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ARTICLE

A TAKINGS TRIFECTA: THE SUPREME COURT'S *LINGLE*, *SAN REMO* & *KELO* DECISIONS

Basil S. Shiber*

I. GOVERNMENT 3, PROPERTY OWNERS 0

In its 2004 term, the United States Supreme Court heard and decided three cases involving its takings jurisprudence. The cases reaffirm the traditional deference the Court has shown to "public use" decisions by local government and limit the ability of an aggrieved property owner to challenge takings, both in substantive and procedural respects. In his dissent in the 1987 case of *Nollan v. California Coastal Commission*,[1] Justice Stevens described the high Court's taking jurisprudence as being fraught with "great uncertainty." These three cases-decided this year-eliminate some of that uncertainty, but also pose new questions. The holdings are fairly characterized as "pro-government," in the sense that they arguably expand the government's ability to condemn property, and constrict the remedies available to property owners.

In this rare foray into multiple takings cases in a single term, the high court in *Lingle v. Chevron USA, Inc.*,[2] *San Remo Hotel, L.P. v. City and County of San Francisco*,[3] and *Kelo v. City of New London*[4] addressed three important, but distinct, aspects of American takings jurisprudence. In each case, the court sided with the government; *Lingle* and *San Remo* were unanimous decisions, but in *Kelo* the divided court's 5-4 ruling attempted to strike a balance between the prerogatives of private property ownership, on the one hand, and the occasional need to condemn private property for economic revitalization, on the other. Far from creating consensus, *Kelo* has been a lightning rod for criticism and commentary

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from both ends of the political spectrum, generating a lot of heat but very little light.

II. *LINGLE*: FAREWELL TO THE SUBSTANTIALLY ADVANCES TEST

A. The Statute at Issue

The first case decided, *Lingle v. Chevron USA, Inc.*,[5] 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. Also, it limits the amount of rent that an oil

company may charge a lessee-dealer. These restrictions were intended to counteract the negative effects of concentration of the retail gasoline market, including high prices for consumers, by protecting the viability of independent lessee-dealers.

B. Chevron's Challenge

Chevron challenged the statute on its face, claiming that it effected 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*.[6] 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 grant of summary judgment and remanded on the basis that the question as to 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 up to the Supreme Court.

C. Four Categories of Takings

The Supreme 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,[7] and second, where a regulation completely deprives an owner of "all economically beneficial use" of the property.[8] In these circumstances, a taking is presumed, and compensation is required.

In addition to these two categories, there is a third category which 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."[9] 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. There is also a fourth category of takings recognized by the high court's jurisprudence, pertaining to land use exactions, illustrated by the 1987 decision in *Nollan v. California Coastal Commission*,[10] and *Dolan v. City of Tigard*,[11] in which the test developed is "nexus" and "rough proportionality."

Each of these tests are 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. It is when a sufficiently disproportionate burden is imposed that a regulatory taking occurs.

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.*[12] In that case, the Supreme 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 or her land …." 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."[13]

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 takings cases, namely, whether the "taking" 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. Namely, 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 Supreme 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

In summary, the Court held that the "substantially advances" formula is not an appropriate test for determining whether a regulation effects a Fifth Amendment taking, and identified the appropriate tests as being:

(1) a physical *Loretto*-type taking;

(2) a *Lucas*-type "total deprivation of 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*.

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 the Court's takings doctrine. *Lingle* takes away 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. 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[14] 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 stand-alone efficacy of the regulations.

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

A. A Heavily Litigated Hotel Conversion

The second case decided was *San Remo Hotel, L.P. v. City and County of San Francisco*.[15] This case 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 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 denial-of-compensation-in-state-court ripeness 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[16] 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 Supreme Court granted certiorari.

B. Once The Claims Are Ripe, They Are Precluded[17]

The issue in the *San Remo* case arose as a result of the Supreme 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."[18] 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* rule of ripeness to litigate their claims in state

court first, the full faith and credit statute should not apply to those claims. The Supreme Court disagreed, finding no manifestation by Congress that it intended to except takings claims from the full faith and credit provisions of 28 U.S.C.A. § 1738. 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 Supreme 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*,[19] they voluntarily presented the issues to the state court for resolution. 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.[20] 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*,[21] 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 County Planning Com'n v. Hamilton Bank of Johnson City*.[22] Such a future reexamination, 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.

IV. *KELO*: THE "PUBLIC USE" CLAUSE, AKA THE "DIVERSE AND ALWAYS EVOLVING NEEDS OF SOCIETY" CLAUSE

A. Revitalizing New London

The *Lingle* and *San Remo* opinions were unanimous. The last and final 2005 takings opinion issued by the court, *Kelo v. City of New London*,[23] was not. It 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 houses for purposes of economic revitalization. The City of New London was in 1990 facing significant challenges due to decades of economic decline. At that time, the state and locality decided to help finance a project in the Fort Trumbull area which they hoped would serve as a catalyst to the area's rejuvenation. The centerpiece of the project was the relocation of a 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.

In order to undertake the project, condemnation of homes was required. Some of the owners agreed to sell, but others did not, among them, petitioners. The homes sought to be condemned were not blighted or otherwise in poor condition; indeed, they were admittedly "well maintained." The homeowners filed suit in the state trial court seeking to prevent the condemnation, and the state trial court found that with respect to some of the homes slated for condemnation, the "Public Use" requirement of the Fifth Amendment[24] 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. The Supreme Court granted certiorari to answer 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."

B. "Economic Distress" May Support a Taking

The Court first noted that a taking to benefit purely 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." Accordingly, simply because private parties are benefited by a taking does not violate the public use limitations of the Fifth Amendment. The Court reviewed its decisions in *Berman v. Parker*,[25] and *Hawaii Housing Authority v. Midkiff*,[26] which had respectively addressed state statutes designed to eliminate blight, and a statute designed to reduce the concentration of land ownership. In both cases, the

Court had espoused a deferential approach to legislative judgments as to what is and is not a "public use." The Court in *Kelo* was similarly deferential, even though the objective was concededly not to eliminate blight, but rather, conditions of economic "distress." As the Court noted, "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."

The Court found it important that the city had "carefully formulated" an economic development plan that would provide benefits to the community, including new jobs and increased tax revenue. The Court agreed with New London that oftentimes the government's pursuit of a public purpose will operate to benefit private parties, but such a benefit does not run automatically afoul of the Public Use limitation. The Court further rejected petitioners' 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 Supreme Court for purposes of the "Public Use" requirement 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 nonetheless strike down takings "that, by clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits …" How such a clear showing could be made without "second-guessing" legislative determinations was not addressed by Justice Kennedy.

C. The Dissent

The dissenters vociferously objected. Justice O'Connor wrote that the majority had effectively deleted the words "Public Use" from the takings clause. According to Justice O'Connor: "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." She noted that the prior cases had generally identified three categories of takings that comply with the public use requirement: (1) when the state transfers private property to public ownership, such as for a road, hospital, or military base; (2) 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, a public utility, or stadium; and (3) those circumstances such as *Berman* and *Midkiff*, where the "public ownership" or "use by the public" standards were too constricting. It was in that third category that *Kelo* fell.

However, in *Berman* and *Midkiff*-unlike this case-the public purpose had been clear; in *Berman*, the elimination of blight, in *Midkiff*, the elimination of the concentration of property ownership which was negatively

impacting the ability of residents to own their homes. Moreover, Justice O'Connor wrote, the majority's analysis made the Public Use Clause redundant with the Due Process Clause, 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." 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.

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 government actually uses the property or gives the public a legal right to use the property. He noted that the framers had used the words "General Welfare" in other parts of the Constitution when they intended to refer to the broader standard of a "public purpose."[27] What the majority had done, according to Justice Thomas, was to change the "public use" clause into the "public purpose clause" or perhaps the

"diverse and evolving needs of society clause." Justice Thomas further noted that, historically, condemnation disproportionately impacted the poor and minorities-a point borne out by a review of prior caselaw, including *Berman*-and the majority opinion would exacerbate these impacts.

D. More Power to the States

As noted by the Court, *Kelo*'s impact in some jurisdictions, including California, may be lessened because of comprehensive state redevelopment legislation which requires findings of economic and physical blight in order to condemn property to put it to a different private use (see, e.g., the California Community Redevelopment Law ("CRL")[28]; *Redevelopment Agency of Chula Vista v. Rados Bros.*).[29] One question pertinent to practice in California is whether a city acting under its traditional municipal authority-as distinct from a redevelopment agency organized and acting under the CRL-may condemn for economic redevelopment under the articulated *Kelo* standards, without making the specific economic and physical blight findings required by the CRL. The "public use, interest and necessity" findings required for adoption by a city of a resolution of necessity under California eminent domain law[30]-a statutory scheme distinct from the CRL and generally applicable to municipalities and other public entities-would appear to be satisfied by the *Kelo* "economic distress" standard, and there is no express statutory or judicial prohibition on a city utilizing its power of eminent domain for economic redevelopment. Indeed, *Berman* and now *Kelo* make clear that economic redevelopment is a legitimate governmental enterprise. The reasonable counter-argument to efforts to evade statutory restraints set forth in the CRL is that the CRL is a

comprehensive statutory scheme intended to preempt the field of condemnation for redevelopment, a proposition never (to our knowledge) directly tested in California courts.

While *Kelo* has generated a lot of angst among commentators, the effect of the case is to effectively leave it to states to decide how and if to depart from the federal baseline standard. And, it may be that different standards are indeed appropriate for different locations and times. For example, the Hawaii legislation at issue in the *Midkiff* case was designed to address the effects of an oligarchic land ownership structure, a uniquely local problem arising from the historic tribal ownership of land. The decay and dilapidation of housing stock addressed in *Berman* was and is a primarily urban phenomenon which manifested itself after the Second World War. What is considered a "Public Use" in an urban Northeastern state such as Connecticut in 2005 may be very different from a Western state such as Wyoming in 1910. So long as there is a confidence in local legislatures to act fairly and with community interests in mind-admittedly a significant "if"- leaving to them the task of determining when condemnation should be pursued may have merit.

V. AS ALWAYS, A MIXED BAG

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, the so called "liberal" majority effectively advocated for state rights, while the "conservative" minority 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 possible future loss of Chief Justice Rehnquist, how the *Kelo* and *San Remo* decisions will weather the test of time is an open question.

NOTES

1. *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Envtl. L. Rep. 20918 (1987).
2. *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 35 Envtl. L. Rep. 20106 (U.S. 2005).
3. *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 125 S. Ct. 2491 (U.S. 2005).
4. *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 35 Envtl. L. Rep. 20134 (U.S. 2005).
5. *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 35 Envtl. L. Rep. 20106 (U.S. 2005).

6. *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env't. Rep. Cas. (BNA) 1555, 10 Envtl. L. Rep. 20361 (1980).
7. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982).
8. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Envtl. L. Rep. 21104 (1992).
9. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978).
10. *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Envtl. L. Rep. 20918 (1987).
11. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Envtl. L. Rep. 21083 (1994).
12. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env't. Rep. Cas. (BNA) 1555, 10 Envtl. L. Rep. 20361 (1980).
13. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).
14. 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, 37 Cal. Rptr. 2d 677 (4th Dist. 1995).
15. *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 125 S. Ct. 2491 (U.S. 2005).
16. 28 U.S.C.A. § 1738.
17. Some commentators have referred to the concurrent and instantaneous ripening and preclusion of claims envisioned by *San Remo* as a "quark"-like phenomenon. (Coon & Friedman, Thrice More Into The Breach: The Supreme Court takes on "takings" in *Kelo*, *San Remo* and *Lingle*, California Land Use Law and Policy Reporter, Fall, 2005.) Quark or no quark, it is clearly an exquisite Catch-22 for those who aspire to litigate their claims in federal court.
18. *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).
19. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964).
20. 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.
21. *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 56 Env't. Rep. Cas. (BNA) 2089 (2d Cir. 2003), cert. denied, 125 S. Ct. 104, 160 L. Ed. 2d 126 (U.S. 2004) and (abrogated by, San Remo Hotel, L.P. v. City and County of San Francisco, Cal., 125 S. Ct. 2491 (U.S. 2005)).
22. *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).
23. *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 35 Envtl. L. Rep. 20134 (U.S. 2005).
24. That is, "nor shall private property be taken for public use, without just compensation."
25. *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954).
26. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186, 14 Envtl. L. Rep. 20549 (1984).
27. But how could the framers have foreseen the social and economic forces of the 19th and 20th centuries which created the conditions of urban economic distress addressed in *Kelo*?
28. Health & Saf. Code, §§ 33030-33037.
29. *Redevelopment Agency of City of Chula Vista v. Rados Bros.*, 95 Cal. App. 4th 309, 115 Cal. Rptr. 2d 234 (4th Dist. 2001), as modified on denial of reh'g, (Jan. 7, 2002) and as modified, (Jan. 15, 2002), indicating city may only take land for economic development purposes in blighted areas.
30. Code Civ. Proc., § 1245.230.

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