing takings jurisprudence.[21] First, the justices made clear that the power of eminent domain did not authorize government to acquire the property of one person for transfer to another, even upon payment of compensation. In other words, government could take private property only for public use.[22] Second, the Court underscored the fundamental fairness norm implicit in the Takings Clause. It pointed out that the purpose of the clause was to prevent ''the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.''[23] In this classic statement the Court cut to the heart of the basic inquiry underlying takings jurisprudence—how far can society single out individuals to contribute a disproportionate amount toward providing social goods? In other words, when should society, through taxation, rather than individual owners bear the cost of achieving desired social goals?

By the late nineteenth century courts and commentators were considering whether a regulation might so diminish the value or

[17]32 U.S. (7 Pet.) 243 (1833).

[18]*Id*. at 250–51.

[19]166 U.S. 226 (1897).

[20]*Id*. at 238–39.

[21]See generally James W. Ely Jr., The Fuller Court and Takings Jurisprudence, 2 J. of Sup. Ct. Hist. 120 (1996).

[22]Missouri Pacific Railway Company v. Nebraska, 164 U.S. 403, 417 (1896).

[23]Monongahela Navigation Company v. United States, 148 U.S. 312, 325 (1893).

usefulness of property as to be tantamount to a taking without physical interference or acquisition of title. Property ownership had long been understood to encompass use and enjoyment, not mere title. In his famous 1792 essay James Madison perceptively warned people against government that ''*indirectly* violates their property, in their actual possessions.''[24] Although Madison anticipated the regulatory takings doctrine, the modern doctrine began to take shape in the last decades of the nineteenth century.[25] For example, in a treatise on eminent domain published in 1888, John Lewis declared that when a person was deprived of the possession, use, or disposition of property ''he is to that extent deprived of his property, and, hence . . . his property may be taken, in the constitutional sense, though his title and possession remain undisturbed.''[26] Likewise, in 1891 Justice David J. Brewer pointed out that regulation of the use of property might destroy its value and constitute the practical equivalent of outright appropriation.[27] While on the Supreme Judicial Court of Massachusetts, Oliver Wendell Holmes also recognized that regulations might amount to a taking of property. ''It would be open to argument at least,'' he stated, ''that an owner might be stripped of his rights so far as to amount to a taking without any physical interference with his land.''[28] As a member of the Supreme Court in 1908 Holmes insisted that a height restriction on buildings that rendered a building lot useless would constitute a compensable taking.[29] In short, the famous 1922 decision of *Pennsylvania Coal v. Mahon*,[30] in which the Court endorsed the emerging concept of a regulatory taking, was hardly an innovation. Rather, it reflected the desire of the Framers for robust protection of the rights of property

[24]James Madison, Property, National Gazette (March 29, 1792), reprinted in 14 The Papers of James Madison 266–68 (Robert A. Rutland & Thomas A. Mason eds., 1983) (emphasis in original).

[25]Adam Mossoff, What Is Property? Putting the Pieces Back Together, 45 Ariz. L. Rev. 371, 428–36 (2003) (examining cases from late nineteenth century in which courts treated restrictions on use or diminution in value of property as a taking).

[26]John Lewis, A Treatise on the Law of Eminent Domain 40–46 (1888).

[27]David J. Brewer, Protection to Private Property from Public Attack, 55 New Englander and Yale Rev. 97, 102–05 (1891).

[28]Bent v. Emery, 53 N.E. 910, 911 (Mass. 1899).

[29]Hudson Water Company v. McCarter, 209 U.S. 349, 355 (1908).

[30]260 U.S. 393 (1922).

owners and marked the culmination of years of discussion about the impact of regulation on property ownership.

The issue of regulatory takings has been most frequently litigated in the context of land use controls. Two trends became apparent early on. First, the Court sometimes conflated takings challenges with the deprivation of property without due process in violation of the Fourteenth Amendment.[31] Superficially similar, these concepts are in reality quite different. A law that constitutes a deprivation of property without due process is simply void. On the other hand, the Takings Clause does not prevent governmental interference with existing property relationships. It only mandates that owners receive just compensation for any property taken by governmental action. In an age of tight budgets and tax cutting initiatives, however, legislators all too often are inclined to provide public benefits by imposing regulatory burdens on a small group of landowners rather than by taxing society as a whole. In this light, land use regulations may represent an attempt to circumvent the just compensation command of the Fifth Amendment.

Second, for decades after *Pennsylania Coal* the Court was reluctant to actually invoke the regulatory taking doctrine to invalidate land use controls. Part of the problem was that the Court found it hard to differentiate between appropriate regulations and an unconstitutional regulatory taking. The standard set forth by Holmes in *Pennsylvania Coal Company v. Mahon*[32]—''[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking''[33]—was not much help in deciding particular cases. Proceeding in an essentially ad hoc manner, the Court wrestled for decades to articulate a comprehensible formula to govern regulatory takings claims. A review of this line of cases is, for the most part, outside of this study. Eventually, in 1978 in *Penn Central Transportation Co. v. New York City*,[34] the Court declined to establish set rules and instead endorsed a multi-factor approach to assess whether a land use restriction amounted to a

[31]See generally Lawrence Berger, Public Use, Substantive Due Process and Takings—An Integration, 74 Neb. L. Rev. 843 (1995).

[32]260 U.S. 393 (1922).

[33]*Id*. at 415.

[34]438 U.S. 104 (1978).

taking of property. Of particular significance were the ''economic impact of the regulation on the claimant,'' the extent to which the regulation unduly frustrated ''distinct investment-backed expectations,'' and ''the character of the governmental action.''[35] Those indeterminate factors provide little guidance to individuals and in practice are heavily balanced in favor of the government and against compensation. Efforts to fashion per se takings tests to govern land use exactions afford only narrow protection to landowners and have added to the doctrinal confusion.[36]

To fully appreciate the problems with contemporary takings jurisprudence, one must take account of the diminished constitutional status of property in the wake of the political triumph of the New Deal. Protection of property rights was a central theme in American constitutionalism before 1937.[37] In the early twentieth century, however, the Progressive movement began urging a more active role for state and federal governments in regulating the economy, leading to an assault on the high constitutional standing of property. Legal theorists associated with the Progressives argued that constitutional doctrine overstated the importance of property and contractual rights.[38] This intellectual challenge to property rights came to fruition in the 1930s.

The Great Depression and the New Deal program of President Franklin D. Roosevelt constituted a watershed in constitutional history. The New Deal legislative program ran directly counter to traditional constitutional principles emphasizing a limited federal government and a high regard for the rights of property owners. The bitter struggle between the New Dealers and the Supreme Court is well known and cannot be treated in detail here. A profound change of direction by the Court, often called the constitutional revolution

[35]*Id*. at 124.

[36]Laura S. Underkuffler, On Property: An Essay, 100 Yale L.J. 127, 130 (1990) (''Various tests . . . have been used to determine whether a constitutionally cognizable property interest exists. The resulting incoherence is profound.'').

[37]Ely, *supra* note 7, at 3–134.

[38]Morton J. Horwitz, The Transformation of American Law, 1870–1960, at 33–63, 145–67 (1992); Mossoff, *supra* note 25, at 372–76 (discussing attempts in early twentieth century to reformulate the concept of property). See generally Morton Keller, Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933 (1990).

of 1937, significantly undermined judicial solicitude for private property.[39] A key feature of New Deal constitutionalism was a judicially fashioned dichotomy between the rights of property owners and other personal liberties. This novel approach was set forth in 1938 in the famous footnote four of *United States v. Carolene Products Co.*,[40] in which the Court signaled that it would give a higher degree of due process scrutiny to a preferred class of individual rights, such as free speech and religious freedom, than to property rights.[41] The rights of owners were relegated to a secondary status, entitled to just a low level of due process review. Economic regulations were presumed to be valid and, henceforth, received only cursory judicial review under a ''rational basis'' test highly deferential to government. It is hard to square this subordination of property rights with either the expressed views of the Framers or the language of the Constitution and Bill of Rights. But the reduced status of property rights well served the political agenda of the New Deal. Today the Court remains fixated on hierarchical rights with property on the bottom tier.

The wholesale abandonment of federal judicial review of economic legislation under due process had ramifications for the other property clauses of the Constitution. Both the once powerful Contracts Clause and the Takings Clause were virtually ignored for decades. The security of economic interests was left to the political arena, in marked contrast to other claims of individual rights. This sweeping change in the Court's philosophy cannot be explained solely by reference to political pressure emanating from the New Deal. Instead, it reflected a skeptical attitude toward private property, an attitude that permeated modern legal culture. Property, deemed an impediment to expanded government authority and redistributive

[39]William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995); Pipes, *supra* note 9, at 241 (''Roosevelt and his advisors encouraged a fundamental and longlasting change in attitude toward private property: laws conceived and presented as emergency measures were subtly transformed into innovative principles which fundamentally altered first governmental and then judicial attitudes toward ownership.'').

[40]304 U.S. 144 (1938).

[41]*Id*. at 152–53, 153 n.4.

policies, was no longer viewed as worthy of serious judicial protection.[42] Modern constitutional law had moved far from the position espoused by the Framers, that property was a bulwark of individual liberty.

With this brief history as background to draw from we can now analyze the three important takings cases the Court decided during its 2004–2005 term. Those cases, in order, addressed the following broad questions:

(1) How does one determine when a government regulation effects a taking of property?
(2) Does the ''public use'' restraint in the Takings Clause permit government to transfer property from one private party to another, under its eminent domain power, in order to promote economic development?
(3) Are owners who claim that a state or local regulation amounts to a taking of property precluded from presenting their claim in federal court by a judicially crafted requirement that they must first seek compensation through state procedures?

III. The Narrowing of the Regulatory Takings Doctrine in *Lingle*

A. Background of the Litigation

The *Lingle* litigation grew out of the Supreme Court's continuing struggle to formulate coherent standards governing regulatory takings. In 1980 in *Agins v. City of Tiburon*,[43] a case involving a facial attack on a municipal zoning ordinance, the Court held, in an opinion by Justice Lewis Powell, that a land use law ''effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.''[44] This language was repeated in a number of subsequent takings decisions

[42]See Richard A. Epstein, Takings: Descent and Resurrection, 1987 Sup. Ct. Rev. 1 (''Today there are many who are openly hostile to private property, and who would gravitate toward the pole that sharply limits its role in social, economic, or political affairs. This skeptical attitude toward property has been reflected by the sharply reduced protection that private property has received in modern American constitutional law.'').

[43]447 U.S. 255 (1980).

[44]*Id*. at 260.

by the Court.[45] Over time the ''substantially advances'' wording was treated as a separate regulatory takings test, and was invoked by lower federal courts to strike down rent control ordinances in several cases.[46]

At issue in *Lingle* was a 1997 Hawaii statute that set the maximum rent that oil companies could charge dealers who leased company-owned service stations.[47] The expressed legislative rationale behind this measure was a desire to reduce retail gasoline prices, yet it was agreed that Chevron was free to raise wholesale gasoline prices to offset any loss resulting from the rent reduction.[48] Chevron did not challenge the constitutionality of the statute on the ground that it could not earn a reasonable return on investment. Rather, its attack was predicated squarely on the contention that Hawaii's law did not ''substantially advance'' its purpose of reducing gasoline prices, and thus effected a regulatory taking.[49] Lengthy litigation ensued. The federal district court found as a fact that the act would not achieve the goal of lowering gasoline prices for consumers, and might indeed cause prices to increase. Concluding that the statute constituted an unconstitutional taking of property, the trial court granted summary judgment to Chevron.[50]

A divided panel of the Ninth Circuit Court of Appeals affirmed, reasoning that the act did not in fact substantially advance the state's objective.[51] It rejected Hawaii's argument that the rent control measure should be evaluated under the Due Process Clause of the Fourteenth Amendment rather than the Takings Clause.[52] Dissenting,

[45]See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 334 (2002); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985).

[46]See, e.g., Richardson v. City and County of Honolulu, 124 F.3d 1150, 1165–66 (9th Cir. 1997), cert. denied, 525 U.S. 871, 525 U.S. 921, and 525 U.S. 1018 (1998); Cashman v. City of Cotati, 374 F.3d 887, 892–93, 896 (9th Cir. 2004).

[47]It is noteworthy that the statute prohibited companies from refusing to renew leases so long as local dealers continued to pay the below-market rents, yet it allowed those same dealers to sublet the stations and charge market rents. For an analysis of the takings implications, see Brief of Amicus Curiae Cato Institute in Support of Respondent, Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074 (2005) (No. 04-163).

[48]Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2078 (2005).

[49]*Id*. at 2082.

[50]Chevron U.S.A., Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1193 (D. Haw. 2002).

[51]Chevron U.S.A., Inc. v. Lingle, 363 F.3d 846 (9th Cir. 2004).

[52]*Id*. at 850.

Judge William A. Fletcher maintained that the ''substantially advances'' test was unsuitable for reviewing a rent control statute.[53]

Before analyzing the Supreme Court's decision, a few general observations are in order. The Hawaii statute would appear a curious measure to trigger an important takings decision. Commercial rent control is unusual in the United States. Moreover, the act is perhaps best viewed as an indirect price control law, since the object of the legislature was to reduce retail gasoline prices. Hence, cases dealing with land use and zoning issues may not be entirely pertinent in resolving the constitutionality of the statute. As the trial court accurately ascertained, the act is highly unlikely to produce lower gasoline prices. The international oil market and Hawaii's isolated geographic location are doubtless the principal factors in determining prices in the state, and neither can be regulated by the legislature. So there is a pronounced shadow boxing quality to the contested statute. Indeed, Judge Fletcher, who dissented from the Ninth Circuit's opinion, nonetheless agreed that the state's argument was weak and that the trial court ''did not err'' in holding that the ''substantially advances'' test was not satisfied.[54] Put simply, the district court's analysis of the probable economic impact of the act was correct.

On the other hand, it was also unclear that Chevron had suffered much economic loss as a consequence of the statute. Indeed, Chevron conceded that earnings on its investment in lessee-dealer stations in Hawaii satisfied the constitutional standard of a reasonable return. Thus, the case did not fit easily within the protective function of the Takings Clause.

B. Supreme Court's Opinion

In *Lingle* Justice Sandra Day O'Connor, writing for a unanimous Court, reversed the Ninth Circuit and jettisoned the ''substantially advances'' formula as inappropriate for determining whether a regulation amounts to a taking.[55] O'Connor began her analysis by insisting that a direct governmental appropriation or physical occupation

[53]*Id*. at 859–61 (Fletcher, J., dissenting).

[54]*Id*. at 859.

[55]125 S. Ct. 2074 (2005).

represented the typical example of a taking under the Fifth Amendment.[56] She then repeated the historically dubious proposition set forth in 1992 in *Lucas v. South Carolina Coastal Council*[57] that before *Pennsylvania Coal* it was thought that the Takings Clause did not reach regulations at all.[58] As discussed above, jurists and commentators had long discussed whether regulations might be so onerous as to have the practical effect of a physical taking. Turning to the currently recognized categories of regulatory takings, O'Connor emphasized that the inquiry in each situation

> aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[59]

Turning to the ''substantially advances'' formula of *Agins*, O'Connor declared that such an inquiry is not tailored to measure the magnitude of the burden placed on private property by a regulation or to shed light on which regulations are functionally comparable to government appropriation.[60] Stressing that questions about the efficacy of a regulation did not address the extent of the owner's burden, she observed: ''The notion that such a regulation nevertheless 'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.''[61] The wisdom of legislation, in her view, does not determine whether a regulation has so burdened property as to constitute a taking.

O'Connor pointed out that Chevron was not seeking to obtain compensation but rather to bar enforcement of a statute it viewed as irrational. Such a claim, she asserted, properly arises under the Due Process Clause of the Fourteenth Amendment.[62] Expressing concern that the ''substantially advances'' test would require judicial

[56]*Id*. at 2081.

[57]505 U.S. 1003 (1992).

[58]125 S. Ct. at 2081.

[59]*Id*. at 2082.

[60]*Id*. at 2084.

[61]*Id*.

[62]*Id*. at 2085.

scrutiny of a wide array of state and federal regulations, she emphasized the highly deferential review of economic legislation under the rubric of due process since 1937.[63]

In conclusion, O'Connor said that future regulatory takings claims should proceed on the other established theories—permanent physical invasion, deprivation of all economically viable use, violation of the *Penn Central* guidelines, or land use exactions that amount to a per se physical taking because not closely tied to the impact of the proposed development.[64] It is unclear if this is a closed list of possible regulatory takings, but the Court seems disinclined at the moment to expand the regulatory takings doctrine.

Justice Anthony Kennedy, in a brief concurring opinion, noted that the decision ''does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.''[65] He added that ''failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry.''[66] In 1998 in *Eastern Enterprises v. Apfel* Justice Kennedy, again concurring, had found a statute imposing a retroactive exaction of money on a former employer to violate due process principles.[67] Perhaps alone among the justices, he appears willing to meaningfully review economic legislation under the due process norm.

C. Analysis

Lingle must be seen as a setback for those interested in reviving constitutional protection for the rights of property owners.[68] To be sure, the opinion makes some valid points: a silly regulation does not necessarily run afoul of the Takings Clause; the ''substantially advances'' formula was imprecise and could have profitably been refined; a regulatory takings inquiry should focus in large part on the burden inflicted on the owner of private property, although the irrational character of a regulation might well speak to the degree

[63]*Id*.

[64]*Id*. at 2081–82.

[65]*Id*. at 2087.

[66]*Id*.

[67]Eastern Enterprises v. Apfel, 524 U.S. 498, 539–50 (1998) (Kennedy, J., concurring).

[68]For a defense of the ''substantially advances'' test, see R.S. Radford, Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking, 15 Fordham Envtl. L.J. 353 (2004).

of burden. Still, *Lingle* is disappointing on several scores and perpetuates the second class status of property rights.

First, the suggestion that Chevron's claim should be heard under the Due Process Clause is almost certainly futile. The Supreme Court has not invalidated an economic regulation as violative of due process since 1937. The notion that Chevron could gain a real consideration of a due process claim is fanciful. Federal courts no longer provide even cursory property rights review under due process. Indeed, O'Connor repeats the prevailing rule of broad judicial deference to legislative judgments. She asserts rather than explains that courts, in her language, ''are not well suited'' to scrutinize economic regulations.[69] The dismissive treatment accorded economic rights is in striking contrast with substantive protection extended to a variety of non-economic rights under due process. But this raises a fundamental question: Why are courts somehow competent to enforce non-economic rights, which often turn upon value judgments, but not economic rights? Worse yet, the New Deal dichotomy between property and other individual rights, although phrased in terms of judicial deference, masks a high level of judicial activism. Courts can pick and choose among those rights they will enforce depending on their subjective assessment of which claims are more worthy.

O'Connor's opinion clearly demonstrates the New Deal constitutional hegemony at work. She even cited *Ferguson v. Skrupa*,[70] a vintage expression of New Deal constitutionalism. In *Ferguson* the Supreme Court readily sustained a special interest law and virtually abdicated any judicial review of economic legislation under due process. So long as *Ferguson* holds sway, property owners cannot expect much from the Due Process Clause. O'Connor's relegation of Chevron's claim to due process review would be more credible if she had moved to abandon the subordination of property rights under due process. One can only hope that Kennedy's view gains adherents.

Second, although the *Lingle* opinion reaffirmed several regulatory takings tests, it made plain that the principal standard for deciding whether a taking has occurred continues to be the multi-factor

[69]Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2085 (2005).

[70]372 U.S. 726 (1963).

approach adopted in *Penn Central*.[71] This is unfortunate, because *Penn Central* is fraught with problems. As O'Connor noted, the *Penn Central* factors have each ''given rise to vexing subsidiary questions.''[72] Not only are the various factors identified in *Penn Central* vague, but there is no indication as to how each factor is to be weighted or how they are to be related. The result is a confused test that can be manipulated to justify any outcome. It is melancholy to reflect how little progress has been made in clarifying takings jurisprudence over the past quarter century. *Lingle* marks no advance in this regard.

Despite these reservations, *Lingle* contains a slender silver lining that warrants mention. A unanimous Supreme Court has now upheld the validity of several takings tests: permanent physical invasion (*Loretto*); deprivation of all economically viable use (*Lucas*); and land use exactions not closely related to the impact of proposed development (*Nollan* and *Dolan*).[73] This is a modest gain since the decisions establishing each of those tests were rendered by a divided Court. It now appears that those once-debated tests are on a firm constitutional footing.

IV. *Kelo* and the Evisceration of the Fifth Amendment's ''Public Use'' Requirement

A. Background of Litigation

The decision in *Kelo v. City of New London*[74] is the Supreme Court's most recent attempt to explicate the ''public use'' limitation on the exercise of eminent domain. Eminent domain is one of the most intrusive powers of government because it compels individual owners, without their consent, to relinquish their property. The extent of this power has long been contested, raising the underlying question of when the perceived needs of the public should trump the property rights of individuals. In 1795 Justice William Paterson

[71]438 U.S. 104 (1978).

[72]Lingle, 125 S. Ct. at 2082.

[73]See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[74]125 S. Ct. 2655 (2005).

famously characterized eminent domain as the ''despotic power.''[75] Although he acknowledged that the power of acquiring private property was an essential aspect of government, Paterson rejected private redistributions of property. ''It is,'' he declared, ''difficult to form a case, in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen.''[76] Paterson's opinion is informative as to the understanding of eminent domain held by the founding generation. Consistent with their high regard for private property as the bedrock of individual liberties, the Framers of the Bill of Rights restricted the exercise of eminent domain by imposing the ''public use'' and ''just compensation'' constraints in the Fifth Amendment. It seems a reasonable proposition, therefore, that the Public Use Clause was expected to have some meaning.

The Supreme Court had little occasion to address the ''public use'' requirement until the late nineteenth century. Nonetheless, prominent commentators as well as the Supreme Court insisted that it was illegitimate for government to take property from one private owner for the benefit of another. In 1829 in *Wilkinson v. Leland*,[77] for example, Justice Story observed: ''We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.''[78] Similarly, in his landmark 1868 treatise, the distinguished jurist Thomas M. Cooley asserted:

> The *public use* implies a possession, occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property, if the right of government to seize and appropriate it could exist for any other use.[79]

In a later edition of the treatise, Cooley rejected specifically the notion that eminent domain could be utilized to transfer property

[75]Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C. Pa. 1795).

[76]*Id*. See also Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (declaring that legislature could not legitimately enact ''a law that takes property from A. and gives it to B.'').

[77]27 U.S. (2 Pet.) 627 (1829).

[78]*Id*. at 658.

[79]Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 531 (1868).

to another private party ''on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.''[80] As early as 1872 the Supreme Court asserted that ''[t]he right of eminent domain nowhere justifies taking property for a private use.''[81]

Notwithstanding these developments, however, in the late nineteenth century both state and federal courts gradually adopted a broader reading of governmental authority to acquire private property. The constitutional norm of ''public use'' was increasingly equated with the more expansive concept of ''public benefit'' or ''interest.'' Moreover, judicial review of legislative decisions about the need to exercise eminent domain grew slack. In the face of such trends the significance of the ''public use'' requirement steadily eroded.[82] The decline of the ''public use'' limitation was hastened by the larger jurisprudential shift associated with the political triumph of the New Deal. As discussed above, the new constitutional orthodoxy marginalized economic rights and strengthened governmental authority over private property. A shriveled Public Use Clause, therefore, was simply one aspect of the diminished constitutional rights of property owners generally. In 1949 one commentator declared that the doctrine of ''public use'' was virtually dead.[83]

Subsequent decisions by the Supreme Court validated that prediction. In 1954 in *Berman v. Parker*[84] the Court sustained the taking of land from one owner for transfer to a private development agency as part of a comprehensive urban renewal plan. It insisted that ''[t]he role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely narrow

[80]Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 663 (4th ed. 1878). For a discussion of Cooley's views about the appropriate use of eminent domain, see James W. Ely Jr., Thomas Cooley, ''Public Use,'' and New Directions in Takings Jurisprudence, 2004 Mich. St. L. Rev. 845, 846–50.

[81]Olcott v. The Supervisors, 83 U.S. (15 Wall.) 678, 694 (1872).

[82]Lawrence Berger, The Public Use Requirement in Eminent Domain, 57 Or. L. Rev. 203, 204–25 (1978).

[83]Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599 (1949).

[84]348 U.S. 26 (1954).

one.''[85] The opinion also likened the eminent domain power to the very different police power, the basic power of government to secure rights.[86] That mischief has confused courts and plagued analysis of the ''public use'' limitation ever since. The Court went a step further in 1984 in *Hawaii Housing Authority v. Midkiff*,[87] upholding a land redistribution scheme that entailed the transfer of fee simple title from a landowner to tenants to overcome the perceived problem of concentrated land ownership. Highly deferential to legislative determination of ''public use,'' the Court indicated that it would uphold any exercise of eminent domain ''rationally related to a conceivable public purpose.''[88]

State courts by and large followed suit. Although some state judges were more inclined to carefully review the exercise of eminent domain, most followed the Supreme Court's deferential path. Indeed, the ''public use'' requirement reached something of a nadir with the Michigan Supreme Court's decision in 1981 in *Poletown Neighborhood Council v. City of Detroit*.[89] There the Michigan court ruled that the condemnation and subsequent transfer of private homes and businesses to the General Motors corporation for construction of a new plant satisfied the ''public use'' norm. The court reasoned that the private economic development the company promised would serve a public purpose by providing jobs and enhancing tax revenue in the Detroit community.[90] In effect, the *Berman*, *Midkiff*, and *Poletown* decisions gutted the ''public use'' requirement and seemingly justified an almost unlimited power to transfer property from one private party to another. *Poletown*, in particular, was highly influential. It opened the door to taking property for economic development by private enterprise and was widely followed nationwide.[91]

[85]*Id*. at 32.

[86]*Id*. (''We deal, in other words, with what traditionally has been known as the police power.'').

[87]467 U.S. 229 (1984).

[88]*Id*. at 241.

[89]304 N.W.2d 455 (Mich. 1981).

[90]*Id*. at 458–59.

[91]Adam Mossoff, The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock, 2004 Mich. St. L. Rev. 837, 841 (pointing out that ''many other states'' followed *Poletown* and found that private economic development constituted ''public use'').

Such aggressive exercise of eminent domain for development purposes fed the perception that governmental power was being employed to take property from the politically weak for predominantly private advantage. Critics charged that powerful interest groups controlled the eminent domain process for their own gain. Moreover, the public benefits that motivated the condemnations were in fact rarely delivered, they said.[92] Then, in a surprising development, the Michigan Supreme Court overruled *Poletown* in 2004 in *County of Wayne v. Hathcock*, holding that economic development was not a ''public use'' justifying acquisition of private property.[93] That dramatic reversal gained national attention, highlighting the controversy over the use of eminent domain to transfer property to private parties for commercial development.

When the U.S. Supreme Court agreed to hear the *Kelo* case shortly after *Hathcock* came down, many observers expressed hope that the stage was set at last for a new and more restrictive reading of ''public use.'' Unfortunately, that hope was short lived. At issue in *Kelo* was a development plan fashioned to revitalize economically distressed areas of New London, Connecticut. The New London Development Corporation (NLDC), a private organization, was authorized by the city council to purchase or acquire by eminent domain real estate within a ninety-acre area. Under the plan the acquired space was to be used for the construction of a hotel, new residences, stores, and recreational facilities. It was announced that some of the parcels would be leased to private developers who would utilize the land in accordance with the development plan. The rationale behind this scheme was the promise of new jobs and increased tax revenue.[94] When the *Kelo* petitioners declined to sell their property, NLDC instituted eminent domain proceedings. The petitioners, residential owners, sought then to enjoin the proposed takings. There was no

[92]See Ilya Somin, Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use, 2004 Mich. St. L. Rev. 1005, 1011–16 (noting that the economic benefits cited to justify the *Poletown* condemnation never materialized and questioning the evidence presented to support economic development takings).

[93]684 N.W.2d 765, 782 (Mich. 2004).

[94]See, e.g., Kelo v. City of New London, 125 S. Ct. 2655, 2658–60 (2005) (summarizing facts).

indication that any of the parcels was blighted. They were condemned only because they were located within the development area. The petitioners alleged that the proposed taking of their property would violate the ''public use'' limitation in the Fifth Amendment. By a vote of four to three, the Supreme Court of Connecticut rejected this contention, holding that economic development was a valid ''public use'' under both federal and state constitutions.[95]

B. Supreme Court's Opinion

A sharply divided U.S. Supreme Court affirmed this determination, sustaining the exercise of eminent domain for purposes of economic development. Writing for the majority, Justice John Paul Stevens emphasized deference to legislative judgments regarding the exercise of eminent domain.[96] He relied heavily on *Berman* and *Midkiff* to observe that ''our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.''[97] Declining to impose a rule that courts should adopt a heightened standard in reviewing economic development takings, he expressed concern that requiring a ''reasonable certainty'' that the public would actually benefit from development schemes would put courts in the position of second-guessing the desirability of economic legislation.[98] Substantively, Stevens brushed aside a literal interpretation of the ''public use'' requirement as meaning use by the general public, maintaining instead that promoting economic development was a traditional function of government.[99] Nor was Stevens impressed with the argument that economic development takings opened the door to conferring benefits on private parties,[100] reasoning that the public interest could sometimes be best served by private enterprise.[101]

[95]Kelo v. City of New London, 843 A.2d 500, 528 (Conn. 2004).

[96]125 S. Ct. 2655, 2663–64 (2005).

[97]*Id*. at 2664.

[98]*Id*. at 2667–68.

[99]*Id*. at 2665.

[100]*Id*. at 2666.

[101]*Id*.

After quoting the famous language of Justice Samuel Chase in the 1798 case of *Calder v. Bull*[102] that a law cannot take property from A and give it to B, Stevens evidently felt a need to give lip service to that principle. He agreed that ''a one-to-one transfer of property, executed outside the confines of an integrated development plan,'' would raise a suspicion that eminent domain was being used for a private purpose.[103] Stevens also acknowledged that ''the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.''[104] And he stressed that states were free to adopt stricter ''public use'' standards by statute or by interpretations of state constitutional law.[105]

Justice Kennedy joined the majority but added a murky concurring opinion. He insisted that courts, even under a deferential standard of review, should invalidate ''a taking, that by a clear showing, is intended to favor a particular party, with only incidental or pretextual public benefits.''[106] It remains unclear, however, how a court is to ascertain whether a particular taking is only pretextual without the very sort of careful inquiry into public purpose that the majority opinion forecloses. Kennedy also whimsically asserted that *Berman* and *Midkiff* imposed some meaningful limit on governmental power to condemn property.[107] At best, Kennedy's concurrence suggests some narrow and ill-defined role for the federal courts in reviewing ''public use'' in particular situations.

Speaking for the four dissenters, Justice O'Connor authored a blistering dissent.[108] ''Under the banner of economic development,'' she charged, ''all private property is now vulnerable to being taken and being transferred to another private owner.''[109] She maintained that if incidental public benefits arising from economic development constituted ''public use,'' then the Court had effectively deleted ''the words 'for public use' from the Takings Clause of the Fifth

[102]3 U.S. (3 Dall.) 386, 388 (1798), quoted in Kelo, 125 S. Ct. at 2661 n.5.

[103]Kelo, 125 S. Ct. at 2667.

[104]*Id*. at 2668.

[105]*Id*.

[106]*Id*. at 2669 (Kennedy, J., concurring).

[107]*Id*. at 2670.

[108]*Id*. at 2671–77 (O'Connor, J., dissenting).

[109]*Id*. at 2671.

Amendment.''[110] O'Connor pointed out that the Fifth Amendment placed two distinct limits on the exercise of eminent domain—that any taking must be for a ''public use,'' and that the owner must be paid ''just compensation.''[111] Those requirements, she explained, ''ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.''[112] O'Connor identified three categories of takings that satisfied the ''public use'' requirement: transfers to public ownership, such as for roads or military bases; transfers to private parties, such as common carriers, who make the property available to the public; and transfers in unusual circumstances to private use where ''the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society,'' such as for the elimination of blight or land oligopoly.[113] She expressed concern that the majority opinion ''significantly expands the meaning of public use,'' and insisted that, realistically, this new understanding does not impose any restraint on the eminent domain power.[114]

Several additional points in O'Connor's dissent warrant comment. First, she sharply criticized the ''errant language'' in *Berman* that equated ''public use'' with the scope of the police power.[115] Second, she highlighted the far-reaching nature of eminent domain as conceived by the majority. ''The specter of condemnation,'' she declared, ''hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.''[116] Third, she noted the perverse implications of enlarged eminent domain power. ''The beneficiaries,'' she aptly pointed out, ''are likely to be those citizens with

[110]*Id*.
[111]*Id*. at 2672.
[112]*Id*.
[113]*Id*. at 2673–75.
[114]*Id*. at 2675.
[115]*Id*.
[116]*Id*. at 2676.

disproportionate influence and power in the political process, including large corporations and development firms.''[117]

Justice Clarence Thomas joined the O'Connor dissent, but also wrote a separate opinion in which he raised deeper concerns about the Court's ''public use'' jurisprudence.[118] He maintained that the Court over the years had gone seriously astray in its construction of ''public use,'' thus reducing the restraint to ''a virtual nullity, without the slightest nod to its original meaning.''[119] Considering at length the original understanding of the phrase ''public use'' and a series of early judicial opinions, Thomas urged the Court to return ''to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.''[120] Echoing O'Connor, he predicted that the losses and indignities inflicted by economic development takings ''will fall disproportionately on poor communities.''[121]

C. Analysis

Since the Public Use Clause of the Fifth Amendment had been largely drained of vitality before the *Kelo* decision, *Kelo* could be seen simply as administering the last rites. Nonetheless, the decision is profoundly disquieting because of its flawed reasoning and dismissive attitude toward the constitutional rights of property owners. It represents a lost opportunity to put the Court back in the business of policing government's eminent domain power.

The majority opinion by Justice Stevens presented an inadequate historical analysis of the Public Use Clause. Stevens gave no attention to the views of the Framers or the observations of leading commentators. Likewise, he did not probe the wording or purpose of the clause. Nor did he consider the costs imposed by condemnation, an issue that might call into question whether the taking served any public use. Rather, he contented himself with a discussion of Supreme Court decisions that purported to adopt a broad reading of ''public use.'' He gave a cursory glance at some Court opinions from the late nineteenth and early twentieth centuries, focusing on

[117]*Id*. at 2677.

[118]*Id*. at 2677–87 (Thomas, J., dissenting).

[119]*Id*. at 2678.

[120]*Id*. at 2686.

[121]*Id*. at 2686–87.

language plucked from context rather than looking at the facts of those cases.[122] Not remotely do the fact patterns of those early cases match the circumstances of *Kelo*.[123] Suffice it to say that the Court of that era never endorsed the view that legislative determinations of ''public use'' were entitled to supine deference, nor did that Court ever approve such a sweeping use of eminent domain as is presented in *Kelo*.[124] In fact, Stevens's opinion rests almost entirely on *Berman* and *Midkiff*. Without considering whether those decisions were faithful to the constitutional text, he simply applied their holdings rather mechanically to economic development projects.

Nor did Stevens come to grips with the longstanding rule that questions about ''public use'' are for the judiciary to decide.[125] ''It is well established,'' the Court declared in 1930, ''that . . . the question [of] what is a public use is a judicial one.''[126] The public use requirement is a constitutional standard that is an integral part of the Bill of Rights. It should not be erased in the guise of deference to legislative determinations.

Indeed, the whole question of judicial deference regarding ''public use'' warrants a fresh look. The Supreme Court does not defer to legislative decisions regarding criminal procedures or the enjoyment of free speech. In fact, among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy deference to legislatures. It is highly unlikely that the Framers intended such an anomalous result.

[122]*Id*. at 2662–63.

[123] For example, both *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), and *Clark v. Nash*, 198 U.S. 361 (1905), cited by Stevens, upheld statutes authorizing condemnation for constructing public irrigation ditches across neighboring land. See, e.g., Fallbrook, 164 U.S. at 159; Clark, 198 U.S. at 367–68. Neither involved the acquisition of large tracts of land or the wholesale displacement of residential owners and small businesses.

[124]See generally Ely, *supra* note 21, at 127–29 (''[J]udicial deference, however strong, was not the same as abdication. The Fuller Court did assess the public use rationale in eminent domain cases . . .'').

[125]Fallbrook, 164 U.S. at 159 (insisting that the determination of what is a public use is a judicial question that the justices ''must decide . . . in accordance with our views of constitutional law''); *id*. at 159–60 (observing that state legislative declarations are not conclusive).

[126]Cincinnati v. Vester, 281 U.S. 439, 446 (1930). The Court added: ''[T]he question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.'' *Id*. at 446.

It is instructive to compare the Supreme Court's refusal to supervise the Public Use Clause with its handling of the other constitutional check on eminent domain, the just compensation requirement. Federal courts have long insisted that the determination of just compensation for a taking of property is a judicial, not a legislative, responsibility.[127] Justice David J. Brewer strongly articulated this position in the leading case of *Monongahela Navigation Company v. United States*:

> It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.[128]

In that statement there is no deference to legislators, who have every incentive to minimize the obligation to pay. The need for judicial oversight seems obvious in order to uphold the constitutional norm of just compensation.

Why then does the Court review the just compensation but not the public use restraint on eminent domain? Both are constitutional standards designed to limit government's power. Why is almost insurmountable deference to legislators appropriate regarding the decision to take property but not regarding the necessary compensation? Stevens never addresses those questions.

Surely the same level of judicial review is merited for both limits. Otherwise all property is held at the pleasure of the legislature, a result at odds with the Framers' design. To be sure, there is no precise test to decide whether a particular exercise of eminent domain is for a public use.[129] But that is no excuse for judicial abdication of the kind we see in *Kelo*. One should bear in mind that there is no

[127]Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 312 (C.C. Pa. 1795) (declaring that the legislature ''cannot constitutionally determine upon the amount of the compensation, or value of the land'').

[128]148 U.S. 312, 327 (1893).

[129]But see the distinctions drawn in the Cato Institute amicus brief in *Kelo*, articulating four rationales for public use condemnations—public projects, network and common carrier undertakings, blight reduction, and economic development—and analyzing the merits of each. Brief of Amicus Curiae Cato Institute in Support of Petitioners, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108).

ready formula for just compensation, either, but that does not prevent judges from tackling the issue.[130] Surely courts could devise working rules to effectuate the public use norm, much as they have done with respect to just compensation. Indeed, the dissenting opinions by O'Connor and Thomas contain useful guidelines to frame further debate along these lines.

The unhappy outcome in *Kelo*, the forced displacement of residents from their homes, also underscores the fact that a principled respect for individual property rights often serves to safeguard the weak and vulnerable. Reflecting the lingering influence of the Progressive movement and the New Deal, many scholars are prone to disparage judicial solicitude for economic rights as favoritism to the wealthy and business interests. The *Kelo* decision puts the lie to that canard. By eviscerating the public use limitation the Court majority has opened the door for powerful corporations and developers, in league with local government, to condemn private property for any vague public purpose.[131] *Kelo* sustained a redistributive scheme that operated, as O'Connor and Thomas perceived, in favor of the developers at the expense of politically weak individual homeowners. This is a classic example, as the Framers saw, of how constitutional protection of property serves as a barrier against arbitrary and excessive government.

Where do we go from here? Short of a change of heart by the Court majority, homeowners must look to Congress or the states for relief. The *Kelo* decision aroused a firestorm of criticism crossing partisan lines. Stevens's majority opinion has triggered intense public debate, generating a national dialogue on eminent domain. In an extraordinary move, the House of Representatives, by a vote of 365 to 33, adopted a resolution expressing its ''grave disapproval'' of the majority opinion in *Kelo* and asserting that the decision ''effectively

[130]See Glynn S. Lunney Jr., Compensation for Takings: How Much Is Just?, 42 Cath. U.L. Rev. 721 (1993) (discussing compensation methodologies and rationales for requiring compensation).

[131]See, e.g., Donald J. Kochan, ''Public Use'' and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 Tex. Rev. L. & Pol. 49, 115 (1998); Joseph J. Lazzarotti, Public Use or Public Abuse, 68 UMKC L. Rev. 49, 51 (1999) (expressing concern that without meaningful judicial review ''big government and powerful corporations can condemn private property for any public use or purpose they can rationalize, provided just compensation is paid'').

negate[s] the public use requirement of the takings clause.''[132] The House has also passed a bill that prevents the expenditure of federal funds in support of projects that utilize eminent domain for economic development purposes,[133] and a similar bill has been introduced in the Senate. In Connecticut the legislature asked local governments to observe an unofficial moratorium on current or planned eminent domain proceedings.[134] Connecticut legislators are considering a special session to take up the broad issue, while Governor M. Jodi Rell criticized *Kelo*, comparing the outcry over economic development condemnations to the Boston Tea Party and endorsing the call for a moratorium.[135] Even former President Bill Clinton expressed his disagreement with the ruling.[136] It is rare that a Supreme Court decision dealing with property rights generates such widespread attention and condemnation. Some states already bar economic development condemnations.[137] No doubt there will be additional moves in state legislatures to curb economic development condemnations. But those efforts, however welcome, are no substitute for a Supreme Court that enforces the Public Use Clause of the Fifth Amendment.

[132]H.R. 340, 109th Cong., 1st Sess. (2005).

[133]Joi Preciphs, Eminent-Domain Ruling Knits Rivals, Wall Street J., July 8, 2005, at 4A.

[134]New London agency agrees to moratorium on eminent domain, Hartford Courant (Online), July 26, 2005, available at http://www.courant.com/news/local/statewire/hc-26014446.apds.m0724.be-ct—sizjul26,0,6496088.story (visited August 11, 2005).

[135]Statement of Governor Rell on Call for Legislative Hearing on Eminent Domain (July 11, 2005), available at http://www.ct.gov/governorrell/cwp/view.asp?A=1761&Q=296184 (visited August 11, 2005).

[136]Josh Gerstein, Clinton: Court Was ''Wrong'' on Eminent Domain, New York Sun, July 14, 2005, available at http://www.nysun.com/pf.php?id=16974 (visited August 14, 2005).

[137]See, e.g., County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). Two other state courts have not categorically rejected the use of eminent domain for economic development purposes but have ruled, on the facts presented, that taking property for transfer to a private business did not constitute a valid public use under state constitutions. Southwestern Illinois Development Authority v. National City Environmental, LLC, 768 N.E.2d 1, 9–11 (Ill. 2002), cert. denied, 537 U.S. 880 (2002); Bailey v. Myers, 76 P.3d 898, 903–04 (Ariz. Ct. App. 2003).

V. *San Remo Hotel* and the Heightened Bar to Regulatory Takings Claims in Federal Court

A. Background of Litigation

In *San Remo Hotel* the Supreme Court revisited the question of bringing regulatory takings cases in the federal courts.[138] To put this decision in perspective, it is necessary to consider the ripeness doctrine annunciated in 1985 in *Williamson County Regional Planning Commission v. Hamilton Bank*.[139] In that case the Court prevented the claimant from bringing a regulatory taking action in federal court on the ground that the claim was not ripe. The Court held that a claimant must satisfy a two prong ripeness test before instituting a federal court challenge. He must obtain a ''final decision'' from the appropriate local government agencies on his land use application.[140] He must have sought and been denied compensation in state court.[141] Over the years, government officials bent on denying owners their rights to use their property have become skilled at delay—believing, often rightly, that the owner will exhaust his time and financial resources before any ''final decision'' is issued. As a practical matter, the *Williamson County* ripeness test virtually closes the door on claimants trying to use the federal courts to assert a takings claim. More troublesome still, the federal courts are precluded by the federal full faith and credit statute, which encompasses the doctrine of res judicata, from relitigating issues that have been resolved in state court actions.[142] Thus, regulatory takings claimants are typically left with no access to a federal forum.[143]

[138]125 S. Ct. 2491 (2005).

[139]473 U.S. 172 (1985).

[140]*Id*. at 190–94.

[141]*Id*. at 194–95.

[142]28 U.S.C. § 1738 (providing that ''judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . .'').

[143]The *Williamson County* ripeness requirements have long been the subject of criticism. See, e.g., Thomas E. Roberts, Ripeness and Forum Selection in Fifth Amendment Takings Litigation, 11 J. Land Use & Envtl. L. 37 (1995); Stephen E. Abraham, Williamson County Fifteen Years Later: When is a Takings Claim (Ever) Ripe?, 36 Real Prop. Prob. & Tr. J. 101, 104 (2001) (''*Williamson County* is regarded as posing formidable hurdles because of its two-part ripeness requirement, finality and compensation, that ultimately may block takings claims.''); Max Kidalov & Richard Seamon, The Missing Pieces of the Debate Over Federal Property Rights Litigation, 27 Hastings Const.

In the *San Remo Hotel* case, a San Francisco city commission granted the petitioners, who owned the San Remo Hotel, a permit to operate as a tourist hotel on condition that they pay a $567,000 ''conversion fee'' for converting residential rooms to tourist rooms.[144] Lengthy administrative and judicial appeals ensued in both state and federal courts, the claimant alleging a regulatory taking. A federal court ruled that key portions of the case were not ripe under *Williamson County*.[145] Eventually the Supreme Court of California rejected the takings claim and upheld the conversion fee.[146] Having satisfied the *Williamson County* ripeness test, the petitioners now found their return to federal district court barred by the full faith and credit statute. Because the petitioners' federal claims were the same as those already adjudicated in the California courts, they were precluded from relitigating the issue in federal court. The Ninth Circuit Court of Appeals affirmed,[147] and the U.S. Supreme Court agreed to decide the narrow question of whether it should fashion an exception to the full faith and credit statute for claims arising under the Takings Clause of the Fifth Amendment.

B. Supreme Court's Opinion

The petitioners argued, in essence, that federal courts should not apply preclusion rules where a case is forced into state court in order to satisfy the ripeness test of *Williamson County*. The Court unanimously rejected this contention in two opinions.

Justice Stevens, speaking for five members of the Court, declined to create an exception to the full faith and credit statute absent an expression of congressional intent. Stressing the importance of finality and comity, Stevens was unimpressed with the notion that claimants necessarily ''have a right to vindicate their federal claims in a federal forum.''[148] He admitted that, in practice, most takings

L.Q. 1, 5 (1999) (''The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause.'').

[144]San Remo Hotel v. City & County of San Francisco, 125 S. Ct. 2491, 2495–96 (2005).

[145]San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998) (holding as-applied takings claim to be unripe and dismissing facial takings challenge based on *Pullman* abstention doctrine).

[146]San Remo Hotel v. City & County of San Francisco, 41 P.3d 87, 106–11 (Cal. 2002).

[147]San Remo Hotel v. City & County of San Francisco, 364 F.3d 1088, 1098–99 (9th Cir. 2004).

[148]125 S. Ct. at 2504.

claimants will be compelled to litigate their federal claims in state court.[149] Finding ''scant precedent'' for takings claims in the federal district courts, Stevens opined that ''state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical and legal questions related to zoning and land use regulations.''[150]

Chief Justice William Rehnquist, writing for four members of the Court, agreed in a concurring opinion that the petitioners were precluded by the full faith and credit statute from litigating their claim in federal court.[151] However, he urged the Court to revisit the second prong of the *Williamson County* ripeness test—that a takings claimant must seek compensation in state court before instituting a federal court action. Although Rehnquist had joined the opinion in *Williamson County*, further reflection caused him to question the justification for the state-litigation requirement. He pointedly observed that claimants challenging land use regulations on First Amendment grounds could proceed directly to federal court. He was puzzled ''why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive.''[152] Those underlying issues were not before the Court because of the limited grant of certiorari.

C. Analysis

The majority opinion is a further manifestation of the Court majority's disdain for the rights of property owners. As a consequence of *San Remo Hotel*, takings claimants will have almost no opportunity to have their case even heard in a federal court. By shutting the door to a federal forum, the Supreme Court has significantly handicapped takings plaintiffs. So once again property rights are downgraded and given second-class treatment. The issue in *San Remo Hotel* was technical, but the outcome speaks volumes about the Court's lack of interest in enforcing property rights. No other important right is dealt with in such a shabby manner. One might have thought that

[149]*Id*. at 2506.

[150]*Id*. at 2506–07.

[151]*Id*. at 2507–10 (Rehnquist, C.J., concurring).

[152]*Id*. at 2509.

all the provisions of the Bill of Rights were entitled to protection in the federal courts. Unfortunately, that will not be the case unless the Court, at some future point, decides to pursue Rehnquist's invitation and modifies the *Williamson County* ripeness test.

VI. Conclusion

It remains to consider why the Supreme Court in *Lingle*, *Kelo*, and *San Remo Hotel* placed such a crabbed interpretation on the Takings Clause and the rights of takings claimants. As discussed above, the Court has abandoned the vision of the Framers, who believed that robust protection of the rights of property owners affirmed liberty by diffusing power and shielding individuals from governmental control. Indeed, the Court generally ignores the express property clauses in the Constitution and Bill of Rights while discovering a variety of novel non-economic rights. The blunt fact is that an abiding dislike of property rights, derived from New Deal constitutionalism, continues to hold intellectual sway. It is revealing, for example, that the majority opinions in *Lingle*, *Kelo*, and *San Remo Hotel* rest almost entirely on post-1937 decisions. The long history of judicial solicitude for the rights of property owners is simply discarded as unwanted baggage from our constitutional past, much like out-of-favor politicians were removed from official photographs in the Soviet Union. Unless the Supreme Court breaks free of statist thinking about property, there is little prospect that the property rights of individuals will be restored.

In 1994 Chief Justice Rehnquist proclaimed: ''We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation.''[153] The promise implicit in this comment—that the Takings Clause should receive the same level of judicial protection as other provisions of the Bill of Rights—has never been realized in the post–New Deal era and now seems further away than ever. It is a sad day for individual liberty and American constitutionalism.

[153]Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).