

RIGHT FOR THE TAKINGS

Eminent domain powers come under fire with recent Supreme Court decision

By Arthur F. Coon, Basil S. Shiber and Ethan K. Friedman

This past term, the U.S. Supreme Court boldly ventured into the jurisprudential thicket of takings law. In the process, it arguably empowered the government to more aggressively regulate and condemn private property.

In *Kelo v. City of New London*, *Lingle v. Chevron*, and *San Remo Hotel L.P. v. San Francisco*, the Supreme Court addressed three important, but distinct aspects of American takings jurisprudence. In each case, the court sided with the government. The *Lingle v. Chevron*, and *San Remo Hotel L.P. v. San Francisco* cases were unanimous decisions, but in *Kelo*, the court's 5-4 ruling struck especially hard at fundamental ideals ordinary Americans hold dear, specifically with the common held belief that "one's home is one's castle." *Kelo* affirmed the Connecticut Supreme Court's approval of condemnation for private economic redevelopment, and found that economic redevelopment was a valid public purpose, and therefore a valid public use, under the state and federal Constitutions.

Kelo has been a lightning rod for critical public opinion from both ends of the political spectrum. It has even galvanized Congress into swift reaction, with the House already proposing to withhold federal transportation funding from take-happy cities that follow *Kelo*'s lead. While the decision appears to have increased government power, the political backlash of the decision may eliminate redevelopment in the United States as we know it. As legislators take action in response to *Kelo*, the government's eminent domain powers will likely be whittled down. We will be following with great interest the various state and federal bills working their way toward becoming law.

In *Lingle v. Chevron*, the court held that the test, which measures whether a challenged regulation "substantially advances" a legitimate state interest, is a due process test with no place in takings law. In other words, property owners can no longer assert takings claims based on the "substantially advances" formula. To show an impermissible regulatory (non-"physical" and non-exaction) taking, the court

will now look only to *Lucas v. South Carolina Coastal Council* or *Penn Central v. New York City*. The application of these distinct standards takes away the property owner's ability to put the likelihood of the regulation's success on trial. It then places the focus of regulatory takings claims squarely on the nature of the harm to the property owner, or, on the taking itself. While it must still comply with due process—typically a "rational relationship" means end review—the government now arguably has somewhat less reason to be concerned with whether its proposed land-use regulations achieve their desired goals.

The final case, *San Remo Hotel, L.P. v. City and County of San Francisco* resolved a circuit split in favor of the Ninth Circuit, and

unanimously held that a state court is a proper forum for federal takings claims and that resolution of such claims in state court precludes their re-litigation in federal court. The *San Remo* case does not deal directly with substantive takings law, but with applicable procedure. More specifically though it deals with the effect of the statutorily-required issue preclusion, mandated under the federal full

faith and credit statute for state court judgments, and the proper context and method for making a reservation of federal claims.

Most importantly, Chief Justice Rehnquist's concurring opinion signals that this case may be merely the beginning of the "main event" that is yet to come—namely, reexamination of the "state litigation" ripeness prong of *Williamson County Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

There will be much debate over the next few years about how these decisions impact American takings law. Most Americans see the *Kelo* case in particular as an insult to the rights of private property ownership. Ultimately, it will be the lawmakers, not the judges, who have the final say.

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