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Takings Cases in the October 2004 Term (Symposium: The Seventeenth Annual Supreme Court Review)

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TAKINGS CASES IN THE OCTOBER 2004 TERM

Honorable Leon D. Lazer[*]

The thirteen words at the end of the Fifth Amendment are at the root of the property cases from the Supreme Court's 2004 Term: "nor shall private property be taken for a public use, without just compensation."[1] There were three cases dealing with the taking of private property in the Term, each one involving property owners' challenges to governmental action. When it was over, the score was government three, property owners zero.

For the sake of readers who are not familiar with land use law, the following brief summary may be in order. One form of the taking of private property is by the use of the eminent domain power.[2] In such cases, the government physically takes property and

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[1] U.S. CONST. amend. V.

[2] Cincinnati v. Lousiville & N.R. Co., 223 U.S. 390, 403-405 (1912) (explaining the history of the eminent domain power relating to the taking of private property).

pays for it.[3] But what if the government does not physically take the property but enacts legislation or regulations that deprive the owners of the ability to put their property to any viable economic use or impose substantial financial loss upon the owners? That too can be a taking—a regulatory taking.[4] Faced with regulatory takings, owners who challenge legislation or regulations rely on the Supreme Court decisions that have established the standards for successful challenges to legislation or regulations. *Lucas v. South Carolina Coastal Council*[5] held that if the legislation or regulation deprives the owner of all economically beneficial use—and "all" means 100%, not 95% - there is a taking.[6] *Loretto v. Teleprompter Manhattan CATV Corp.*[7] held that if the government requires the owner to permit a physical invasion, like cable television wires crossing its property, that too is a taking.[8] The decision that necessarily is the one most used by those who challenge regulatory takings is *Penn Central Transportation Co. v. New York City.*[9] According to *Penn Central*, the Court considers three factors in deciding whether there is such a taking: the economic effect of the regulation on the owner; whether it interferes with the owner's "investment backed expectations"; and finally, the character of the regulation—its benefits to the public.[10]

For the last twenty-five years, there has been a fourth test set

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[3] *Id.*
[4] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[5] *Id.*
[6] *Id.* at 1019.
[7] 458 U.S. 419 (1982).
[8] *Id.* at 421.
[9] 438 U.S. 104 (1978).
[10] *Id.* at 124.

forth in *Agins v. City of Tiburon.*[11] Under *Agins*, a regulation of private property is a taking if the regulatory provision does not—and these are the key words—"substantially advance legitimate state interests."[12] *Agins* is important when an owner has problems establishing sufficient economic loss to meet the other tests. Ultimately, the *Agins* test is whether the regulatory provision is or will be successful in accomplishing the purpose for which it was adopted.[13] *Agins* and the "substantially advances" test were subsequently mentioned or relied upon in important land use decisions like *Nollan v. California Costal Commission,*[14] *Dolan v. City of Tigard,*[15] and *Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency.*[16]

I. LINGLE V. CHEVRON U.S.A. INC.

Returning to the 2004 Term, in *Lingle v. Chevron U.S.A. Inc.*,[17] *Agins* was the basis for Chevron's attack on a Hawaii rent control statute.[18] Faced with rising gas prices, Hawaii enacted a law that capped the amount of rent that oil companies could charge

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[11] 447 U.S. 255 (1980).

[12] *Id.* at 260.

[13] *Id.* at 261.

[14] 483 U.S. 825 (1987) (holding that there was a taking of property without just compensation where the condition of granting a permit to build a house imposed the requirement of a public easement across the beachfront section of the property).

[15] 512 U.S. 374 (1994) (holding that the city did not show the rough proportionality required under the Fifth Amendment's Takings Clause in imposing the requirement of dedication of a bicycle path as a condition of permit approval).

[16] 535 U.S. 302 (2002) (finding that two moratoria on residential development, which were imposed for about 32 months, did not constitute per se takings requiring compensation under the Fifth Amendment).

[17] 125 S. Ct. 2074 (2005).

[18] *Id.* at 2078.

independent lessees of its service stations.[19] Chevron's argument was that under the *Agins* test, the rent control law did not substantially advance any legitimate governmental interest.[20] In its motion for summary judgment, Chevron showed that the $207,000 rent reduction it would have to bear under the statute would be overcome by more than a million dollars in additional rent it could charge its other dealers under the statute.[21] After a one-day trial, with competing expert testimony, the district court found that the statute would actually increase gas prices, and granted summary judgment to Chevron.[22] The Ninth Circuit affirmed[23] and the Supreme Court granted certiorari.[24]

Writing for the Court, Justice O' Connor examined the precedential basis for *Agins* and concluded that the "substantially advances" test, going back to the seminal zoning case of *Euclid v. Amber Realty Co.*,[25] is not a takings test but a due process test.[26] It is a means-ends test that asks whether a regulation of private property is effective in achieving some public purpose.[27] Such a test is a due process test because if the statute fails to achieve the public purpose, it may be so arbitrary or irrational as to violate due process.[28]

However, the Court held that such a test is not a valid way to

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19 *Id.*
20 *Id.* at 2079.
21 *Id.*
22 *Lingle*, 125 S. Ct. at 2079.
23 *Id.*
24 *Id.* at 2801.
25 272 U.S. 365 (1926).
26 *Lingle*, 125 S. Ct. at 2083-84.
27 *Id.* at 2083.
28 *Id.*

decide whether property has been taken in violation of the Fifth Amendment. It reveals nothing about the magnitude of the burden upon private property rights or how the burden is distributed. In fact, the burden upon private property may be the same whether the statute is effective or ineffective. Thus, the "substantially advances" inquiry is distinct from whether there is a taking. Furthermore, under the test the Court would have the burden of scrutinizing the efficiency of a vast array of regulations and engaging in predictive analysis.[29] Therefore, according to the Court, the "substantially advances" test was not a valid method of identifying regulatory takings for which the Fifth Amendment requires compensation and thus Chevron failed in its takings claim.[30]

Dealing with *Nollan v. California Costal Commission,*[31] *Dolan v. City of Tigard,*[32] and the other Supreme Court decisions that seemingly relied on the *Agins* test in the past, Justice O'Connor engaged in a classic text book distinguishing of the cases: their real ratio decidendi were unconstitutional exactions from the property owners.[33]

Agins thus has evaporated as a takings test. The stakes for the government in *Lingle* were high—had it gone the other way, the door would have been opened to many takings challenges to all kinds of

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[29] *Id.* at 2084 (noting that if the *Agins* test were interpreted to demand "heightened means-ends review of virtually any regulation of private property. . . . it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited.").

[30] *Id.* at 2085.

[31] 483 U.S. 825 (1987).

[32] 512 U.S. 374 (1994).

[33] *Lingle*, 125 S. Ct. at 2086-87.

governmental regulatory actions. Conservative advocacy groups regarded the decision as a serious defeat.

II. SAN REMO HOTEL V. CITY & COUNTY OF SAN FRANCISCO

The second of the three cases is a classic application of the non-judicial doctrine of catch-22 to judicial decision-making. *San Remo Hotel v. City & County of San Francisco*[34] touched upon a frequent problem for lawyers: should they resort to the federal or the state route for their clients. If the client is complaining about a regulation that amounts to a regulatory taking, is 42 U.S.C. § 1983 available and can the action be brought in the federal court? Or, if the § 1983 action is brought in the state court, can the client reserve its federal rights and proceed in the federal forums if its state action fails? For property owners, *San Remo Hotel* furnished very undesirable answers.

Those who consider going the federal route in a takings case have to be aware of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[35] a case that was basic to the holding in *San Remo Hotel*.[36] In *Williamson County*, the owner sought to file a cluster zone plat, deeded property to the county and spent millions of dollars on improvements, only to be faced with changes in the zoning ordinance and other unpleasant actions, which

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[34] 125 S. Ct. 2491 (2005).

[35] 473 U.S. 172 (1985).

[36] *San Remo Hotel*, 125 S. Ct. at 2506 (rejecting plaintiff's argument that *Williamson County* should be read to preclude plaintiffs from raising compensation claims in state court).

ultimately resulted in rejection of the plat.[37] In the takings action that followed, the *Williamson County* Court held that a challenge based on a takings claim is not ripe to be brought in the federal courts until the local governmental entity has reached a final decision in the matter before it.[38] The key word is "ripe." Since the property owner in *Williamson County* did not seek variances from the local zoning board of appeals, the local determination was not a final decision.[39] But the *Williamson County* Court went even further, declaring that no violation of the Fifth Amendment's Just Compensation Clause could be asserted in the federal courts until the owner's pursuit of compensation under state law failed.[40] For all practical purposes that order of procedure deprives the owner of any ability to seek compensation in the federal court in a regulatory takings case.

The *San Remo Hotel* case is itself somewhat bizarre. One of the law bloggers, Michael Dorf, referred to it as the "Half-Million Dollar Typo."[41] San Remo Hotel is an old sixty-two unit hotel at Fisherman's Wharf in San Francisco. The hotel had already been converted to tourist units when the city, dealing with a shortage of affordable rental housing, enacted an ordinance that prohibited conversion of residential units into other uses like tourist units, without placing them elsewhere or paying a fee.[42] San Remo Hotel

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[37] *Williamson County*, 473 U.S. at 177-81.

[38] *Id.* at 186.

[39] *Id.* at 190.

[40] *Id.* at 195 n.13 (stating that "no constitutional violation occurs until just compensation has been denied" by the State).

[41] FindLaw.com, The Case of the Half-Million Dollar Typo: The Supreme Court Traps Property Owners in a Catch-22, http://writ.news.findlaw.com/dorf/20050622.html (last visited Mar. 21, 2006).

[42] *San Remo Hotel*, 125 S. Ct. at 2495, 2496 n.2 (2005).

erroneously reported to the city that all its units were in the residential zone, even though they had already been converted to tourist units.[43] As a result, the property was zoned residential.[44] When the hotel applied for a permit to use the rooms as tourist units, the planning commission approved the permit on condition of a $567,000 payment.[45] The hotel initiated a mandamus action in state court, but let that action lay dormant while it brought a § 1983 action in federal district court claiming due process violations and a regulatory taking, both facial and as-applied, under the Fifth and Fourteenth Amendments.[46] The procedural history is lengthy and of marginal relevance. It culminated before the Ninth Circuit, which ruled that the takings claim was not ripe under the *Williamson County* case because the hotel had not first pursued its takings claim for compensation in the state court.[47] The Ninth Circuit added that San Remo Hotel could pursue its federal takings claim in the state court, but if it wanted to return to federal court after the state court proceedings, it could reserve its federal rights in state court.[48] The hotel then reactivated its dormant state court action, while reserving its federal rights. Relying on the "reasonable basis" test, the California Supreme Court upheld the San Francisco ordinance against

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[43] *Id.* at 2496.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 2496-97.

[47] *See* San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998) (affirming the district court's dismissal of the hotel's claims because the hotel did not avail itself of the state's procedures for obtaining compensation) (citing *Williamson County*, 473 U.S. at 194).

[48] *Id.* at 1106 n.7 (citing England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 420-21 (1964)).

both the facial and as-applied attacks.[49] San Remo Hotel lost in state court.[50]

Instead of seeking certiorari in the United States Supreme Court, the hotel started over, filing an amended complaint in the federal district court. The district court dismissed the case relying on 28 U.S.C. § 1738. That statute requires federal courts to give full faith and credit preclusive effect to any state court judgment that would have preclusive effect in the state where the judgment was rendered.[51] Because California takings law is co-extensive with federal law, the compensation claims asserted in the district court were the same ones that had already been resolved in state court. The Ninth Circuit affirmed dismissal of the case[52] and the Supreme Court granted certiorari.[53]

For Justice Stevens, writing for the Court, the only question was whether the Court should grant an exception to the full faith and credit statute in order to provide a federal forum for litigants who have to obtain a final state judgment denying compensation, before they can pursue their takings claims in federal court.[54] The hotel

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[49] San Remo Hotel v. City & County of San Francisco, 41 P.3d 87, 107, 110 (Cal. 2002).

[50] *Id.*

[51] 28 U.S.C. § 1738 (2006) which states in pertinent part:

> [The] [a]cts records and judicial proceedings or copies [of any state court or legislature] . . . 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, Territory or Possession from which they are taken.

[52] San Remo Hotel v. San Francisco, 364 F.3d at 1098 (holding that the district court was correct in finding that the federal takings claims were barred).

[53] San Remo Hotel v. San Francisco, 364 F.3d 1088 (9th Cir. 2004), *cert. granted*, 543 U.S. 1032, *aff'd*, 125 S. Ct. 2491 (2004).

[54] San Remo Hotel v. City & County of San Francisco, 125 S. Ct. 2491, 2495 (2005) ("This case presents the question whether federal courts may craft an exception to the full

argued that under *England v. Louisiana Board of Medical Examiners*[55] it could reserve its federal claims while proceeding in state court.[56] Justice Stevens distinguished *England* on the ground San Remo Hotel's broad claim in state court, in effect, asked the California courts to resolve the very federal issues the hotel sought to reserve for the federal courts.[57] In the ultimate, the hotel's state takings claim was based on the underpinning of the federal decisional law. Therefore, under 28 U.S.C. § 1738, the Full Faith and Credit Statute, res judicata, collateral estoppel, issue preclusion, and perhaps claim preclusion would apply and defeat the hotel's federal claims.[58]

San Remo Hotel relied, however, on a Second Circuit case, *Santini v. Connecticut Hazardous Waste Management Service*,[59] which held that parties who litigate takings claims in state court because they must achieve *Williamson County* ripeness, cannot be precluded from having a federal court resolve those claims.[60] Justice Stevens noted that *Santini* cited no statute or case but relied on the fact that the catch-22 situation was ironic and unfair and prevented a property owner from ever bringing a Fifth Amendment takings claim in federal court.[61] The Supreme Court rejected the *Santini*

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faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment.").

[55] 375 U.S. 411 (1964).

[56] *San Remo Hotel*, 125 S. Ct. at 2501.

[57] *Id.* at 2502 (noting that in *England* the statute that required absention was "*distinct* from the reserved federal issue," and that therefore the Court's holding in *England* did not support the hotel's claim).

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

[59] 342 F.3d 118 (2d Cir. 2003).

[60] *Id.* at 121.

[61] *San Remo Hotel*, 125 S. Ct. at 2504.

exception.[62]

In an effort to soften the obvious catch-22 consequences of the decision, Justice Stevens noted that the hotel could have brought its non-compensation related claims—the facial claims—in federal court.[63] Furthermore, most cases that arrive at the Supreme Court come via certiorari from state courts, and the hotel had not sought certiorari.[64]

Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas concurred in affirmance,[65] with the Chief Justice writing separately to explain why he thought the Court's decision in *Williamson County* may have been mistaken.[66] Justice Rehnquist criticized the concept that state courts are more familiar with land use issues as a reason for federal abstention.[67] He noted the anomalies that *Williamson County* created and concluded that the Court should reconsider whether plaintiffs who assert a Fifth Amendment takings claim based on a final decision of a state or local entity must first seek compensation in state court.[68]

Until there is a reconsideration of *Williamson County*, owners have no real § 1983 regulatory takings remedy in the federal courts.

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[62] *Id.*

[63] *Id.* at 2505.

[64] *Id.* at 2499.

[65] *Id.* at 2507 (Rehnquist, C.J., concurring).

[66] *San Remo Hotel,* 125 S. Ct. at 2507-10.

[67] *Id.* at 2509.

[68] *Id.* at 2510 ("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.").

III. KELO V. CITY OF NEW LONDON

Kelo v. City of New London[69] was the takings case that caused the greatest stir, although the doctrine it expressed is hardly new. The case is based on very old law.

The issue in *Kelo* was not whether the government could, as the critics proclaimed, take a person's home and give it to a developer. The issue was whether the term "public use" includes economic use.[70]

In 2000, the City of New London, Connecticut approved a development plan that was projected to create 1,000 jobs, increase tax revenues, and revitalize the economically distressed city that had lost many jobs when the undersea war center that employed 1,500 people was shut down.[71] The unemployment rate in New London was double that of the State. The State authorized bonds for the planning and creation of a park in New London. Pfizer announced plans to erect a 300 million dollar research facility next to the park.[72] After a series of hearings, a development plan was approved covering ninety acres next to the park and providing for eighty new residences.[73] Most of the property owners negotiated the sale of their properties. However, the petitioners were nine residents or owners of fifteen homes, some of which were rented for income purposes, refused to negotiate.[74] None of the properties were blighted. The relevant

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[69] 125 S. Ct. 2655 (2005).
[70] *Id.* at 2658.
[71] *Id.*
[72] *Id.* at 2659.
[73] *Id.*
[74] *Kelo,* 125 S. Ct. at 2660.

Connecticut statute stated that the taking of land as part of an economic development is a public use.[75]

The petitioners brought an action in the Connecticut courts claiming that the taking would violate the public use restriction of the Fifth Amendment.[76] Ultimately, the Connecticut Supreme Court, relying on *Berman v. Parker*[77] and *Hawaii Housing Authority v. Midkiff*,[78] found the takings valid under the federal and state constitutions.[79] According to the Connecticut Supreme Court, there was no evidence that the taking was a pretext for conferring a private benefit on any particular private party. That was not an issue in the case.

The United States Supreme Court granted certiorari to decide whether the taking of property for economic development satisfies the "public use" requirement of the Fifth Amendment.[80] Justice Stevens commenced the majority opinion by noting the Nineteenth Century history of takings for economic purposes in the west for the development of mines and in the northeast for the development of mills.[81] The principal and unequivocal precedents, however, were *Berman v. Parker* in 1954 and *Hawaii Housing Authority v. Midkiff* in 1984.

Berman involved a redevelopment plan for a blighted area of

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[75] CONN. GEN. STAT. § 8-186 (2004).
[76] *Kelo*, 125 S. Ct. at 2660.
[77] 348 U.S. 26 (1954).
[78] 467 U.S. 229 (1984).
[79] Kelo v. City of New London, 843 A.2d 500, 528 (2004); *see also Kelo,* 125 S. Ct. at 2668.
[80] *Kelo,* 125 S. Ct. at 2661.
[81] *Id.* at 2662-63.

Washington, D.C. involving 5,000 persons; 64% of the houses were beyond repair and 57% of the houses had no toilet facilities.[82] Berman's department store was in an area that was not blighted, and he argued that creation of "a better balanced, more attractive community" was not a valid public use.[83] Using broad language, the Court upheld the plan, noting that "the concept of public welfare is broad and inclusive. . . . It is within the power of the legislature to determine that the community should be beautiful as well as . . . sanitary, [and] there is nothing in the Fifth Amendment that stands in the way."[84] The fact that Congress concluded that it could accomplish the end better by using a private developer rather than doing the development directly was a matter for Congress.[85]

Next, *Hawaii v. Midkiff* dealt with Hawaii's efforts to extinguish a land oligopoly.[86] Because of the old Polynesian feudal land tenure systems, land ownership in the state was an oligopoly. In the 1960's, the state and federal governments owned 49% of the land, 47% was in the hands of seventy-two owners.[87] Eighteen owners owned 40% of the land and in Oahu, twenty-two owners owned 72.5% of the titles.[88] Hawaii enacted a land reform act providing for the condemnation of residential properties and the selling of the titles

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[82] *Berman*, 348 U.S. at 30.

[83] *Id.* at 31.

[84] *Id.* at 33.

[85] *Id.* "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Id.*

[86] *Midkiff*, 467 U.S. at 231. Oligopoly is "a market situation in which each of a few producers affects but does not control the market." Webster's Collegiate Dictionary 822 (9th ed. 1991).

[87] *Midkiff*, 467 U.S. at 232.

[88] *Id.*

to the lessees thus transferring the condemned properties to private owners.[89] The owners' attack on the statute resulted in a Ninth Circuit determination that the act violated the public use requirements of the Fifth Amendment.[90]

Writing for the majority in *Midkiff*, Justice O'Connor relied primarily on *Berman v. Parker* utilizing extensive quotes from its broad language in prior cases concerning legislative discretion including: "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' "[91]; "When the legislature's purpose is legitimate and its means are not irrational, our cases make it clear that empirical debates over the wisdom of takings—no lesser than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[92]; and "[T]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."[93]

These extensive quotes used by Justice O'Connor are relevant because twenty-one years later, she became the author of a very vigorous dissent in *Kelo*.[94] In her dissent, Justice O'Connor, while citing the *Berman* and *Mitkiff* decisions, placed limitations on the

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[89] *Id.* at 233.
[90] *Id.* at 243.
[91] *Midkiff*, 467 U.S. at 241 (quoting United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896)).
[92] *Id.* at 242-43.
[93] *Id.* at 243-44.
[94] *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

deference given to the legislature in those decisions.

> Yet for all the emphasis on deference, *Berman* and *Mitkiff* hewed a bedrock principle [of deference to legislative judgment in takings cases] without which our public use jurisprudence would collapse . . . . To protect that principle, those decisions reserved a "role for courts to play in reviewing a legislature's judgment of what constitutes public use though the Court in *Berman* made clear that it is an extremely narrow one."[95]

The *Kelo* majority, relying on *Berman* and *Midkiff*, concluded that the plan unquestionably served a public purpose.[96] Justice Stevens relied heavily on federalism, noting that the Court's public use jurisprudence had afforded the legislature broad latitude in determining what public needs justified use of the takings power while eschewing rigid formulas and intrusive scrutiny.[97] He also declared that New London's decision that the area required rejuvenation was entitled to the Court's deference.[98]

The majority rejected what it called the bright line argument that economic development does not qualify as public use.[99] It also rejected the owners' argument that the Court should require a "reasonable certainty" test "that the expected public benefits would actually accrue."[100]

Justice O'Connor's dissent viewed *Berman* and *Midkiff* as

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[95] *Id* at 2674 (citing *Mitkiff*, 467 U.S. at 245 (quoting *Berman*, 348 U.S. at 32)).
[96] *Id.* at 2665-66 (majority opinion).
[97] *Id.* at 2664.
[98] *Id.* at 2664-65.
[99] *Kelo*, 125 S. Ct. at 2665.
[100] *Id.* at 2667.

true to the Public Use Clause of the Fifth Amendment because in those cases, the use of the targeted properties inflicted harm on society, and a public use was realized when such harm was eliminated.[101] However, Justice O'Connor found that the use in *Kelo* was not one that inflicted a harm on society; rather, the use in *Kelo* was "ordinary private use."[102] She argued that the majority expanded the meaning of public use, which in effect sanctioned the taking of private property "put to ordinary private use, and [giving] it over for new, ordinary private use."[103]

No one could argue that absent harm, the government may not take property from A and sell it to B if the purpose of the taking is for public use. However, for Justice O'Connor, the fact that the New London plan was the product of a relatively careful deliberative process did not blunt the negative force of the majority's holding.[104] There was nothing in the majority's "rule to prohibit property transfers generated with less care."[105]

Justice Thomas' lengthy dissent began by quoting Blackstone: "[T]he law of the land . . . postpones even public necessity to the sacred and inviolable rights of private property."[106] He then proceeded to contend that *Berman* and *Midkiff* flowed from "two misguided laws of precedent," that *Berman* and *Midkiff* were decided

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[101] *Id.* at 2674 (O'Connor, J., dissenting). In addition, Justice O'Connor noted that because the takings in *Berman* and *Midkiff* "*directly* achieved a public benefit, it did not matter that the property was turned over to public use." *Id.*

[102] *Id.* at 2675.

[103] *Id.*

[104] *Kelo,* 125 S. Ct. at 2676.

[105] *Id.*

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

in error, and the public purpose test cannot be applied in a principled manner.[107] Justice Thomas would therefore return the Public Use Clause to its original meaning: the government may only take property if it actually uses it or gives the public the right to use it.[108]

Thus, the dissenters, as the majority noted, sought a bright line rule that economic development does not qualify as a public use. The majority's response was that history and a public end might be better served through an agency of private enterprise than through a department of government. As far as abuses like one-on-one transfers to property outside of an integrated development plan, the fact that a private purpose might be afoot would certainly raise suspicions, but that is no reason for an artificial restriction on the concept of public use. Finally, in response to the argument that there should be a "reasonable certainty" standard that the public benefits will actually accrue, the Court, citing its decision in *Lingle v. Chevron U.S.A. Inc.,* noted that such a standard would be a departure from the Court's precedent.[109]

While *Kelo* was a five-to-four decision, its future prospects may differ from that of *Roe v. Wade.* None of the five Justices in the majority are leaving the Court and the two new Justices are replacing two dissenters.[110]

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[107] *Id.* at 2685-86.

[108] *Id.* at 2686.

[109] *Kelo,* 125 S. Ct. at 2666 (majority opinion) (citing *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528 (2005)) (explaining that *Lingle* noted that courts should not "substitute their predictive judgments for those of the legislatures and expert agencies").

[110] Chief Justice John G. Roberts replaced former Chief Justice William H. Rehnquist due to his death on September 4, 2005. Justice Sandra Day O'Connor retired from the Court and was replaced by Justice Samuel A. Alito, Jr.

Kelo has created an uproar. At least twenty-eight states are considering changes to their eminent domain statutes.[111] Delaware and Alabama have already enacted legislation.[112] Alabama now precludes taking of residences for the construction of industrial, commercial or residential developments.[113] There are bills in Congress to prohibit the use of federal money for projects that would rely on takings of property for transfer to others. Where the process will end is yet to be determined. The New London project has not gone forward since the decision.

[111] For a current listing of all proposed eminent domain legislation, see Castle Coalition, Legislative Center, http://www.castlecoalition.org/legislation/index.html (last visited March 14, 2006).

[112] 2005 Del. Code. Ann. Adv. Legis. Serv. 216 (LexisNexis); 2005 Ala. Adv. Legis. Serv. 313. (LexisNexis).

[113] 2005 Ala. Adv. Legis. Serv. 313. (LexisNexis).