

**PICKING UP THE PIECES  
IN THE AFTERMATH OF  
THE SUPREME COURT'S 2005  
PROPERTY RIGHTS' TRILOGY**

**NANCIE G. MARZULLA**



## PREFACE

Property rights jurisprudence has been the subject of intense legal and policy debate since the issuance of three important opinions by the Supreme Court of the United States in 2005. This monograph provides the reader with a thoughtful analysis of the current status of property rights and offers valuable insights on what might lie ahead.

Author Nancie Marzulla writes that prior to 2005, takings jurisprudence had reached a point where it was beginning to provide property owners with real protection. She then evaluates the impact of the three cases: *Lingle v. Chevron U.S.A. Inc.*, *San Remo Hotel v. City and County of San Francisco*, and *Kelo v. City of New London*. Ms. Marzulla concludes that the decisions severely restrict the rights of property owners to challenge both regulating and physical takings of their property. It will be up to the Roberts Court to decide whether the 2005 property rights cases were an aberration, or whether going forward property rights will receive less judicial protection than other constitutionally protected rights.

Like all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of the law and its processes. The views expressed in this monograph are those of the author and do not necessarily reflect the opinions of the advisers, officers, or directors of the Center. The *Briefly*. . . booklets are designed to be short, insightful treatments of leading legal issues of interest to the private sector.

**Richard A. Hauser**  
President  
National Legal Center

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## EXECUTIVE SUMMARY

Within the space of a single month last year, the Supreme Court rendered three property rights decisions in swift succession, shattering a body of property rights jurisprudence that finally had begun to make the protections afforded by the Fifth Amendment's Just Compensation Clause meaningful. The three decisions, *Lingle v. Chevron U.S.A. Inc.*, *San Remo Hotel v. City and County of San Francisco*, and *Kelo v. City of New London*, were a substantial setback from nearly two decades' worth of gains in property rights jurisprudence during the Rehnquist era. Although the numerous protections afforded private property in the Constitution, especially the Fifth Amendment's Just Compensation Clause, would appear to place protection of private property on a par with other constitutional rights, throughout much of the nation's history, the Supreme Court has treated property rights as though they were a "poor relation" to other constitutionally protected rights. Inroads to greater protection for property rights were made in the last two decades; however, each of the three property rights decisions of the last Term had a negative effect on those inroads:

- In *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court eliminated the powerful, substantial advancement regulatory takings test that had been in place for nearly three decades.
- In *San Remo Hotel v. City and County of San Francisco*, the Supreme Court eliminated any hope a property owner might have for bringing a Fifth Amendment takings challenge against a state action in federal court.
- Finally, in *Kelo v. City of New London*, the Supreme Court eliminated any suggestion of a limitation on the government's eminent domain power provided by the "public use" component of the Fifth Amendment's Just Compensation Clause.

Taken as a whole, these three decisions severely restrict the rights of all property owners—from homeowners to business owners—to challenge both regulatory and physical takings of their property, and make it nearly impossible for a property owner to challenge regulatory and physical takings by a state government in federal court. Last but not least, in three bites, the Supreme Court has swallowed decades of progress courts have made in protecting property rights, leaving all of us less secure and more vulnerable to government infringement of our rights and freedom.

# PICKING UP THE PIECES IN THE AFTERMATH OF THE SUPREME COURT'S 2005 PROPERTY RIGHTS' TRILOGY

NANCIE G. MARZULLA

Within the space of a single month last year, the Supreme Court rendered three property rights decisions in swift succession, shattering a body of property rights jurisprudence that finally had begun to make the protections afforded by the Fifth Amendment's Just Compensation Clause meaningful. On May 23, 2005, the Court handed down its decision in *Lingle v. Chevron U.S.A. Inc.*,<sup>1</sup> eliminating the powerful, substantial advancement regulatory takings test that had been in place for nearly three decades. On June 20, 2005, in *San Remo Hotel v. City and County of San Francisco*,<sup>2</sup> the Court eliminated any hope a property owner might have for bringing a Fifth Amendment takings challenge against a state action in federal court. Finally, three days later, on June 23, 2005, the Court, in *Kelo v. City of New London*,<sup>3</sup> dropped its final bomb, holding that the government's power of eminent domain was virtually unfettered. Together, these three decisions have shattered takings jurisprudence, setting back roughly two decades' worth of gains that private property owners had made during the Rehnquist era. As one constitutional scholar has put it, "[f]or all their once bright promise . . . 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."<sup>4</sup>

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<sup>1</sup> 125 S. Ct. 2074 (2005).

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

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

<sup>4</sup> John W. Ely, Jr., "Poor Relation" *Once More: The Supreme Court and the Vanishing of Property Owners*, in *CATO SUPREME COURT REVIEW* 39 (2005).

**I. PRIOR TO 2005, TAKINGS JURISPRUDENCE HAD REACHED  
THE POINT WHERE IT WAS BEGINNING TO PROVIDE  
PROPERTY OWNERS WITH REAL PROTECTION**

Although multiple clauses in the Constitution provide protection from deprivations of private property,<sup>5</sup> the seminal protection of property rights is found in the Fifth Amendment's Just Compensation Clause, which provides: "nor shall private property be taken for public use, without just compensation." The Just Compensation Clause would appear to put protection of property rights on equal footing with other enumerated rights, such as the right to free speech and to freely exercise one's religion; however, until the last two decades, with rare exception,<sup>6</sup> the Supreme Court has not lived up to its constitutional duty to afford protections for private property equal treatment with other constitutional rights. In recent years, though, prior to the Supreme Court's 2005 trilogy of property rights cases, the Court's jurisprudence in the area of property rights had begun to afford owners of private property real protection from deprivations of their property.

This increased protection for property rights began with another trilogy of cases decided by the Court in 1987,<sup>7</sup> and later cases have

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<sup>5</sup> See, e.g., the Contract Clause, U.S. CONST. art. I, § 10; the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; and the doctrine of enumerated powers, U.S. CONST. art. I, § 8.

<sup>6</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>7</sup> The 1987 trilogy of cases are *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The first of these cases, *Keystone Bituminous Coal Association*, was a defeat for the individual property owners directly involved in the case; however, in *Keystone*, the Court began to meaningfully consider limitations on government regulation of property. In *First English*, the Court recognized that the Just Compensation Clause requires compensation not only for permanent deprivations of property but for temporary takings of property as well. Finally, in *Nollan*, the Court held that government entities may not use

further elevated that protection.<sup>8</sup> At the high-water mark of the Rehnquist Court's takings jurisprudence, the Court developed a doctrine of "exactions," which prevents governments from using their regulatory powers to exchange building and like permits for the owners' right to object to physical occupations of their property; the Court held, for the first time since 1922, that a noninvasive regulation may trigger just-compensation requirements; and the Court gave owners a presumptive right to just compensation when regulations strip them of all economically productive uses of their land. Indeed, the Court's acceptance of meaningful protection for property rights led the late Chief Justice William H. Rehnquist, writing for a majority of the Court, to observe that "[w]e 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."<sup>9</sup> However, after the Court's latest trilogy of property rights cases, it appears that the Court is once again placing property rights at a level below other apparently more favored (at least among members of the Supreme Court) rights. Simply put, "in three decisions issued in May and June 2005, the Court signaled broad consensus favoring an end to major doctrinal development in regulatory takings while it cut the doctrine back at its margins; and paradoxically, revealed a bitter split . . . over the meaning and bite of the public use limitation on eminent domain."<sup>10</sup>

## II. THE 2005 PROPERTY RIGHTS TRILOGY

Thus, prior to the release of the decisions in the Court's 2005 takings trilogy, prospects were good that the Court would continue down its recent path of putting real teeth behind the Just Compensation

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their permitting authority as a means to extract property concessions from landowners.

<sup>8</sup> See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1002 (1992).

<sup>9</sup> *Dolan*, 512 U.S. at 392.

<sup>10</sup> MARK FENSTER, *THE TAKINGS CLAUSE, VERSION 2005: THE LEGAL PROCESS OF CONSTITUTIONAL PROPERTY RIGHTS*, 2 (March 10, 2006) available at <<http://ssrn.com/abstract=888755>>.

Clause's property rights protections. Although there were some warning tremors that the Court may be headed backward in its protection of private property,<sup>11</sup> as one commentator has put it, the "Supreme Court's understanding of the Takings Clause got unexpectedly weird in the October 2004 term."<sup>12</sup> Rather than continue to place property rights on the same plane with other important constitutional protections, the Court, in one month's time, eliminated an important test for determining whether a taking has occurred, further closed the federal courtroom door to takings cases, and severely limited the protections provided by the "public use" component of the Just Compensation Clause.

### A. *Lingle v. Chevron*

The 2005 trilogy began with *Lingle v. Chevron*, a case in which the Court repudiated the long-standing first prong of the *Agins* test<sup>13</sup> for regulatory takings: whether the regulation of property at issue substantially advances a legitimate state interest. In *Lingle*, Chevron brought a challenge, based on the *Agins* substantially advances test, to a Hawaii rent control statute aimed at gasoline service stations. Chevron argued that the rent control statute at issue, Hawaii Act 257,<sup>14</sup> effected an unconstitutional taking of private property because the statute does not substantially advance Hawaii's interest in controlling the retail price of gasoline.

Chevron is one of two gasoline refiners and one of six gasoline wholesalers in Hawaii. At the retail level, gasoline is sold in Hawaii from roughly 300 different service stations; about half of these stations are leased from oil companies by independent lessee-dealers, about seventy-five are owned and operated by open dealers, and the remainder are owned and operated by the oil companies themselves. At issue in *Lingle* were Chevron's sixty-four independent lessee-dealer stations. Typically, in a lessee-dealer arrangement, Chevron buys or leases land from a third party, builds a service station, and then

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<sup>11</sup> See *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

<sup>12</sup> FENSTER, *supra* note 10, at 1.

<sup>13</sup> *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

<sup>14</sup> HAW. REV. STAT. § 486H-10.4 (1997).

leases the station to a dealer. The monthly rent charged on the lease is defined as a percentage of the dealer's margin on retail sales of gasoline and other goods.

In response to concerns regarding the highly concentrated wholesale gasoline market in Hawaii, and the perceived resulting high cost of gasoline to consumers, Hawaii enacted Act 257 in 1997. The Act seeks to protect independent dealers by imposing certain restrictions on the ownership and leasing of service stations by oil companies. To this end, it prohibits oil companies from converting dealer-operated stations into company-operated stations and from placing new company-operated stations in close proximity to existing dealer-operated service stations. More importantly Act 257 regulates the maximum rent an oil company can charge dealers who lease service stations owned by the oil company. Specifically, the Act caps the rent Chevron and other oil companies can collect from lessee-dealers at fifteen percent of the dealer's profit on gasoline sales and fifteen percent of the dealer's gross sales on products other than gasoline.

Chevron brought suit in federal district court, claiming Hawaii's Act 257 effects an unconstitutional regulatory taking because it does not substantially advance the purported legitimate state interest of reducing the price of retail gasoline. Both the district court and the Ninth Circuit Court of Appeals agreed with Chevron and held that Act 257 unconstitutionally takes private property in violation of the Fifth and Fourteenth Amendments.<sup>15</sup> The lower courts based their rulings on the Supreme Court's pronouncement in *Agins v. City of Tiburon*,<sup>16</sup> that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."<sup>17</sup> The lower courts' reliance on *Agins* would have appeared to most to be justified as, in the twenty-five years since the *Agins* decision, "the two-pronged takings test has been repeatedly cited by the Supreme Court and the lower federal courts as part of its

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<sup>15</sup> *Chevron v. Bronster*, 363 F.3d 846 (9th Cir. 2004); *Chevron v. Cayetano*, 198 F. Supp. 2d 1182 (D. Haw. 2002).

<sup>16</sup> 447 U.S. 255 (1980).

<sup>17</sup> *Id.* at 260.

accepted regulatory takings jurisprudence.”<sup>18</sup> Moreover, “the substantial advancement standard is recognized as a mainstream regulatory takings test by virtually all authoritative legal treatises and practice guides.”<sup>19</sup>

However, in *Lingle*, the Supreme Court dismissed the twenty-five-year-old *Agins* test, holding that the *Agins* formula “prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.”<sup>20</sup> What the Supreme Court’s decision in *Lingle* fails to acknowledge, regarding the *Agins* test, is that even after *Lingle*, “the Court’s takings tests remain based on substantive due process concepts, primarily under the rubric of ‘fairness.’”<sup>21</sup> As Justice Brennan noted in *Nollan v. California Coastal Commission*, “[o]ur phraseology may differ slightly from case to case—*e.g.*, regulation must ‘substantially advance,’ or be ‘reasonably necessary to,’ the government’s end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.”<sup>22</sup>

In other words, the Court’s suggestion that *Agins* was a departure from the Court’s takings jurisprudence is simply indefensible. In fact, this Court’s recent takings cases confirm exactly the opposite conclusion. As the Court’s opinion in *Lucas v. South Carolina Coastal Council* confirms, the “[h]armful or noxious use’ analysis was, in other words, simply the progenitor of our more contemporary statements that ‘land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests.’”<sup>23</sup> Thus, in the opinion of the *Lucas* Court, rather than being a departure from the

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<sup>18</sup> Ronald H. Rosenberg & Nancy Stroud, *When Lochner Met Dolan: The Attempted Transformation of American Land-Use Law by Constitutional Interpretation*, 33 URB. LAW. 663, 671 (2001).

<sup>19</sup> 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. REV. 353, 354 (2004).

<sup>20</sup> *Lingle*, 125 S. Ct. at 2083.

<sup>21</sup> Steven J. Eagle, *Lingle v. Chevron and Its Effect on Regulatory Takings*, Address Before the ALI-ABA Course of Study in Inverse Condemnation and Related Government Liability (Sept. 30, 2005), at 1.

<sup>22</sup> 483 U.S. 825, 845 (1987) (Brennan, J., dissenting) (internal citations omitted).

<sup>23</sup> 505 U.S. 1003, 1023-24 (1992).

Court's takings jurisprudence, the *Agins*' substantially advances test was actually an older, and more important, accepted takings analysis.

Other recent Supreme Court cases amplify the acceptance of the now rejected *Agins* test. For example, in *City of Monterey v. Del Monte Dunes*, the Court held that the trial court's application of the substantially advances test from *Agins* was entirely "consistent with our previous general discussions of regulatory takings liability."<sup>24</sup> The Court, in rejecting the Solicitor General's suggestion that the Court reexamine the substantially advances test, cited seven Supreme Court cases invoking the *Agins*' test.<sup>25</sup> Moreover, as an entirely practical matter, the taking in *Del Monte Dunes* had to be supported under the substantially advances prong of *Agins*, as the plaintiffs were able to sell the property for \$4.5 million.<sup>26</sup> Therefore, "[m]ost analysts, including a number of prominent Takings Clause doves, have acknowledged that *City of Monterey* reaffirms the substantial advancement test as a central element of the Supreme Court's regulatory takings jurisprudence."<sup>27</sup> (Emphasis added)

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<sup>24</sup> 526 U.S. 687, 704 (1999).

<sup>25</sup> *Id.* (citing *Dolan, supra*, at 385; *Lucas*, 505 U.S. at 1016; *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Nollan, supra*, at 834; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 485; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Agins*, 447 U.S. at 260.

<sup>26</sup> The \$4.5 million in proceeds from the sale would absolutely prohibit recovery for a categorical taking under *Lucas*, and would almost certainly preclude any recovery under *Penn Central*.

<sup>27</sup> Radford, *supra* note 19, at 378.

The Supreme Court's decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*<sup>28</sup> further confirms the Court's acceptance of the substantially advances test prior to *Lingle*. In *Tahoe-Sierra*, the Court, in examining different theories under which the petitioners could have brought their takings claim, suggested that "apart from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the lake, petitioners might have argued that the moratoria did not substantially advance a legitimate state interest, *see Agins* and *Monterey*."<sup>29</sup>

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<sup>28</sup> 535 U.S. 302 (2002).

<sup>29</sup> *Id.* at 334.

Thus, it appears that at least four years ago the Court did not believe the substantially advances test was an incorrect standard. Rather, as one commentator suggested, “[i]n light of this statement, the suggestion by some commentators that *Agins*’ substantial advancement test is not viable as an independent takings standard must be viewed with considerable skepticism.”<sup>30</sup>

Indeed, the Supreme Court decisions since *Agins* led one commentator to state prior to *Lingle* that, “[i]n terms of the realities of Supreme Court doctrine, [the position that the substantially advances test is not a viable independent test] is simply not tenable after *Tahoe-Sierra*. . . . [E]very Justice has written or joined opinions applying, upholding, or expressly affirming the general applicability of the substantial advancement test to regulatory takings.”<sup>31</sup> In short, prior to *Lingle*, it appeared that the substantially advances test was well established.

Accordingly, *Lingle* can be viewed as a backtracking away from earlier precedent that provided greater protection to owners of private property. Moreover, any suggestion that the negative effect of *Lingle* on property rights can be assuaged through direct due process challenges to onerous property regulations fails to acknowledge that the Supreme Court has not invalidated an economic regulation on due process grounds since 1937.<sup>32</sup> Furthermore, the Court’s bright-line pronouncement that due process and the takings principle cannot be “commingled”<sup>33</sup> ignores the fact that the tests developed for determining whether one constitutional provision has been violated are regularly used in making that determination regarding other constitutional provisions and the fact that the protection against governmental deprivations of property was “from colonial times through the first third of the 20th Century, predicated on substantive due process analysis.”<sup>34</sup> Thus, given the Supreme Court’s regular “commingling” of constitutional standards and tests, and the

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<sup>30</sup> J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 *FORDHAM L. REV.* 22 n.136 (2002).

<sup>31</sup>

Radford, *supra* note 19, at 381.

<sup>32</sup> Ely, “*Poor Relation*” *Once More*, *supra* note 4, at 39, 52.

<sup>33</sup> 125 S. Ct. at 2083.

<sup>34</sup> Eagle, *supra* note 4, at 2.

historical method for analyzing governmental deprivations of private property, the *Lingle* Court should not have been surprised by, nor, more important, should it have based its decision to abandon the substantially advances test on, the fact that the substantially advances test from *Agins* reflected a due process standard.

In sum, the Supreme Court's jettisoning of the substantially advances prong of the *Agins* test for determining whether a regulatory action amounts to a taking was inconsistent with, what was at least perceptibly, the Court's takings jurisprudence. Furthermore, rather than merely amounting to doctrinal housekeeping,<sup>35</sup> the Court's invalidation of the substantially advances test was a reversal of the Court's recent trend of according property rights meaningful protection. While governmental action that arguably violates the protections guaranteed in the First Amendment's Free Speech or Free Exercise clauses or the Fourteenth Amendment's Equal Protection Clause, for example, will continue to be adjudged under heightened standards akin to the substantially advances test, the protection of private property, after *Lingle*, will be accorded only a general rational basis review.

#### **B. *San Remo Hotel v. San Francisco***

The Supreme Court dealt property owners a second severe blow on June 20, 2005, when it affirmed the Ninth Circuit's Catch-22 holding that a Fifth Amendment takings claim against a state or local government is not ripe for federal court review before the owner has first brought the claim in state court, and that *res judicata* bars a federal court from hearing the claim after it has been tried in state court. In choosing to adopt the Ninth Circuit's reasoning, the Supreme Court rejected the more cogent holding of the Second Circuit that "[i]t would be both ironic and unfair if the very procedure that the Supreme Court required [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also precluded [them] from ever bringing a Fifth Amendment takings claim."<sup>36</sup> Flatly rejecting the simplistic thought that "[P]laintiffs have a right to

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<sup>35</sup> See 125 S. Ct. at 2077-78 (suggesting that the *Agins* test attained apparent validity through "simple repetition").

<sup>36</sup> *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 130 (2d Cir. 2003).

vindicate their federal claims in a federal forum,”<sup>37</sup> the Court simply held that “the Constitution . . . makes no such guarantee.”<sup>38</sup> Thus, the Court effectively slammed the federal courthouse door in the face of property owners except in the rare instance where (as California once did) the state explicitly prohibits all just compensation claims in its courts.<sup>39</sup>

1. *Welcome to the Hotel New California*

In December 1906, shortly after the great earthquake and fire destroyed most of the city of San Francisco, the New California Hotel “opened its doors to house dislocated individuals, immigrants, artists, and laborers.”<sup>40</sup> Renamed “the San Remo Hotel” in 1922, by the early 1970s the hotel had fallen into “financial difficulties and a “dilapidated condition.”<sup>41</sup> New owners, however, “restored it, and began to operate it as a bed and breakfast inn.”<sup>42</sup>

Responding to a shortage of low-cost residential hotel rooms, in 1981 San Francisco adopted a Hotel Conversion ordinance under which “a hotel owner could convert residential units into tourist units only by obtaining a conversion permit. And those permits could be obtained only by constructing new residential units, rehabilitating old ones, or paying an ‘in lieu’ fee into the city’s Residential Hotel Preservation Fund Account.”<sup>43</sup> Although the San Remo had operated as a mixed residential and tourist hotel since the 1970s, in filling out a city form, the San Remo’s manager “erroneously reported that all of the rooms in the hotel were ‘residential’ units” and the city refused to allow the owners to correct the report.<sup>44</sup> The Hotel was thus required to obtain a conversion permit if it were to operate as a tourist hotel. “In 1993, the City Planning Commission granted the [San Remo’s] requested conversion and conditional use permit, but

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<sup>37</sup> *San Remo*, 125 S. Ct. at 2494

<sup>38</sup> *Id.* at 2504.

<sup>39</sup> *See First English supra* note 7.

<sup>40</sup> *San Remo*, 125 S. Ct. at 2494.

<sup>41</sup> *Id.* at 2496.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

only after imposing several conditions, one of which included the requirement that petitioners pay a \$567,000 ‘in lieu’ fee.”<sup>45</sup> On appeal, the city council upheld the fee, and the owners sued, beginning the twelve-year odyssey that ended up in the Supreme Court.

## 2. *Is It Ripe Yet?*

In 1993, the owners brought suit in federal district court, alleging that the half-million dollar payment was an unconstitutional condition on the use of their property, citing the Supreme Court’s decisions in *Nollan v. California Coastal Commission*<sup>46</sup> and *Dolan v. City of Tigard*.<sup>47</sup> The district court dismissed the case as “unripe” under the “*Williamson County* doctrine,” and the Ninth Circuit affirmed, holding that if the owners wanted to retain their right to return to federal court for adjudication of their federal claim, they must make an appropriate reservation in state court. The owners subsequently filed suit in state court, making the reservation—generally referred to as an *England* reservation—as suggested by the Ninth Circuit.<sup>48</sup> On the merits of their taking case, based solely on the California Constitution, the owners lost in the state trial court but won in the intermediate appellate court, on the ground that the condition failed the “essential nexus” and “rough proportionality” tests, because, *inter alia*, it was based on the original flawed designation that the San Remo Hotel was an entirely “residential use” facility.<sup>49</sup>

The California Supreme Court, in a 4-3 decision, found no taking, and reinstated the trial court’s dismissal. “The [California Supreme] [C]ourt initially noted that [the hotel owners] had reserved their federal causes of action and had sought no relief for any violation of the Federal Constitution.”<sup>50</sup> Nevertheless, asserting that the state

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<sup>45</sup> *Id.*

<sup>46</sup> *Supra* note 7.

<sup>47</sup> *Supra* note 8.

<sup>48</sup> *See England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964).

<sup>49</sup> *San Remo*, 125 S. Ct. at 2498.

<sup>50</sup> *Id.* at 2498 (citing *San Remo Hotel v. San Francisco*, 41 P.3d 87, 91 n.1 (2002)).

Constitution and the federal Constitution had been interpreted “congruently,” the state court went on to opine that the owners had no taking claim under either constitution.

Returning to the federal district court, the owners now sought to prosecute the Fifth Amendment claim they had reserved in accordance with the Ninth Circuit’s suggestion, only to be told that their claim had already been litigated in state court, and that “re-litigation” of that claim was barred by the doctrine of *res judicata*. The Ninth Circuit affirmed, holding that the owners’ reservation of their federal claim was ineffective in the face of the California Supreme Court’s *sua sponte* declaration that the California and federal constitutions were identical in effect, so that the decision of the state claim also resolved the federal claim.

### 3. *Sorry, You Don’t Have a Reservation*

The Supreme Court upheld the Ninth Circuit’s holding that the *England* reservation was ineffective to preserve the owners’ Fifth Amendment claim because the California Supreme Court had, in effect, decided the federal constitutional issue when it determined that no taking had occurred under the state Constitution. The majority of the Court was unimpressed with the fact that the owners were in state court involuntarily under the *Williamson County* doctrine, and that they had specifically reserved their Fifth Amendment claim for federal court review, just as the Ninth Circuit had instructed them. Justice Stevens, speaking for a unanimous Court, flatly rejected the owners’ argument that “plaintiffs have a right to vindicate their federal claims in a federal forum.”<sup>51</sup> Justice Rehnquist, speaking for himself and three other Justices, suggested that the Court revisit the *Williamson County* doctrine, which forces property owners involuntarily into state court in the first place.<sup>52</sup>

The Court stated the *England* reservation rule as: “when a federal court abstains from deciding a federal constitutional issue to enable the state courts to address an antecedent state-law issue, the plaintiff may reserve his right to return to federal court for the disposition of his federal claims.”<sup>53</sup> Justice Stevens then distinguished *San Remo*

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<sup>51</sup> *Id.* at 2494.

<sup>52</sup> *Id.* at 2507-10.

<sup>53</sup> *Id.* at 2502.

from the typical *England* reservation case on the ground that, in deciding the state constitutional issue of taking, the California Supreme Court had simultaneously decided the “congruent” federal constitutional issue:

*England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner. In such cases, the purpose of abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question. To the contrary, the purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy.<sup>54</sup>

In contrast, in the present case, “[b]y broadening their state action beyond the mandamus petition to include their [constitutional] claims, petitioners effectively asked the state court to resolve the same federal issues they asked it to reserve. *England* does not support the exercise of any such right.”<sup>55</sup>

The Court recognized, however, that the owners’ ultimate submission was that ordinary rules of *res judicata* should not apply to a claimant who is involuntarily forced into state court by the *Williamson County* doctrine, since this effectively shuts the federal courthouse door on all takings claims against state and local governments. Justice Stevens sided with the reasoning of the Ninth Circuit in *San Remo*, and rejected the reasoning of the Second Circuit in the conflicting *Santini* holding, citing three reasons. First, Justice Stevens reasoned that “both petitioners and *Santini* ultimately depend on an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum. We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgments may well deprive plaintiffs of the ‘right’ to have their federal claims relitigated in federal court.”<sup>56</sup>

Second, the Court held that Congress had provided no exception to normal issue preclusion principles in Fifth Amendment cases: “Even conceding, *arguendo*, the laudable policy goal of making federal

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<sup>54</sup> *Id.* at 2493.

<sup>55</sup> *Id.* at 2503.

<sup>56</sup> *Id.* at 2504.

forums available to deserving litigants, we have expressly rejected petitioners' view. 'Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress.'"<sup>57</sup>

Finally, the Court rejected the owners' argument that *Williamson County* is internally inconsistent, as it holds both that the federal claim is unripe until *after* completion of a state suit for just compensation, but also holds that the property owner must assert that federal claim, if at all, in the very state proceeding intended to ripen it. Doubling back on *Williamson County*'s premise that no federal constitutional violation has occurred until the owner completes the state's process for obtaining compensation (i.e., an inverse condemnation claim), the *San Remo* court actually holds that the federal claim should be pleaded in the alternative in the state case:

The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so," does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution. Reading *Williamson County* to preclude plaintiffs from raising such claims in the alternative would erroneously interpret our cases as requiring property owners to "resort to piecemeal litigation or otherwise unfair procedures."<sup>58</sup>

Justice Stevens fails to explain why the federal claim is ripe if brought in the state court, but is not ripe if brought in the federal court.

#### 4. *Should Williamson County Be Revisited?*

In a concurrence that reads much more like a dissent to the *Williamson County* decision (in which he joined), Justice Rehnquist, for himself and Justices O'Connor, Kennedy, and Thomas, urges the

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<sup>57</sup> *Id.* at 2505 (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982)).

<sup>58</sup> *Id.* at 2506 (internal citations omitted).

Court to revisit the *Williamson County* decision, the illogic of which now lies bared in the *San Remo* result:

It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in *Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement. More recently, we have referred to it as merely a prudential requirement. It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim.<sup>59</sup>

Pointing out that *Williamson County* purported merely to require exhaustion of a state process before suing in federal court, Chief Justice Rehnquist challenges Justice Stevens's conclusion that barring property owners from federal court is permissible:

As the Court recognizes, *Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee. The basic principle that state courts are competent to enforce federal rights and to adjudicate federal takings claims is sound and would apply to any number of federal claims. But that principle does not explain 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.<sup>60</sup>

The Chief Justice and three other Justices (the number required to grant *certiorari*) candidly question whether his concurrence in the *Williamson County* decision was correct, in light of its preclusion of a federal forum for Fifth Amendment plaintiffs:

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<sup>59</sup> *Id.* at 2508 (Rehnquist, C.J., concurring) (internal citations omitted).

<sup>60</sup> *Id.* at 2509.

I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. Here, no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.<sup>61</sup>

### 5. Conclusion

Unless the Supreme Court acts on Chief Justice Rehnquist's suggestion to revisit *Williamson County* (a less likely prospect now that he is deceased and Justice O'Connor has left the Court), property owners must look to Congress to affirmatively grant them the right (which virtually all other claimants under the Constitution have) to bring their federal constitutional claims in federal court. Failing this, takings litigation must begin and end in state court: "the courthouse doors are open, but property owners do not get to choose the one through which they enter and from which they exit."<sup>62</sup>

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<sup>61</sup> *Id.* at 2509-10.

<sup>62</sup> Fenster, *supra* note 10 at 13.

**C. *Kelo v. City of New London***

Following on the heels of *San Remo*, the Court issued its final curtailment of property rights for the Term two days later in *Kelo v. City of New London*. The *Kelo* case raised the question of the extent to which the “public use” component of the Just Compensation Clause restricts the taking of private property to further the goals of economic development and increased tax revenue in an economically distressed municipality. The Court’s answer to that question is that the “public use” requirement only restricts against “purely private taking.”

1. *Facts*

In 1990, the city of New London, Connecticut, was designated a “distressed municipality” by a state agency.<sup>63</sup> As of 1998, the unemployment rate in the city was almost double the unemployment rate in Connecticut.<sup>64</sup> To help revitalize New London, the city developed a plan to redevelop riverfront property and adjacent land on which the pharmaceutical company Pfizer planned to build a \$300 million global research facility.<sup>65</sup> The New London Development Corporation (“NLDC”), a private nonprofit corporation created in 1978 to assist the city in planning economic development, was reactivated in response to the city’s economic problems, and received approval to develop and rejuvenate part of the Fort Trumbull neighborhood of New London in accordance with the Fort Trumbull Municipal Development Plan. This plan was intended “to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract.”<sup>66</sup> The plan covered approximately ninety acres located on the Thames River, adjacent to both the planned Pfizer facility and the Fort Trumbull state park. The plan included the development of, among other things, a hotel and conference center, retail space, and a technology center, all of which would be privately owned and operated.

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<sup>63</sup> *Id.* at 2658.

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

<sup>65</sup> *Id.* at 2659.

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

The development plan area comprised approximately 115 land parcels and included a closed U.S. Naval Center. In 2000, the city of New London adopted NLDC's development plan and authorized the NLDC to acquire property by exercising eminent domain in the city's name.<sup>67</sup> The NLDC successfully purchased most of the real estate in the ninety-acre area, but its negotiations with Susette Kelo and eight other property owners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to the *Kelo* case.<sup>68</sup> In December 2000, Susette Kelo and her co-plaintiffs sought a permanent restraining order against the condemnation proceedings in Connecticut Superior Court, which was partially granted and partially denied.<sup>69</sup>

## 2. *Connecticut Supreme Court Decision*

The parties cross-appealed the superior court judgment, and the appeal was transferred to the Connecticut Supreme Court.<sup>70</sup> The principal issue on appeal was whether the trial court's conclusion—that the use of eminent domain for economic development did not violate the public use clauses of the Connecticut and United States constitutions—was proper.<sup>71</sup> The Connecticut Supreme Court concluded that “economic development projects created and implemented pursuant to [the state statute authorizing such development] that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.”<sup>72</sup>

The Connecticut Supreme Court also found that the legislative power to authorize development “requires a degree of elasticity to be capable of meeting new conditions and the ever increasing necessities of society.”<sup>73</sup> Because the court had “continued to afford the public

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<sup>67</sup> *Id.* at 2659-60.

<sup>68</sup> *Id.* at 2660.

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

<sup>70</sup> *Kelo v. City of New London*, 843 A.2d 500, 507-08 (Conn. 2004).

<sup>71</sup> *Id.* at 519.

<sup>72</sup> *Id.* at 520.

<sup>73</sup> *Id.* at 523 (quoting *Olmstead v. Camp*, 33 Conn. 532, 551 (1866)).

use clause a broad construction, and repeatedly has embraced the purposive formulation first articulated in *Olmstead*<sup>74</sup>; provisions of the statute permitting land to be taken by the government and sold or leased to private developers were permissible and constitutional. Indeed, the court quoted with approval one of its former holdings in which it concluded:

If the public use which justifies the exercise of eminent domain in the first instance is the use of the property for purposes other than slums, that same public use continues after the property is transferred to private persons. The public purposes for which the land was taken are still being accomplished.<sup>75</sup>

The court further held that “[t]he United States Supreme Court has afforded similarly broad treatment to the federal public use clause.”<sup>76</sup> Finally, the court determined that its determination was consistent with numerous decisions in other state and federal appeals courts.<sup>77</sup> Thus, the court concluded that

economic development plans that the appropriate legislative authority rationally has determined will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent domain power under either the state or federal constitution.<sup>78</sup>

The public use envisioned in this case—revitalization of a distressed economic area, the creation of new jobs, and the increase on the tax rolls—was not only found to be proper, but also was found not to be primarily intended to benefit a private party (Pfizer). Although Pfizer’s planned presence may have motivated much of the planned

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<sup>74</sup> *Id.* (internal citations and footnote omitted).

<sup>75</sup> *Id.* (quoting *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365, 369-70 (Conn. 1954)).

<sup>76</sup> *Id.* at 525-28 (citing *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

<sup>77</sup> *See id.* at 530 n.39 (citing cases).

<sup>78</sup> *Id.* at 531.

development, the court found that the takings that resulted were not primarily intended to benefit Pfizer, but “simply afforded the development corporation an opportunity to create an economic development plan that would go a long way toward the rejuvenation of a distressed city.”<sup>79</sup> The court emphasized that its decision was not “a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster.”<sup>80</sup>

### 3. *United States Supreme Court Majority Decision*

The United States Supreme Court agreed to hear *Kelo* “to determine whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.”<sup>81</sup> The Court held that New London’s taking of the properties at issue did satisfy the Just Compensation Clause’s public use requirement. First, the Connecticut statute authorizing the takings “expresse[d] a legislative determination that the taking of land, even developed land, as part of an economic development project is a ‘public use’ and in the ‘public interest.’”<sup>82</sup> The Court recited the familiar principle that “the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”<sup>83</sup> According to the Court, however, a state “may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.”<sup>84</sup> The majority held that what is forbidden by the public use component of the Just Compensation Clause is taking land for the purpose of conferring a private benefit on a particular private party, or taking property under a simple pretext of a public purpose, when the actual purpose of the taking is to bestow a private benefit.<sup>85</sup>

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<sup>79</sup> *Id.* at 542.

<sup>80</sup> *Id.* at 543.

<sup>81</sup> 125 S. Ct. at 2661

<sup>82</sup> *Id.* at 2660 (citation omitted).

<sup>83</sup> *Id.* at 2661.

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

<sup>85</sup> *Id.*

The Supreme Court noted that the trial judge, and all the justices of the Connecticut Supreme Court, agreed that there was no evidence of an illegitimate purpose.<sup>86</sup> The New London plan was a “carefully considered” development plan that was, in the Court’s view, “not adopted to benefit a particular class of identifiable individuals.”<sup>87</sup> The Court agreed with the Connecticut Supreme Court that the plan was not intended to benefit Pfizer, or any other private entity, but was intended to revitalize the local economy. It would create jobs, generate a significant increase in tax revenue, encourage spin-off business, and maximize public access to the waterfront.<sup>88</sup> And, although the plan did not envision opening the entire project to use by the general public, the Court nonetheless found that the city’s proposed uses served a public purpose.

The Court stated that it has always deferred to legislative judgments in this area, emphasizing the “great respect that [it] owes to state legislatures and state courts in deciding local public needs.”<sup>89</sup> The city’s determination, according to the Court, that the area was sufficiently distressed to justify a program of economic rejuvenation, was entitled to the Court’s deference.<sup>90</sup> Because the entire plan “unquestionably” served a public purpose, including, but not limited to, new jobs and increased tax revenue, it satisfied the “public use” clause of the Fifth Amendment.<sup>91</sup> Thus, economic development qualifies as a public use, and although government pursuit of a public purpose will often benefit individual private parties, that does not eliminate its “public purpose” character.<sup>92</sup> The Court concluded

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 2661-62.

<sup>88</sup> *Id.* at 2661 n.6.

<sup>89</sup> *Id.* at 2664 (citation omitted).

<sup>90</sup> *Id.* at 2665.

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

<sup>92</sup> *See id.* at 2666-67. The Court observed, in a footnote, that “while the City intends to transfer certain of the parcels to a private developer in a long-term lease—which developer, in turn, is expected to lease the office space and so forth to other private tenants—the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A*’s property to benefit the private interests of *B* when the identity of *B* was unknown.” *Id.* at

that its authority extended only to “determining whether the City’s proposed condemnations are for a ‘public use’ within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.”<sup>93</sup>

#### 4. *Justice Kennedy’s Concurring Opinion*

Justice Kennedy joined the opinion of the Court, and also claimed that a taking should be upheld as consistent with the public use requirement as long as it is rationally related to a conceivable public purpose.<sup>94</sup> Thus, according to Justice Kennedy, “[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.”<sup>95</sup> Although a court confronted with an accusation of cronyism should treat that accusation seriously, it should presume that the government’s actions were reasonable and intended to serve a public purpose. Justice Kennedy believed, however, that in a more narrowly drawn category of takings, such as private transfers, where the risk of undetected impermissible favoritism might be acute, a presumption that a taking is invalid may be warranted.<sup>96</sup> He declined, however, to apply that standard in the instant case, finding that such a level of scrutiny was not required simply because the purpose of the taking was economic development.<sup>97</sup>

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2661 n.6. That the Court’s analysis may have turned on whether the specific private interests in this case were identifiable individuals would appear to contravene the purpose of the Public Use Clause. But the Court decided that “a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.” *Id.* at 2667.

<sup>93</sup> *Id.* at 2668.

<sup>94</sup> 125 S. Ct. at 2669 (Kennedy, J., concurring) (citations and internal quotations omitted).

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

<sup>96</sup> *See id.* at 2670.

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

5. *Justice O'Connor's Dissenting Opinion*

Justice O'Connor sharply dissented from the majority opinion.<sup>98</sup> She found the majority opinion rendered all private property more vulnerable to taking, so long as the legislature would deem some future use of that property more beneficial to the public. Criticizing the majority, Justice O'Connor wrote that "[t]o reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment."<sup>99</sup> Justice O'Connor reviewed previous Supreme Court cases and found that under those cases, there are three categories of takings that comply with the public use requirement. First, the sovereign may transfer private property to public ownership, such as for a road, a hospital, or a military base.<sup>100</sup> Second, the government may transfer private property to private parties such as common carriers, which make the property available for public use (such as railroads, public utilities, or stadiums). Third, in certain circumstances, "takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use."<sup>101</sup> But Justice O'Connor argued that in *Berman* and *Midkiff* the precondemnation use of the targeted property "afflicted *affirmative harm* on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth."<sup>102</sup> In those cases, the legislatures had found that eliminating the existing use was necessary to remedy the harm; therefore, a public purpose was realized when the harmful use was eliminated.<sup>103</sup>

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<sup>98</sup> Justice O'Connor was joined by Chief Justice Rehnquist, and Justices Scalia and Thomas.

<sup>99</sup> 125 S. Ct. at 2671 (O'Connor, J., dissenting).

<sup>100</sup> *Id.* at 2673.

<sup>101</sup> *Id.* (citing *Berman*, 348 U.S. at 26; *Midkiff*, 467 U.S. at 229).

<sup>102</sup> 125 S. Ct. at 2674 (emphasis added).

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

In contrast, New London had made no claim that the plaintiffs' "well-maintained homes" were causing any social harm.<sup>104</sup>

Justice O'Connor further observed that "nearly any lawful use of real private property can be said to generate some incidental benefit to the public."<sup>105</sup> Moreover, Justice O'Connor criticized Justice Kennedy's proposed presumption-shifting analysis for failing to specify "what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not."<sup>106</sup> She noted that "[t]he trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs."<sup>107</sup>

Justice O'Connor concluded that after *Kelo*:

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<sup>104</sup> *Id.* at 2675.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2675-76.

who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. . . . Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a "higher" use. . . . The beneficiaries [of today's decision] are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.<sup>108</sup>

#### 6. *Justice Thomas's Dissenting Opinion*

Justice Thomas, in addition to joining Justice O'Connor's dissent, authored another, separate dissent. He found that the majority decision was "simply the latest in a string of [the Court's] cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning."<sup>109</sup> Justice Thomas observed that the original understanding of the Public Use Clause was as a meaningful limit on the government's eminent domain power. Therefore, "[t]he most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."<sup>110</sup> In other words,

[w]hen the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the

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<sup>108</sup> *Id.* at 2676-77 (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 464 (Mich. 1981) (Fitzgerald, J., dissenting) (other citations omitted)).

<sup>109</sup> 125 S. Ct. at 2678 (Thomas, J., dissenting).

<sup>110</sup> *Id.* at 2679.

property, regardless of the incidental benefits that might accrue to the public from the private use. The term “public use,” then, means that either the government or its citizens as a whole must actually “employ” the taken property.<sup>111</sup>

Justice Thomas noted that elsewhere in the Constitution, the word “use” is employed more narrowly—for the user’s own control.<sup>112</sup> Thus, the Public Use Clause should be interpreted to have the same meaning. Justice Thomas concluded that “[t]he Constitution’s text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.”<sup>113</sup> This analysis is bolstered by reading the Takings Clause in conjunction with the Necessary and Proper Clause: because the Takings Clause is a prohibition, not a grant, of power, the government may only take private property when such a taking is necessary and proper to the exercise of an expressly enumerated power. A taking is permissible under the Necessary and Proper Clause only when it serves a valid public purpose; accordingly, the Public Use Clause is “most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.”<sup>114</sup> According to Justice Thomas, this reading is largely borne out by early American eminent domain practice, where states used the eminent domain power to provide goods for use by the public, such as roads, ferries, canals, railroads, and public parks.

Justice Thomas also found that the Court’s public use jurisprudence had gone astray in at least two different ways. First, in certain circumstances, condemnations had been deemed proper to ensure access to a resource (such as water) to which similarly situated members of the public had a legal right of access. The Court, however, had come to rely too heavily and without analysis on dictum discussing the “inadequacy of use by the general public as a

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<sup>111</sup> *Id.* (citation omitted).

<sup>112</sup> *Id.* (citing U.S. CONST. art. I, § 10; *id.* art. I, § 8).

<sup>113</sup> *Id.* at 2680.

<sup>114</sup> *Id.* at 2681.

universal test.”<sup>115</sup> Second, the Court had deviated from the Public Use Clause’s original meaning by deferring too greatly to legislatures’ definitions of public use, and legislative conclusions about whether such a use was served. As Justice Thomas pointed out, “a court owes no deference to a legislature’s judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property.”<sup>116</sup> Courts owe no such deference to legislative determinations of (for example) when the search of a home might be reasonable, when criminal defendants must be shackled during sentencing proceedings, or when state law creates property interests protectible by the Due Process Clause. The ways in which the Court’s public use jurisprudence had erred culminated in *Berman* and *Midkiff*, in which the Court erroneously equated the eminent domain power with the states’ police power. Whether the government may take property using its eminent domain power is distinct from the question of whether the government may regulate property pursuant to its police power, and the Court erred by conflating the two powers in *Berman*.

In conclusion Justice Thomas observed that “[s]omething has gone seriously awry with this Court’s interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.”<sup>117</sup> He noted, in conclusion, that the majority decision ensured that future property losses in the name of economic development were all but assured to fall disproportionately on poorer communities. These communities—which are less likely to put land to its highest and best use, and which are also the least politically powerful—are likely to merit heightened scrutiny and thus a more searching judicial inquiry.<sup>118</sup> Thus, “[w]hen faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding

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<sup>115</sup> *Id.* at 2684 (quoting *Strickley v. Highland Boy Gold Min. Co.*, 200 U.S. 527, 531 (1906)).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2685.

<sup>118</sup> *Id.* at 2686-87 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning."<sup>119</sup>

### 7. Conclusion

As the above discussion demonstrates, *Kelo* was by far the most fractured of the three just compensation cases decided last Term; moreover, of the decisions, *Kelo* has by far generated the most professional and public interest and, in many instances, backlash. This backlash results from the fact that the Supreme Court's interpretation of public use has evolved from being narrowly defined to being so broadly defined in *Kelo* so as to essentially negate the entire clause. Although it can be argued that *Kelo* was merely an extension of *Berman* and *Midkiff*, and thus unremarkable, unlike *Berman* and *Midkiff*, the preexisting use of the land in *Kelo* did not inflict an "affirmative harm on society."<sup>120</sup> In the end, it may be hard to determine what the overall effect of the *Kelo* decision will be: will the courts apply an ad hoc analysis of public purpose and fairness as the *Kelo* majority did, or will the approach offered by the swing justice, Justice Kennedy, of enforcing public use through a higher level of judicial scrutiny carry the day. There is also, of course, the possibility that the Supreme Court will return to more traditional limitations on public use as the Michigan Supreme Court did in *County of Wayne v. Hathcock*.<sup>121</sup>

### III. PICKING UP THE PIECES—WHAT LIES AHEAD

The property rights' trilogy of 2005 is a break from the brief era that began with the property rights' trilogy of 1987. It appears that once again the Supreme Court has decided to ignore the express protections of private property encapsulated in the Just Compensation Clause and elsewhere in the Constitution while at the same time continually discovering nonexpress, and sometimes quite novel, noneconomic rights. Although the prospect of backtracking away from the gains made over the last two decades is unsettling, one must pick up the pieces left after these decisions and move forward.

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<sup>119</sup> *Id.* at 2687.

<sup>120</sup> *Id.* at 2674-75.

<sup>121</sup> 684 N.W.2d 765 (Mich. 2004).

Indeed, in moving forward there are prospects for rectifying the sad state that the 2005 decisions left property rights in. For instance, the immense public outcry over *Kelo* has prompted attempts at legislative fixes at both the state and federal levels. Moreover, the *Kelo* decision itself was fractured, with one of the five Justices in the majority writing separately to suggest limits on the decision's effects—thus, a judicial fix to *Kelo* is not entirely out of the question. The *San Remo* decision offers the same prospects. Four Justices dissented, offering some hope that the Court itself may be open to revisiting the question in the future. Moreover, a congressional solution is possible, as *San Remo* was an application of the federal Full Faith and Credit statute. *Lingle*, on the other hand, does not lend itself to a congressional correction; however, as Justice Kennedy noted in concurrence, the statute at issue in *Lingle* could have been challenged directly under the Due Process Clause. The only question is whether that would be an empty challenge.

#### IV. CONCLUSION

In sum, the Court's 2005 Just Compensation Clause trilogy is a disappointment for those who cherish the Constitution's protections of private property. The immediate future of the extent of the protections over private property is now in the hands of the Roberts Court. That Court must decide whether the 2005 property rights' trilogy was an aberration, or whether the Supreme Court has reversed course, sending property rights back down the path of receiving less judicial protection than other constitutionally protected rights.

## ABOUT THE AUTHOR

**NANCIE G. MARZULLA** is a founder and President of Defenders of Property Rights, the nation's only national nonprofit, public-interest legal foundation devoted exclusively to the protection of private property rights.

Ms. Marzulla is one of the nation's premier property rights attorneys. She has participated in the leading Supreme Court cases involving property rights, including *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*; *Kelo v. City of New London*; *San Remo Hotel, L.P. v. City and County of San Francisco*; *Lingle v. Chevron U.S.A., Inc.*; *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*; *Palazzolo v. Rhode Island*; *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*; *Phillips v. Washington Legal Found.*; *Suitum v. Tahoe Reg'l Planning Agency*; *Bennett v. Spear*; *Dolan v. City of Tigard*; and *Lucas v. South Carolina Coastal Council*.

In 1991, Ms. Marzulla co-founded Defenders of Property Rights, a national public-interest litigation foundation devoted to protecting all forms of property rights, including real and intellectual property. Since 1997, Ms. Marzulla has also served as a partner at Marzulla & Marzulla.

As an attorney-adviser during the Reagan administration, Ms. Marzulla rendered legal advice to the Assistant and Deputy Attorney General of the Civil Rights Division in the U.S. Department of Justice on a variety of litigation and appellate issues, and assisted in formulating and articulating the Division's position on a wide range of policy and legal issues. Ms. Marzulla was a prosecutor in the employment section at the Department of Justice. Ms. Marzulla left the Justice Department in 1988, and joined the Washington, DC-based law firm of Verner, Liipfert as litigation counsel, where she worked on complex litigation involving airline labor disputes and general civil litigation matters. Prior to coming to Washington, Ms. Marzulla worked at the International Labor Organization in Geneva, Switzerland, doing comparative legal research on questions of international labor law.

Ms. Marzulla is a member of the Advisory Council for the Chief Judge of the U.S. Court of Federal Claims. She is the President of the Court of Federal Claims Bar Association. In 2002, she was awarded the Bar Association's first Randolph W. Thrower Award for exceptional individual efforts to advance and promote the goals of the Bar. In 1997, she was honored by the D.C. Women's Bar as the female environmental Lawyer of the Year. The *National Journal* has described Ms. Marzulla as "the leading national spokesperson for the property rights movement."

Ms. Marzulla received her law degree in 1984 from the University of Colorado at Boulder, where she was a member of the *Colorado Law Review* and a founder of the Federalist Society Chapter. She attended the University of Texas as an undergraduate and received her bachelor's and master's degrees from the University of Colorado, and a diploma in Advanced International Legal Studies from the University of the Pacific. Ms. Marzulla has written and lectured extensively on constitutional property rights, water rights, and environmental law. She is the author of *Property Rights: Understanding Government Takings and Environmental Regulation*.