THE GOVERNMENT IS ALWAYS RIGHT: THE SUPREME COURT TACKLES TAKINGS

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I. *KELO, LINGLE AND SAN REMO*: THE BACKGROUND

In its 2004/2005 term, the United States Supreme Court heard and decided three takings cases, an unusual focus in the area in a single term. One of those cases, *Kelo v. City of New London*,[1] is probably one of the most debated real property law decisions in the Court's modern history. *Kelo* arises in the "direct" condemnation context, while the other two cases, *Lingle v. Chevron USA, Inc.*[2] and *San Remo Hotel, L.P. v. City and County of San Francisco*,[3] arise in the "inverse" condemnation context. All three impact this country's laws of takings, but *Kelo* has resonated with the public to an extent almost unprecedented for Supreme Court property decisions. This may be because the right to own property without governmental interference or confiscation is so central to our notion of a "free" society. This article will focus on these three cases, and their impact on the high court's takings jurisprudence.

II. DIRECT AND INVERSE CONDEMNATION: AN OVERVIEW

Direct condemnation is distinguished from inverse condemnation by the identity of the party who initiates the action. In direct condemnation proceedings, the public agency initiates the action to acquire the property of the defendant upon the payment of just compensation.[4] By contrast, an action for inverse condemnation is initiated by the property owner for the recovery of damages resulting from the improper "taking" of the owner's property by reason of some action or failure to act, or negligence on the part of the government, or by some cause for which the government is responsible. In either case, the property owner is entitled to recover just compensation measured by the fair market value of the property taken.[5]

The government's liability for direct condemnation and for inverse condemnation is governed largely by the same principles in California.[6] Those principles derive from the Fifth Amendment to the U.S. Constitution,[7] and in California, Article I, Section 19 of the California Constitution.[8] It should be noted at the outset that there is no prohibition on the government taking private property for public use.[9] Rather, the United States and California Constitutions require that (1) the taking be for a "public use" and that (2) just compensation be paid to the property owner when property is taken.[10]

Regulatory takings claims, which arise when a regulation imposed by the government deprives a person of their property rights, are a subset of inverse condemnation claims.[11] In the *Lingle* case, the Court limited the theories under which a regulatory takings claim could be pursued, holding that a taking has not occurred simply because a regulation does not "substantially advance" a governmental objective. *San Remo* involved a procedural question relating to when, and in what forum, a regulatory takings claim may be litigated. *Kelo*, as noted, does not involve a regulatory taking or inverse condemnation claim at all, but rather concerns the nature and scope of the "public use" limitation contained in the Fifth Amendment to the United States Constitution. We turn to *Kelo* first.

III. CONDEMNATION FOR ECONOMIC REDEVELOPMENT: IS TRANSFERRING PROPERTY FROM ONE PRIVATE PARTY TO ANOTHER A "PUBLIC USE"?

A. Community Redevelopment: The Legal Parameters

Economic redevelopment in California is governed by the Community Redevelopment Act, which was enacted in 1945 in response to nationwide concerns about widespread urban decay, including the spread of blight in slums, deterioration of existing housing stock, and the concomitant reduction of the local tax base.[12] In 1951, the Act was codified and renamed the Community Redevelopment Law.[13] Under the Community Redevelopment Law, redevelopment agencies can be established in a community to undertake the functions set forth in the Community Redevelopment Law.[14]

One of the powers unique to a redevelopment agency is the ability to finance redevelopment through "tax increment." Tax increment financing authorizes the division of tax revenues raised by levies on taxable property in a redevelopment project between the taxing authorities (i.e., the state, cities, counties, districts, and public corporations) and the redevelopment agency. In this way, the amount of tax revenues produced, based on the last equalized assessed value of that property prior to adoption of the redevelopment plan, is allocated to the taxing authorities, while the portion of tax revenues in excess of that amount—the "tax increment"—is allocated to the redevelopment agency to repay indebtedness incurred in financing the project.[15] This is considered a "win-win" situation: taxing agencies retain their tax base, while redevelopment agencies can use the taxes generated by the redevelopment to finance those activities.

Community redevelopment is uniquely suited to, and based upon, public-private partnerships. The need for government involvement in redevelopment is premised on the assumption that the private sector cannot or will not pursue the necessary redevelopment, typically because of economic infeasibility.[16] Government therefore provides the economic environment in which private interests can feasibly engage in redevelopment by, for example, facilitating or providing financing, contributing land, and assembling property, often through condemnation.

A necessary power available to a redevelopment agency is the power to acquire by condemnation property within its territorial jurisdiction for redevelopment purposes.[17] The govern-

ment's ability to take property for redevelopment purposes has been broadly authorized and upheld by the United States Supreme Court. This is true even when the properties within a redevelopment area are not subject to blight,[18] and where the private property is taken not for a "public use" but is transferred to another private person to carry out the *public purpose* of redevelopment.[19] Similarly, California's Community Redevelopment Law, which authorizes the use of eminent domain in order to facilitate redevelopment, has been uniformly upheld against constitutional challenges by California courts.[20]

The tension which arises between the constitutional requirement of a "public use" to support condemnation, and the need to condemn property for ultimate transfer to private developers to facilitate redevelopment, provides the context for the *Kelo v. City of New London*[21] decision. The precise issue is the definition of a "public use." A literal interpretation of the term would seem to limit the power of eminent domain to the acquisition of private property by an agency of government for a traditional governmental function such as a road, library or police station. At the other end of the spectrum is a more expansive standard which posits that so long as a "public purpose" underlying the redevelopment program is shown, the Public Use requirement of the Fifth Amendment is satisfied, even if the property is ultimately transferred to a private party or entity. *Kelo* explored that spectrum and found that the more expansive standard holds.

B. The Condemnation of Suzette Kelo's House for the Redevelopment of New London

Kelo was issued late in the Court's 2005 term, and was a 5-4 split between the so-called "liberal" and "conservative" wings of the Court, with Justice Kennedy joining the "liberal" majority, and Justice O'Connor joining the "conservative" minority. *Kelo* involved the condemnation of private homes for purposes of economic revitalization in the Fort Trumbull area of New London, Connecticut. The city of New London, at the time of the condemnation of Kelo's property, was facing significant challenges due to decades of economic decline, including the closure of the U.S. Navy's Undersea Warfare Laboratory. Indeed, New London contained some of the most economically depressed areas of Connecticut. In 1990, the state and New London decided to help finance a redevelopment project in the Fort Trumbull area, which they hoped would serve as a catalyst for the area's rejuvenation. The centerpiece of the project was the relocation of the pharmaceutical company Pfizer Inc. to the area. The purpose of the project was to create jobs and generate tax revenue, and thus build momentum for the revitalization of downtown New London. The merits of the plan were not in dispute, and the plan appears to have been a success.[22] It was the burden of condemnation to be borne by homeowners like Ms. Kelo which engendered the dispute resulting in litigation.

Private homes stood in the way of the proposed redevelopment, and some of the owners of those homes declined to sell, among them, Suzette Kelo and Wilhelmina Drery. Ms. Kelo had lived in her house since 1997 and prized its views of the New London Harbor and Thames River. Ms. Drery was born in her house in 1918 and had lived there ever since, together with her husband of the past 60 years. The homes of these "holdouts" were not blighted or otherwise in poor condition. On the contrary, they were admittedly well maintained, and had been improved. After the condemnation process was initiated, the homeowners filed suit in state court seeking to enjoin the condemnation.

The state court found that with respect to *some* of the homes slated for condemnation, the "public use" requirement of the Fifth Amendment[23] had not been satisfied. On appeal, the Connecticut supreme court held that with respect to *all* of the condemnations, the "public use" requirement was satisfied.[24] The United States Supreme Court granted certiorari to address the question of "whether a City's decision to take property for the purpose of economic development satisfies the public use requirement of the Fifth Amendment."[25] Oral argument was held on February 22, 2005, and the decision issued on June 23, 2005.

C. The *Kelo* Decision: Courts Should Defer to the Legislature Regarding Need to Condemn for Redevelopment

In its opinion, the Court first noted that a taking which solely benefits private interests will not withstand the scrutiny of the Public Use requirement of the Fifth Amendment. However, the Court also noted that it had long ago "rejected any literal requirement that condemned property be put into use for the general public." Those types of uses satisfying a "literal requirement" would include, for example, libraries, police stations, city halls, roads, all of which have traditionally been regarded as governmental in nature. The question in *Kelo*, therefore, was whether the acquisition of admittedly non-blighted property and its transfer to private interests for the sole purpose of economic redevelopment satisfies the public use requirement of the Fifth Amendment. In that regard, the Court reviewed its earlier decisions in *Berman v. Parker*[26] and *Hawaii Housing Authority v. Midkiff*.[27]

In *Berman v. Parker*, the high court upheld a redevelopment plan targeting a blighted area of Washington, D.C., in which most of the housing for the area's 5,000 inhabitants was substandard and beyond repair. Under the plan, the area would be condemned, and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low cost housing. The owner of Berman's department store located within the redevelopment area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid "public use" sufficient to support condemnation.[28] The Court held that in reviewing condemnation for economic redevelopment, the Court should defer to the judgment of the legislature. In a much-quoted portion of its opinion, the court noted that the values of redevelopment "are spiritual as well as physical, aesthetic as well as monetary . . . [and] it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully controlled."[29]

In *Hawaii Housing Authority v. Midkiff*, the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to

reduce the concentration of land ownership. The concentration of land ownership was an artifact of the historically tribal control of land, with the tribal chiefs owning the land, and assigning portions to sub-chiefs who in turn leased the land to the occupants. This resulted in 49% of the state's land being owned by the state and federal governments, and another 47% of the state's land being in the hands of only 72 private landowners.

The Ninth Circuit reversed and remanded the district court's finding that the act was constitutional. On remand, the district court found the act to be unconstitutional, but refused to enjoin the act. On appeal, the Ninth Circuit revised its mandate and allowed for injunctive relief in favor of the property owners. The Ninth Circuit found that the Hawaii statute was "a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit,"[30] but the United States Supreme Court disagreed. Reaffirming *Berman*'s deferential approach to legislative judgments in this area, the court of appeal concluded that the state's purpose of eliminating the "social and economic evils of land oligopoly" qualified as a valid public use.[31] Moreover, the Court rejected the contention that simply because the state immediately transferred the properties to private individuals upon condemnation the public character of the taking was diminished. As stated by the Court, "It is only the takings purpose, and not its mechanics" that matters in determining public use.[32]

With limited exceptions, this deferential standard has been applied uniformly by the Court, and was reaffirmed in the *Kelo* decision. The Court in *Kelo* described the conditions facing the City of New London as conditions of economic "distress." The Court noted that "those who govern the city were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."[33] The Court found it important that the city "carefully formulated" an economic development plan that would provide benefits to the community, including new jobs and increased tax revenue. The Court rejected Kelo's argument that it should require a "reasonable certainty" that the expected public benefits will actually accrue, emphasizing the practical difficulties in having courts "second guess" the merit of legislative determinations.

Thus, with respect to the federal "baseline" for takings—and recognizing that states may place further and more stringent restrictions on the exercise of the takings power—the test identified by the Court for purposes of the Public Use clause of the Fifth Amendment amounts to a "rational relationship" test. In his concurring opinion, Justice Kennedy noted that notwithstanding this deferential test, the Court should strike down any taking "that by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits."[34]

D. The Dissent: Replacing Motel 6 With a Ritz Carlton

The dissenters in the case vociferously objected to the majority opinion. Justice O'Connor wrote that the majority had effectively deleted the words "public use" from the takings clause. Justice O'Connor stated: "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."[35] She noted that the prior cases had generally identified three categories of takings that comply with the public use requirement: First, when the state transfers private property to public ownership, such as for a road, hospital, or military base—those uses are clearly "public" in nature. Second, when it transfers property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, public utility or stadium. Third, those circumstances such as *Berman* and *Midkiff*, where the "public ownership" or "use by the public" standards were too constricting, and condemnation was needed to eliminate blight or another social ill. It was in that third category that *Kelo* most closely fell.

However, in *Berman* and *Midkiff*—unlike this case—the public purpose had been fairly clear; in *Berman*, the elimination of blight which negatively impacted the lives of residents, in *Midkiff*, the elimination of the concentration of property ownership which was negatively impacting the ability of residents to own their homes. There was no such "affirmative harm" which required a remedy in this case.

Moreover, wrote Justice O'Connor, the majority's analysis made the Public Use Clause[36] redundant with the Due Process Clause,[37] which already protects against irrational governmental action. Justice O'Connor opined that after the *Kelo* opinion "nearly all real property is susceptible to condemnation and the beneficiaries of that state of affairs are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."[38] As for Justice Kennedy's proposal requiring a review of legislation to determine if it primarily benefits a private party, Justice O'Connor saw that test as both impractical and one which no one "but the stupid staffer" would fail.[39]

Writing a separate dissent, Justice Thomas reviewed the language of the Constitution and found that the phrase "Public Use" means a direct public purpose, i.e., where the property is condemned for a "traditional" government use such as a library or road, or where the public retains a right to use the property, such as a stadium or park. He noted that the framers had used the phrase "General Welfare" in other parts of the Constitution where they intended to refer to the broader standard of a "public purpose" as opposed to public *use*. What the majority had done, according to Justice Thomas, was to change the "Public Use" clause into the "Public Purpose Clause" or, as he put it, the "Diverse and Evolving Needs of Society Clause."[40] Justice Thomas further noted that, historically, condemnation disproportionately impacted the poor and minorities—a point borne out by a review of prior case law, including *Berman*—and the majority opinion would exacerbate those impacts.

E. *Kelo*'s Effect on Condemnation for Economic Redevelopment in California

As pointed out by the Court, *Kelo*'s holding sets a "baseline" federal standard for condemnation to effectuate economic redevelopment.[41] States are free to establish more stringent requirements, and California, for example, has a comprehensive scheme of legislation regulating condemnation for redevelopment in the Community Redevelopment Law.[42] That law requires that a determination of both physical and economic blight be made as

a prerequisite to redevelopment.[43] Thus, redevelopment can never be used just because the public agency considers it can make a better use of the area than its current use.[44] The requirement of findings relative to physical blight and economic blight means that a more stringent standard is applied in California with respect to condemnation for redevelopment than the federal "baseline" standard articulated in *Kelo*.

F. Can a Public Entity in California Condemn for Economic Redevelopment Without Making Blight Findings?

The *Kelo* decision raises a question which as of yet has not been addressed in California courts. That is, to what extent may a city or other public entity opt to condemn property for economic redevelopment based on the "baseline" standard articulated in *Kelo*, rather than the more stringent standards set forth in the Community Redevelopment Law? The Government Code provides that "[a] city may acquire by eminent domain any property to carry out any of its powers or functions."[45] The legislative history to this statute suggests that the purpose of the statute is to give cities the authority to carry out their municipal functions, and further suggests that the scope of the city's powers and functions may be determined by reference to a city's charter or to a statute.[46]

It is well settled that it is within the police power of a city to regulate for aesthetic purposes.[47] Indeed, in the redevelopment context, the Court in *Berman v. Parker* noted that "[t]he concept of the public welfare is broad and inclusive . . ." and "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."[48]

The specific procedures for condemnation by a public entity in California are set forth in the Code of Civil Procedure, which states that "[t]he power of eminent domain may be exercised to acquire property only for a public use."[49] Like the United States Supreme Court, the California supreme court has expansively defined public use as "[a] use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[50] Moreover, California courts, like the United States Supreme Court, have held that the public nature of a particular use is not destroyed simply because private persons may incidentally benefit from economic redevelopment.[51]

In order to acquire property by eminent domain in California, a city or other condemning agency must adopt a resolution of necessity as specified in the Code of Civil Procedure,[52] and a resolution of necessity must make certain findings, including "a general statement of the public use for which the property is to be taken . . ." and a declaration that the legislative body has found and determined that "the public interest and necessity require the proposed project."[53]

It is readily apparent that under the deferential standard articulated in *Kelo*, most economic redevelopment in California would qualify as a "public use," at least under the Federal Constitution. That would also likely be the result under the State Constitution, since the two provisions have been found to be coextensive.[54] The question, therefore, becomes whether a city may—independently of the blight findings required by the Community Redevelopment Law and contained in the Health and Safety Code—condemn property for economic redevelopment through a resolution of necessity adopted pursuant to the Code of Civil Procedure.[55] Both statutory schemes are comprehensive and do not appear to be exclusive of each other. Moreover, there is no apparent express requirement in either statutory scheme that condemnation for purposes of economic redevelopment proceed *only* under the Community Redevelopment Law. Certainly, there are benefits which accrue to a redevelopment agency by virtue of so proceeding (such as tax increment financing), but that does not answer the question of whether the Community Redevelopment Law is the *exclusive* mechanism for condemnation for economic redevelopment in California.

It remains to be seen whether these issues will be more fully explored and, if they are, how they will be resolved. It is interesting that among the many legislative reactions (some would say over-reactions) to the *Kelo* decision, none have been directed at shoring up this possible ambiguity in California legislation by making it clear that findings of physical and economic blight are required before any property—whether located within a redevelopment plan area or not—may be condemned for economic redevelopment. What is not in doubt is that *Kelo* confirms that it is largely the function of state and local legislators—not judges—to determine the conditions under which condemnation for economic redevelopment can occur. This result may make sense as a matter of public policy given the infinite variations in needs and circumstances of localities throughout the U.S., including their appetite for the use of condemnation as a tool of economic redevelopment.

Politicians often attempt to address perceived economic problems through legislative action. In *Kelo*, the legislative action was the exercise of the power of eminent domain. In *Lingle v. Chevron*, discussed below, the legislative action was the exercise of the state's regulatory power over retail gasoline distributors. And in that case, the Court clarified the standards applicable in determining whether a regulatory taking, a subset of inverse condemnation, has occurred in the first instance.

IV. *LINGLE*: FAREWELL TO THE "SUBSTANTIALLY ADVANCES" TEST

A. The Statute at Issue

Lingle v. Chevron USA, Inc.,[56] issued by the Court on May 23, 2005, addressed a statute enacted by the Hawaii legislature in response to concerns about the effects of market concentration on retail gasoline prices. The statute prohibits oil companies from converting stations leased to an independent dealer to company-operated stations, and further prohibits the oil companies from locating new company-operated stations in close proximity to existing dealer-operated stations. The statute also limits the amount of rent the oil company may charge a lessee-dealer. These restrictions were intended to counteract the negative effects of concentration in the retail gasoline market, including high gasoline prices for consumers, by protecting the viability of independent lessee-dealers.

B. Chevron's Challenge: Failure to Substantially Advance a Legitimate State Interest

Chevron challenged the statute on its face,[57] claiming that it amounted to a taking under the Fifth and Fourteenth Amendments because it did not "substantially advance a legitimate state interest," a takings test first articulated in the 1980 Supreme Court case of *Agins v. City of Tiburon.*[58] The district court granted summary judgment in favor of Chevron, and the state appealed. The Ninth Circuit held that the district court had applied the correct legal standard to Chevron's takings claim, but it vacated the award of summary judgment and remanded back to the trial court on the grounds that the question whether the legislation in fact "substantially advanced" a legitimate governmental purpose involved factual disputes which could not be resolved on summary judgment.

Following a bench trial, the district court again entered judgment for Chevron, having heard from competing expert witnesses regarding the efficacy of the statute in achieving the stated objectives. The district court found Chevron's expert witness "more persuasive" in opining that oil companies would simply raise gasoline prices to offset any rent reduction or cap required by the statute, thus undermining the stated market objectives, and further, the rent restriction would result in incumbent lessee-dealers selling their leaseholds at a premium, depriving incoming lessees of the benefits of the rent cap. Based on these findings, the district court held that the statute on its face "effected an unconstitutional regulatory taking given its failure to substantially advance any legitimate state interests." The Ninth Circuit affirmed the decision, and the case went to the United States Supreme Court.

C. Four Categories of Takings

The Court first reviewed its precedents in the area of takings, and identified four categories of takings, two of which are deemed "*per se*" takings for Fifth Amendment purposes. Those are, first, where the government physically invades private property,[59] and second, where a regulation completely deprives an owner of "all economically beneficial use" of her property.[60] In these circumstances, a taking is presumed, and compensation is required.

The third category of takings focuses on an analysis of several factors designed to identify "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[61] These factors, which in application can require a complex economic analysis, are utilized to resolve regulatory takings claims which fall short of the deprivation of "all economically beneficial use of property" required by the *Lucas* test. The fourth category of takings recognized by the high court's jurisprudence, pertaining to land use exactions, were identified by the 1987 decision in *Nollan v. California Coastal Commission,*[62] and the 1994 decision in *Dolan v. City of Tigard,*[63] in which the test is "nexus" and "rough proportionality."

Each of these tests is designed to measure the severity of the burden the government imposes upon private property rights, with the ultimate objective of ensuring that no one property owner bears a disproportionate burden in connection with governmental activities. A regulatory taking occurs when a sufficiently disproportionate burden is imposed. The standard used by Chevron in advancing their claim for compensation was a standard based upon the *content* of the legislation (on its face) as opposed to the *impact* of the legislation. Ultimately, this distinction was the deciding factor for the Court in its rejection of the *Agins* test.

D. The Rise and Fall of the "Substantially Advances" Test in Takings Jurisprudence; An Ill-Advised "Or"

The "substantially advances" test was first articulated in 1980 in *Agins v. City of Tiburon.*[64] In that case, the Court stated that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... *or* denies an owner economically viable use of his land . . . ."[65] Courts read that language in the disjunctive, and therefore a body of law developed which considered the "substantially advances" test as a wholly separate takings test appropriate for facial challenges to regulatory enactments. The *Lingle* Court noted, however, that *Agins* had imported this language from due process, not takings, precedents; specifically, cases involving substantive due process challenges to zoning regulations. In those situations, the court found that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[66]

This "substantially advances" formula asks whether a regulation of private property is effective in achieving some legitimate public purpose. It sheds no light, however, on the primary relevant inquiry in a takings case, namely, *whether the takings has disproportionately impacted a private property owner by forcing him or her to bear an unequal burden of governmental activity.* To illustrate, the owner of property subject to an *effective* regulation may be just as singled out and just as unequally burdened as the owner of a property subject to a wholly *ineffective* regulation. It makes little sense to say that the second owner has suffered a taking while the first has not. In the Court's words, "the notion that such a regulation [i.e., one which does not "substantially advance" the governmental purpose] nevertheless takes private property for public use merely by virtue of its ineffectiveness or foolishness is untenable."

Not only is the "substantially advances" formula doctrinally untenable as a takings test, the Court found that it also presents significant practical difficulties in application. For example, to the extent that the *Agins* formula is read to demand a heightened means-ends review of regulation of private property, it requires courts to scrutinize the efficacy of a vast array of regulations, and substitute its judgment for those of elected legislatures and expert agencies. The Court noted that in the case before it, the district court was required to choose between the competing views of two economist experts to resolve Chevron's takings claim, with the district court ultimately finding that Chevron's expert was "more persuasive." The Court considered this an unprecedented interference in the legislative process by applying a "heightened" standard of review at odds with the deferential standard typically applied to legislation.

E. Where We Are Now With Respect to Regulatory Takings Claims

The Court in *Lingle* held that the "substantially advances" formula is not an appropriate test for determining whether a regulation constitutes a Fifth Amendment taking, and identified the appropriate tests as being (1) a physical *Loretto*-type taking, (2) a *Lucas*-type "deprivation of all economic use" taking, (3) a *Penn Central*-type "interference with economic expectations" taking, or (4) a land use exaction governed by the "nexus" and "rough proportionality" standards set forth in *Nollan* and *Dolan*.

We briefly review the types of takings recognized by the Court post-*Lingle*:

1. *Loretto*: Physical Takings

Loretto v. Teleprompter Manhattan CATV Corp. set forth the rule that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine."[67] In other words, when the government intrudes on property in a physical manner, there is no need to consider other factors to determine if compensation is due.

2. *Lucas*: Deprivation of All Economic Use

In *Lucas v. South Carolina Coastal Council*,[68] the Court concluded that regulations which deny the property owner *all* "economically beneficial or productive use of land" constitute one of the discrete categories of compensable regulatory deprivations which do not require the usual case-specific (i.e., ad hoc) inquiry into "the public interest advanced in support of the restraint."[69] Therefore, the *Lucas* Court enunciated a *per se* category of regulatory takings that applies when a property owner is denied *all* economic use of his or her property.

3. *Penn Central*: Interference With Economic Expectations

In *Penn Central Transportation Co. v. New York City*, the Court considered whether the application of the New York City Landmark's Law constituted a taking of Penn Central's property since it denied Penn Central the right to develop a building on top of the existing Grand Central Terminal building.[70] The *Penn Central* court established a three-factor "ad hoc" test to determine when a *regulation* goes too far, and constitutes a taking.[71] The three basic factors are: (1) the economic impact of the regulation on the person affected, (2) whether the regulation has interfered with a distinct investment-backed expectation of that person and (3) the character of the government action.[72] Thus, it is now settled that a regulation which does not leave the property economically idle should be analyzed under the *Penn Central*, rather than the *Lucas*, test.[73]

4. *Nollan/Dolan*: Nexus and Tailored to Impacts

Lastly, further elaboration on the law of regulatory takings came in *Nollan v. California Coastal Commission*[74] and *Dolan v. City of Tigard*,[75] both of which involved the government attempting to condition approval of development of property on concessions from the landowners. The question presented was how such regulations should be scrutinized.

In *Nollan*, the landowners wished to enlarge their oceanfront home.[76] The California Coastal Commission allowed them to do so only if they would agree to grant the public an easement over the front of their property for access to the beach.[77] The Court held that the Coastal Commission could not require such an easement without compensation, because the condition placed on development was not related to the stated goal of the Commission—to prevent oceanside buildings from blocking freeway views of the ocean.[78] In other words, there was a "lack of nexus between the condition and the original purpose of the building restriction."[79]

In *Dolan*, as in *Nollan*, the property owner was granted permission to enlarge her property only if she fulfilled certain conditions.[80] Dolan wished to expand her business and the city required that she grant land adjacent to the business to the city so it could build a bike path and additional storm drainage.[81] The Court held that this requirement did have a "nexus" to a legitimate public purpose (as required by *Nollan*), but that the burden on *Dolan* did not "bear the required relationship to the projected impact of proposed development."[82] *Nollan* and *Dolan* together hold that (1) a proposed condition or exaction imposed in connection with a development approval must have a sufficient relationship (i.e., nexus) to the legitimate public purpose sought to be furthered, and (2) the extent of the condition or exaction must be tailored to fit the impact of the proposed development.

F. The Practical Impact of *Lingle*

After *Lingle*, property owners can no longer assert takings claims based on the "substantially advances" formula, which from its inception was always a poor doctrinal fit with takings doctrine. *Lingle* eliminates the property owner's ability to put the likelihood of the regulation's success on trial and places the focus of regulatory takings claims squarely on the nature of the harm to the property owner, or in other words, on the taking itself. Chevron's critical error was limiting its takings claim to the "substantially advances" test. Perhaps, however, Chevron knew it could not satisfy the multi-factor *Penn Central* test and was left only with an *Agins* challenge.

While the Court did not explicitly jettison the concept of a facial takings challenge, it appears that such a challenge would be tenable only in those rare circumstances where the legislation *on its face* and however applied[83] denies the owner all economic use of the property. This means in practice that a regulatory takings claim is always "as-applied," in the sense that the focus is the impact of the regulation on the property owner, *not* the standalone efficacy of the regulations.

Another local regulation was challenged in a case involving the conversion of a residential hotel in San Francisco to a tourist hotel. In the *San Remo* case, the third of the 2004/2005 takings trilogy, it fell on the Court to address whether state or federal court was the appropriate forum for a federal takings claim, and foreshadowed possible further activity in that area.

V. *SAN REMO*: NO RIGHT TO SEEK COMPENSATION IN FEDERAL COURT FOR A CONSTITUTIONAL TAKINGS VIOLATION

A. A Heavily Litigated Hotel Conversion

San Remo Hotel, L.P. v. City and County of San Francisco[84] was decided by the high court on June 20, 2005. *San Remo* involved a protracted challenge by hotel owners to an ordinance adopted by the city of San Francisco requiring them to pay a fee for converting residential hotel rooms to tourist rooms. The owners initially sought a writ of mandamus in California state court, but that action was stayed when they filed suit in federal district court asserting facial and as-applied challenges to the hotel conversion ordinance under the Takings Clause. On appeal following the district court's grant of summary judgment in favor of the city, the Ninth Circuit *abstained* from ruling on the facial challenge on the basis that the pending state mandamus action could moot the federal question, and *affirmed* the district court's ruling that the as-applied claim was unripe because the owners had not yet been denied compensation in state court.

The owners returned to state court, which ultimately rejected their various state law takings claims. Now back in federal district court, having satisfied the state litigation requirement, the owners advanced a series of federal takings claims that turned on issues identical to those previously resolved in the state court. The district court found that the full faith and credit statute[85] precluded relitigation of the issues already decided, which included both the facial and as-applied takings claims. Since California courts had interpreted the relevant substantive state takings law coextensively with the federal law, the issues decided in state court were identical to those which would be decided in federal court, and relitigation of those issues was barred. The Ninth Circuit affirmed the district court's ruling, and the United States Supreme Court granted *certiorari*.

B. Once the Claims Are Ripe, They Are Precluded[86]

The issue in the *San Remo* case arose as a result of the Court's holding that an as-applied takings claims is not ripe until there is (i) a final determination by the relevant authorities with respect to the regulations at issue, and (ii) the state fails "to provide adequate compensation for the taking."[87] The second prong of that requirement was at issue in *San Remo*. The owners in *San Remo* argued that since they were compelled by the *Williamson County Planning Comm'n v. Hamilton Bank of Johnson City* rule of ripeness to first litigate their claims in state court, the full faith and credit statute should not apply to those claims. The Court disagreed, finding no manifestation by Congress of its intent to except takings claims from the full faith and credit statute. Describing the "ancient" origins of the rules of preclusion, the court noted that "such a fundamental departure from traditional rules of preclusion, enacted in federal law, can be justified only if plainly stated by Congress." Since there was no plainly stated exception in the takings area, the rules applied. The Court further reasoned that "state courts are fully competent to adjudicate constitutional challenges to local-use decisions" and noted that most takings cases historically addressed by the Court *emanate* from state courts.

The Court held that unlike the as-applied claims seeking compensation, the facial takings claims asserting that the regulation did not "substantially advance a legitimate state interest" *could* be reserved for initial resolution in federal court, since the "state litigation" prong of the ripeness rule was inapplicable. However, although the hotel owners had reserved their facial takings claim for adjudication in federal court under *England v. Louisiana Board of Medical Examiners*,[88] they *voluntarily presented* the dispositive issues to the state court for resolution.[89] Accordingly, by reason of the owners' own conduct in submitting the issue to state court, relitigation of the facial claims, as well as the as-applied claims, was precluded.[90] The *San Remo* court helpfully explains that the purpose of an *England* reservation is not to give plaintiffs a "second bite" at the *same* takings apple in federal court, but to allow resolution of *distinct* antecedent state law issues which may moot the reserved federal constitutional question. It disapproves of the Second Circuit's decision in *Santini v. Connecticut Hazardous Waste Management Service*,[91] and thoroughly disabuses plaintiffs of any notion that they have a "right" to vindicate their federal takings claims in a federal court.

C. The Sequel: Reexamination of the State Litigation Requirement?

In his concurring opinion, Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy and Thomas, states that although he joined in *Williamson*, upon further experience and reflection, he believes its "state-litigation requirement" for ripeness is wrong and not required by the Fifth Amendment, and he essentially queries why federal takings claims, alone among federal constitutional claims, should be "singled out to be confined to state court, in the absence of any asserted justification or congressional directive." Chief Justice Rehnquist's concurring opinion signals that *San Remo* may be merely the procedural prelude to a substantive "main event" yet to come—namely, reexamination of the "state litigation" ripeness prong of the 1985 decision in *Williamson*.[92] Such a future re-examination, if it goes the way Chief Justice Rehnquist and the three other justices joining his concurring opinion believe it should, may ultimately assure the choice of a federal court forum that many takings plaintiffs would prefer.

VI. WHAT NOW FOR TAKINGS JURISPRUDENCE?

The three takings decisions discussed above are, as with most judicial and legislative activities, a mixed bag. From a doctrinal standpoint, *Lingle* probably makes the most sense—the "substantially advances" test was always awkward and out of place in the takings context. No one would argue with *San Remo*'s premise that once a claim is adjudicated in a court of competent jurisdiction it should be put to rest. However, many may, and undoubtedly will, take issue with *San Remo*'s holding that a claimant effectively has no recourse to federal court for a violation of federal constitutional rights. Chief Justice Rehnquist's concurrence promises more debate on that issue.

Finally, *Kelo* was a decision based on social policy, more than constitutional construction. In a turnabout, Justices Ginsburg, Kennedy, Souter, Stevens and Breyer effectively advocated for state rights, while the minority—Justices O'Connor, Thomas, Scalia and Rehnquist—advocated for more centralized management and control. It remains to be seen how *Kelo* will play out in practice, and how active states will be in responding to the decision. One footnote to these three decisions is that if and when the issues addressed are revisited, the Court will no longer have the benefit of Justice O'Conner's moderating influence. With her loss, and the recent loss of Chief Justice Rehnquist, it is an open question how the *Kelo* and *San Remo* decisions will weather the test of time in Chief Justice Roberts' court.

In California, a further important and unresolved issue is how—if at all—the *Kelo* decision affects the interaction between the state's existing eminent domain and redevelopment statutory schemes? As we have discussed, this question will be the source of continuing debate and legislation. An example of the legislative response to *Kelo* is the Private Property Rights Protection Act of 2005, passed by the U.S. House of Representatives.[93] The questions are complex, and not always susceptible to bright line rules. The Court, at least for now, has reaffirmed that the notion of "public use" justifying the use of eminent domain is not static, but adapts to changes in society as expressed and embodied in legislative activity. Stay tuned as state and local legislatures react to the *Kelo* decision. As 2006 unfolds, these elected bodies will continue to grapple with the takings issue posed by the *Kelo* decision and other cases.

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ENDNOTES

1. *Kelo v. New London*, 125 S.Ct. 2655 (2005).
2. *Lingle v. Chevron USA, Inc.*, 125 S.Ct. 2074 (2005).
3. *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491 (2005).
4. Cal. Civ. Proc. Code §§ 1230.010 *et seq.*
5. *Klopping v. City of Whittier*, 8 Cal. 3d 39, 43 (1972).
6. *San Diego Metro. Transit Dev. Bd. v. Handlery Hotel*, 73 Cal. App. 4th 517, 529 (1999).
7. "No person shall be deprived of property, without due process of law; nor shall private property be taken for public use without just compensation."
8. "Private property may be taken or damaged for public use only when just compensation has first been paid to the owner."
9. *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097, 1112 (9th Cir. 2001).
10. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).
11. For a more complete discussion of the nature and types of regulatory takings claims, see Shiber and Friedman, *Take This! A Roadmap through a Regulatory Takings Claim*, Cal. Real Prop. J., Fall 2003, at 29.
12. *See* 1945 Cal. Stat. 2478.
13. Cal. Health & Safety Code §§ 33000 *et seq.*; 1951 Cal. Stat. 1922.
14. Cal. Health & Safety Code §§ 33101, 33200.
15. Cal. Const., art. XVI, § 16, subd. (a), (b); Cal. Health & Safety Code §§ 33670, 33670.5.
16. "The success of any redevelopment project is dependent upon whether private lenders, developers, owners, and tenants can be persuaded to participate in the process." *County of Santa Cruz v. City of Watsonville*, 177 Cal. App. 3d 831, 841 (1985).
17. Cal. Health & Safety Code §§ 33391, 33390.
18. *Berman v. Parker*, 348 U.S. 26, 32 (1954).
19. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243-44 (1984).
20. *In Re Bunker Hill Urban Renewal Project 1B*, 61 Cal. 2d 21, 41, 49-52 (1964).
21. 125 S.Ct. 2655 (2005).
22. But the success of the project is also in question and the well publicized litigation may have chilled further progress. *See* William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. Times, Nov. 21, 2005, at A-1.
23. That is, "nor shall private property be taken for public use, without just compensation."
24. 268 Conn. 1 (2004).
25. 125 S.Ct. 2655, 2658.
26. 348 U.S. 26.
27. 467 U.S. 229.
28. 348 U.S. 26, 31.
29. 125 S.Ct. 2655, 2663.
30. 467 U.S. 229, 235.
31. *Id.* at 241-42.
32. *Id.* at 244.
33. 125 S.Ct. 2655, 2665.
34. 125 S.Ct. 2655, 2669.
35. *Id.* at 2676; *see also 99 Cents Stores v. City of Lancaster*, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001) (involving the replacement of a discount retailer with Costco). and *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (involving efforts to locate a Costco on church property).
36. U.S. Const. amend. V.

37. *Id.*
38. 125 S.Ct. 2655, 2677.
39. *Id.* at 2675.
40. *Id.* at 2677.
41. *Id.* at 2668.
42. Cal. Health & Safety Code §§ 33030, *et seq.*
43. Cal. Health & Safety Code § 33030(d)(b)(2)(a); *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 395 (2000).
44. *Sweetwater Valley Civic Ass'n v. City of National City*, 18 Cal. 3d 270, 278 (1976).
45. Cal. Gov't Code § 37350.5.
46. Cal. Gov't Code (West 1975), § 37350.5. cmt. (Cal. Law Revision Comm'n).
47. *Kucerav v. Lizza*, 59 Cal. App. 4th 1141, 1148 (1997) (ordinance preserving views and sunlight was valid) *Schroeder v. Municipal Court*, 73 Cal. App. 3d 841, 848 (1977) (residential zoning limiting height of radio or television antennas valid).
48. 348 U.S. 26, 33.
49. Cal. Civ. Proc. Code § 1240.010.
50. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 69 (1982).
51. *City and County of San Francisco v. Ross*, 44 Cal. 2d 52, 59-60 (1955).
52. Cal. Civ. Proc. Code § 1240.040.
53. Cal. Civ. Proc. Code § 1245.230(a)(c).
54. *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal. 4th 643, 664.
55. Cal. Civ. Proc. Code § 1240.040.
56. 125 S.Ct. 2074 (2005).
57. A facial challenge objects to the statute when and as adopted—in contrast, an applied challenge objects to the statute as applied to the challenging party. *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, 1076 (1995); *Lake Nascimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 877 (9th Cir. 1987).
58. 447 U.S. 255 (1980).
59. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
60. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
61. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).
62. 483 U.S. 825 (1987).
63. *Nollan v. California Coastal Comm'n* 512 U.S. 374 (1994).
64. 447 U.S. 255, 260 (1980).
65. *Id.* at 260.
66. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).
67. *Loretto*, 458 U.S. at 432.
68. 505 U.S. 1003 (1992).
69. *Id.* at 1015.
70. *Id.*
71. *Id.* at 124.
72. *Id.*
73. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).
74. 483 U.S. 825 (1987).
75. 512 U.S. 374 (1994).
76. *Nollan*, 483 U.S. at 828.
77. *Id.*
78. *Id.* at 837.
79. *Id.*
80. *Dolan*, 512 U.S. at 377.
81. *Id.* at 379-80.
82. *Dolan*, 512 U.S. at 388.
83. In order to establish a facial regulatory taking, the claimant must establish that the regulation could not be applied by the regulators in a manner which would avoid the taking. *See, e.g., Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, 1076 (1995).
84. 125 S.Ct. 2491 (2005).
85. 28 U.S.C. § 1738.
86. Some commentators have referred to the concurrent and instantaneous ripening and preclusion of claims envisioned by *San Remo* as a "quark"-like phenomenon. (Coon and Friedman, *Thrice More Into the Breach: The Supreme Court takes on "takings" in Kelo, San Remo and Lingle*, Cal. Land Use L. and Pol'y Rep., Fall 2005.) Quark or no quark, it is clearly an exquisite Catch-22 for those who aspire to litigate their claims in federal court.
87. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985).
88. *England v. Louisiana Bd. of Med. Exam'rs* 375 U.S. 411 (1964).
89. *Id.* An *England* reservation is a notification filed in the federal action as a means of preserving a right to litigate a federal claim when state claims are pending and may dispose of related federal claims. The *England* court held that such a reservation is required in order to preserve such a claim.
90. An irony of *San Remo* is that following the decision in *Lingle*, petitioners would have been unable to advance their facial takings claim in any event.
91. 342 F.3d 118 (2003).
92. 473 U.S. 172 (1985).
93. H.R. 4128, 109th Cong. (2005). The Private Property Rights Protection Act of 2005 seeks to prohibit Federal funds from being used for projects where the public use is "economic development." The Act would also prohibit the federal government from exercising the power of eminent domain for "economic development."