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## The Property Rights Revolution That Failed: Eminent Domain in the 2004 Supreme Court Term

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## THE PROPERTY RIGHTS REVOLUTION THAT FAILED: EMINENT DOMAIN IN THE 2004 SUPREME COURT TERM

*David Schultz\**

### INTRODUCTION

Defenders of property rights had hoped to hit a home run in the 2004 Supreme Court Term. Instead, they struck out. In three decisions during the last Term—*Kelo v. City of New London*,<sup>1</sup> *Lingle v. Chevron, U.S.A. Inc.*,<sup>2</sup> and *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*<sup>3</sup>—the Supreme Court ruled against property rights and owners. In the process, the Court turned back hopes that a supposedly conservative Rehnquist Court would come to their defense and make it more difficult for the government to take private property for a variety of public uses.<sup>4</sup>

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<sup>1</sup> 126 S. Ct. 326 (2005).

<sup>2</sup> 125 S. Ct. 2074 (2005).

<sup>3</sup> 125 S. Ct. 2491 (2005).

<sup>4</sup> See DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT* 51 (1992) (describing the 1986 term as the sunset for the Brennan Court); BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 98-99 (1990) (describing how conservatives on the Rehnquist Court would place new limits on the ability of the government to regulate property rights); BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 367 (1993) (describing the Rehnquist Court as the first one in fifty years to move in a conservative direction); STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* 144 (2000) (describing the contrasting views of liberal and conservative members of the Rehnquist Court regarding property rights); MARK

Yet the 2004 Term was not the first time that there was a trio of property cases before the Rehnquist Court. In 1986, in *Keystone Bituminous Coal Association v. DeBenedictis*,<sup>5</sup> *Nollan v. California Coastal Commission*,<sup>6</sup> and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,<sup>7</sup> the new Rehnquist Court handed two victories to property owners, portending an era that would give significantly greater protection to owners than they had more recently enjoyed. Yet by 2005, the property rights counter-revolution appeared to have largely failed. Why?

This Article examines the failed property rights revolution of the 2004 Supreme Court Term, and perhaps of the entire Rehnquist Court. Such an overview is especially apt in that with the death and replacement of Chief Justice Rehnquist with that of Chief Justice John Roberts and the resignation of Justice Sandra Day O'Connor and her replacement by Justice Samuel Alito, the Rehnquist Court has ended, making an assessment of its legacy with regards to property rights timely and valuable. Part I of the Article sets the constitutional context of property rights and eminent domain at the time William Rehnquist became Chief Justice in 1986. Part II examines the first property rights trilogy during the 1986 Term, seeking to explain why ownership rights seemed poised for a comeback. The Article then explores the second trilogy of the 2004

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TUSHNET, THE NEW CONSTITUTIONAL ORDER 35 (2003) (comparing the jurisprudence of the Rehnquist Court to that of the pre-New Deal era Courts), for discussion on how it was anticipated that the Rehnquist Court would become more conservative and supportive of property rights.

<sup>5</sup> 480 U.S. 470 (1987).

<sup>6</sup> 483 U.S. 825 (1987).

<sup>7</sup> 482 U.S. 304 (1987).

Term, briefly contrasting it to the first trilogy, while trying to explain why property interests were not protected. Overall, the argument is that the anticipated property rights revolution under the Rehnquist Court either stalled or was never as radical as some had hoped. Finally, the Article concludes that even with anticipated changes on the Court, the arrival of new Justices may not radically alter the current balance of power when it comes to how property rights and eminent domain issues are decided.

## I. CONTEXTUALIZING THE REHNQUIST COURT

Leading up to the start of the Rehnquist Court in 1986, the law on property rights and eminent domain had been well defined by numerous decisions and doctrinal changes. Together, case law and jurisprudential views de-emphasized protection of property in favor of other individual rights.

### A. Substantive Due Process and Property Rights

The treatment of property rights by the Supreme Court since the Civil War can be divided into two periods: the *Lochner* Era and the post-*Carolene Products* Era. The *Lochner* Era, named after *Lochner v. New York*,<sup>8</sup> can be categorized as a jurisprudential period between the late Nineteenth Century and the New Deal. During this period, the Supreme Court gave heightened scrutiny to property rights and economic regulation through the use of legal doctrines

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<sup>8</sup> 198 U.S. 45, 52, 64 (1905) (striking down a New York State labor law that limited bakery workers to sixty hours of work per week).

such as, substantive due process and liberty of contract.<sup>9</sup> The Post-*Carolene Products* Era, named after *United States v. Carolene Products Co.*,<sup>10</sup> de-emphasized the protection of property rights and economic regulation while increasing scrutiny towards laws affecting individual rights.<sup>11</sup> In seeking to understand the treatment of property rights and eminent domain by the Court as Rehnquist was becoming Chief Justice in 1986, a brief review of how they were constitutionally situated is essential.

Edwin Corwin defined substantive due process as the doctrine that finds “every species of State legislation, whether dealing with procedural or substantive rights, subject to the scrutiny of the Court when the question of essential justice is raised.”<sup>12</sup> Corwin argued that substantive due process invoked the Nineteenth Century idea of “higher law” principles of natural justice, which limit state encroachment on individual (economic) liberties. Higher law was not only important in placing limits on state police power, but also placed limits on commerce and eminent domain power, especially as they affected property rights.<sup>13</sup>

Though there are some state precedents for substantive due process, the Supreme Court first invoked this doctrine in 1872 with

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<sup>9</sup> DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 2* (1996) (contrasting the jurisprudential values of the two eras).

<sup>10</sup> 304 U.S. 144 (1938).

<sup>11</sup> SCHULTZ & SMITH, *supra* note 10.

<sup>12</sup> EDWARD CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JUDICIAL CONCEPT* (1948).

<sup>13</sup> Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in State Courts*, in *LAW AND AMERICAN HISTORY* 398-402 (DONALD FLEMING & BERNARD BAILYN EDS., 1971).

the *Slaughterhouse Cases*.<sup>14</sup> This case involved a Louisiana law granting an exclusive charter for a slaughterhouse to operate in New Orleans. All other slaughterhouses were required to cease operation. The butchers, who were subsequently unemployed as a result of the statute, filed suit contending that the state law violated the Thirteenth and Fourteenth Amendments. Despite the fact that the Supreme Court upheld the Louisiana statute and affirmed the police power of the state, several points were made in both the majority and dissenting opinions that were important for the development of substantive due process.

The majority rejected the defendants' arguments that the Louisiana law violated the Privileges and Immunities' Clause of the Fourteenth Amendment. The Court conducted an extensive review of the meaning of this clause and concluded that these were the same privileges and immunities found in Article IV, Section 2 of the Constitution, which applied to the rights of citizens against the federal government. The clause did not create any new rights for citizens; rather, "privileges and immunities" refers to those rights that are

*fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious

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<sup>14</sup> 83 U.S. 36 (1872). See also *Wynehamer v. People*, 13 N.Y. 378 (1856) (employing, for possibly the first time by a state court, substantive due process as a limit to economic legislation).

than difficult to enumerate.<sup>15</sup>

In effect, the Privileges and Immunities Clause was a simple affirmation of preexisting rights.<sup>16</sup>

The Court also limited federal enforcement of the clause. The majority explained that Congress did not have the power to intervene on behalf of citizens to enforce their rights against the state.

And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.<sup>17</sup>

However, Justice Field bitterly disagreed with the majority. Field relied on the Privileges and Immunities Clause, arguing that it did protect the “natural and inalienable rights, which belong to all citizens.”<sup>18</sup> Field referred to the 1866 Civil Rights Act, which includes the rights “to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . .”<sup>19</sup> Field concluded that this clause did have substantive meaning, which

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<sup>15</sup> *Slaughter-House Cases*, 83 U.S. at 76.

<sup>16</sup> *Id.* at 97.

<sup>17</sup> *Id.* at 77-78.

<sup>18</sup> *Id.* at 96.

<sup>19</sup> *Id.* at 91.



included the protection of certain economic rights.<sup>20</sup> He disagreed with the majority and claimed that the federal government had the authority to enforce these economic rights against state interference.<sup>21</sup> Justice Bradley agreed and argued, “the right to choose one’s calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man’s property and right. Liberty and property are not protected when these rights are arbitrarily assailed.”<sup>22</sup> Thus, Justice Bradley argued that the Louisiana law violated the Due Process Clause of the Fourteenth Amendment, which protected certain fundamental rights such as the right to property and freedom from government interference in following an economic calling.

Four years later in *Munn v. Illinois*,<sup>23</sup> the Court again refused to strike down a state regulation establishing maximum rates for grain stored in elevators. Similar to the *Slaughter-House Cases*, both the majority and dissenting opinions defended economic due process. The majority, relying upon Judge Hale’s common law rule, held that regulation of private interests is justified only when the private property is affected with a public interest.<sup>24</sup> This majority’s distinction between private and public interests meant that only the latter could be regulated.<sup>25</sup> The implication of this between private

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<sup>20</sup> Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 394-98 (1988).

<sup>21</sup> *Slaughter-House Cases*, 83 U.S. at 101.

<sup>22</sup> *Id.* at 116.

<sup>23</sup> 94 U.S. 113 (1876).

<sup>24</sup> *Id.* at 126.

<sup>25</sup> *Id.*

Property does become clothed with a public interest when used in a

and public interests was that truly private (economic) interests were beyond the scope of regulation. Justice Field's dissent was similar to his argument in the *Slaughter-House Cases*. He believed that private property rights should be protected and would have found this law a violation of both the Due Process and Privileges and Immunities Clauses.<sup>26</sup>

The majority and minority opinions suggested that certain rights of individuals were beyond the encroachment of the state. However, they disagreed on two points. The majority did not see these rights as economic or property rights, or as a vehicle for the courts to second-guess the reasonableness of legislative action involving property regulation. The minority argued the opposite.<sup>27</sup> The minority disagreed and found that the Illinois statute was unconstitutional because it was an invasion of private property rights. Had the personnel and the attitude of the entire Court not changed over the next several years, their position might have remained a minority view. Evidence of the new attitude of the Court can be seen

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manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

*Id.*

<sup>26</sup> *Id.* at 136 (Field, J., dissenting) ("The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support.").

<sup>27</sup> *Id.* at 140 ("If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature.").

in *Mugler v. Kansas*.<sup>28</sup> The Court in *Mugler* upheld a Kansas prohibition law, and in dicta stated:

[E]very statute enacted ostensibly for the promotion of [the public welfare] is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty-indeed, are under a solemn duty-to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.<sup>29</sup>

The implications of the *Mugler* dicta were that the courts had the obligation to view economic regulation with special scrutiny. The courts could review regulations to determine their reasonableness or encroachment upon private economic rights, and strike down encroachments of the former if unreasonable. This heightened scrutiny of economic regulation led to the doctrines of liberty of contract and substantive due process, which were best captured and criticized by Justice Holmes in *Lochner v. New York*.<sup>30</sup> In *Lochner*, the Court struck down a state law regulating the working hours of employees in bakeries.<sup>31</sup> Over the next fifty years, numerous state

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<sup>28</sup> 123 U.S. 623 (1887).

<sup>29</sup> *Id.* at 661.

<sup>30</sup> 198 U.S. 45 (1905).

<sup>31</sup> *Id.* at 75 (Holmes, J., dissenting).

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does

statutes were struck down as violations of substantive due process. According to Benjamin Wright, from 1899 to 1937,

[E]xcluding the civil liberties cases, there were 159 decisions under the due process and equal protection clauses in which state statutes were held to be unconstitutional, plus 16 in which both the due process and commerce clauses were involved, plus 9 more involving due process and some other clause or clauses. Had the Court adhered to the interpretation of due process and equal protection clauses stated in the Slaughter House opinion less than a score of these decisions would have been possible. Indeed, no more than five of them are concerned with procedure.<sup>32</sup>

Though the Court did affirm some state regulations,<sup>33</sup> substantive due process was extended to protect many property rights,<sup>34</sup> but not individual rights.<sup>35</sup>

The point at which substantive due process peaked as a legal doctrine is hard to identify. Whatever strength the Fourteenth Amendment had in protecting property rights and economic interests, events surrounding the New Deal curtailed these property rights and

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not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.

*Id.*

<sup>32</sup> BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 154 (1942).

<sup>33</sup> *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon statute setting a maximum number of working hours for female workers).

<sup>34</sup> *See, e.g., Chicago M. & St. P.Ry. Co. v. Minnesota* 134 U.S. 418, 456, 468 (1890) (limiting the ability of states to impose rate hikes unless hearings were provided); *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897) (limiting states ability to regulate businesses using the mail); *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525, 560-61 (1923) (limiting ability of states to impose minimum wage laws).

<sup>35</sup> *See, e.g., Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (upholding the segregation of races on railways).

economic interests. The Court reversed itself for many reasons, possibly due to changes in Court personnel, the FDR Court Packing Plan, or changes in public opinion.<sup>36</sup> Regardless of the reasons, starting in 1937, the Court reaffirmed state and federal police, regulatory, commerce, and taxation power.<sup>37</sup> However, *West Coast Hotel Co. v. Parrish*<sup>38</sup> and *United States v. Carolene Products Co.*,<sup>39</sup> were important in ending substantive due process and judicial protection of property rights.

The Court in *West Coast Hotel* addressed the constitutionality of a Washington state minimum wage statute. An employee sued the hotel because it was paying its employees below minimum wages.<sup>40</sup> *West Coast Hotel*, relying on precedent set forth in *Adkins v. Children's Hospital of the District of Columbia*,<sup>41</sup> where the Court struck down a similar minimum wage statute, claimed that the Washington law was a limitation of their liberty and in violation of the Fourteenth Amendment.<sup>42</sup> In a five-to-four decision Justice Hughes, writing for the majority, upheld the Washington statute. The Court rejected *Adkins*, with Justice Hughes questioning the meaning of "liberty of contract."

What is this freedom? The Constitution does not speak

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<sup>36</sup> C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* (1969) (reviewing the reasons for the changes in legal doctrine during the New Deal).

<sup>37</sup> See, e.g., *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1 (1937); *U.S. v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Mulford v. Smith*, 307 U.S. 38 (1939).

<sup>38</sup> 300 U.S. 379 (1937).

<sup>39</sup> 304 U.S. 144 (1938).

<sup>40</sup> *West Coast Hotel*, 300 U.S. at 388.

<sup>41</sup> 261 U.S. 525 (1963).

<sup>42</sup> *West Coast Hotel*, 300 U.S. at 392.

of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.<sup>43</sup>

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In *West Coast Hotel*, the Court departed from precedent by affirming the constitutionality of minimum wage regulations. Justice Hughes referred to standards in previous due process cases to show the reasonableness of the state regulation.<sup>44</sup> Justice Hughes, noting that this case involved a woman paid a sub-minimum wage,<sup>45</sup> expanded upon previous regulations, which affected the working

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<sup>43</sup> *Id.* at 391.

<sup>44</sup> *Id.* at 390.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case, it had twice been held valid by the Supreme Court of the state. *Larsen v. Rice*, 100 Wash. 642, 171 P. 1037; *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 P. 595. The Washington statute is essentially the same as that enacted in Oregon in the same year. Laws 1913 (Oregon) c. 62, p. 92. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler v. O'Hara*, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann.Cas.1916A, 217, and *Simpson v. O'Hara*, 70 Or. 261, 141 P. 158. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U.S. 629, 37 S.Ct. 475, 61 L.Ed. 937.

*Id.*

<sup>45</sup> *Id.* at 412-13.

conditions of women, and were upheld by the Court.<sup>46</sup> Moreover, Hughes effectively read liberty of contract out of the due process clause, by redefining liberty in terms of those ends furthered by the police power of the state.<sup>47</sup> Finally, the definition of reasonableness was changed from the existing standard—not impinging one’s economic rights—to a new standard—does the statute further the health, safety, morals, and welfare of the community.<sup>48</sup> By changing the standard of reasonableness, the Court overruled portions of both *Mugler* and *Lochner*. All that was left after *West Coast Hotel* was to overturn the rest of *Mugler* and return to the legislature the right to judge the reasonableness of a regulation. This is what happened in *Carolene Products*.

*Carolene Products* involved a federal law regulating and prohibiting the interstate shipment of doctored or adulterated skimmed milk.<sup>49</sup> *Carolene Products Company* contested this commerce regulation as a violation of the Due Process Clause of the Fifth Amendment.<sup>50</sup> By affirming the regulation as a proper exercise of federal commerce power, the Court’s ruling also affirmed both congressional and state legislative authority to regulate and use their discretion to determine whether to enact legislation.<sup>51</sup>

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<sup>46</sup> *Id.* at 412 (citing *Morehead v. People of New York ex rel. Tipaldo*, 298 U.S. 587, 615 (1936)).

<sup>47</sup> *West Coast Hotel*, 300 U.S. at 392-93.

<sup>48</sup> *Id.*

<sup>49</sup> 304 U.S. at 145-46.

<sup>50</sup> *Id.* at 147 (arguing that the statute is a denial of due process and that “the statute purports to make binding and conclusive upon appellee the legislative declaration that appellee’s product ‘is an adulterated article of food injurious to the public health and its sale constitutes a fraud on the public.’ ”).

<sup>51</sup> *Id.* at 148 (explaining that the Court will not depart from the ruling that state laws have the constitutional power to protect the public from fraud by enacting state laws).

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>52</sup>

According to Justice Stone, the judiciary generally should not second-guess the wisdom of legislation. Unless legislation is lacking some reasonableness or rational basis, the courts should affirm the regulation. Thus, *West Coast Hotel* and *Carolene Products* together heralded the end of judicial determinations of legislation to protect property interests. More specifically, Justice Stone denied that any special or heightened scrutiny would be used by the courts to judge economic regulation. Scrutiny of this type of legislation would presume its constitutionality unless the contrary was shown. Subsequent cases, such as *Ferguson v. Skrupa*,<sup>53</sup> make clear that the legacy of *West Coast* and *Carolene Products* was to end the *Lochner* era and the increased protection the Court gave to property rights. Finally, *Carolene Products* signaled a new era that would give

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<sup>52</sup> *Id.* at 152.

<sup>53</sup> 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, ‘[we] are not concerned . . . with the wisdom, need, or appropriateness of the legislation.’ Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to ‘subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.’ ” (footnotes omitted)).



greater scrutiny to individual rights and minorities, thereby paving the way for the Court's expansive protection of the Bill of Rights guarantees.<sup>54</sup>

## **B. Eminent Domain and Property Rights**

In addition to the Court generally retreating from substantive protection of property after 1938, the New Deal ushered in a judiciary more deferential to legislative employment of eminent domain. Two cases, *Berman v. Parker*<sup>55</sup> and *Hawaii Housing Authority v. Midkiff*,<sup>56</sup> set the stage for how eminent domain was viewed by the Court as the Rehnquist Court assembled in 1986.

### *1. Berman v. Parker*

In 1954, the Supreme Court in *Berman v. Parker*<sup>57</sup> unanimously held that the District of Columbia's use of eminent domain, pursuant to statutory authority,<sup>58</sup> for the public use of acquiring commercial property, was constitutional. In *Berman*, the justification for the taking of property was slum clearance or the removal of urban blight.<sup>59</sup> While hardly newsworthy today, the *Berman* decision was quite remarkable when announced. The expansion of the public use definition resulted from the Court's

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<sup>54</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) for a discussion of the role the Court played in subsequent litigation.

<sup>55</sup> 348 U.S. 26 (1954).

<sup>56</sup> 467 U.S. 229 (1984).

<sup>57</sup> *Berman*, 348 U.S. at 26.

<sup>58</sup> *Id.* at 36.

<sup>59</sup> *Id.* at 33 (explaining that 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 patrolled").

comment that “the concept of the public welfare is broad and inclusive . . . [and] . . . the power of eminent domain is merely the means to the end.”<sup>60</sup> Notably, the Court found that the means used to exercise eminent domain could include utilizing an entity of private enterprise or the authorization to take private property for its resale or lease to the same or other parties.<sup>61</sup> In this regard, and especially important here, the Court said that:

[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.<sup>62</sup>

While *Berman* illustrated the use of eminent domain to benefit society as a whole, other recent decisions<sup>63</sup> affirmed the use of eminent domain to benefit narrower interests, in the hopes that this would eventually serve the broader, public interest. This recent concern with benefiting narrower interests is important. It arguably supports using eminent domain to prevent a business from closing, even though it would appear to only benefit the employees of the business, a narrow interest, given the ripple effect of unemployment

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

<sup>61</sup> *Id.* at 34.

<sup>62</sup> *Berman*, 348 U.S. at 33-34.

<sup>63</sup> *See, e.g.,* Puerto Rico v. E. Sugar Assocs., 156 F.2d 316, 324 (1st Cir. 1946) (upholding an agrarian reform measure that broke up large tracts of land and redistributed it in smaller parcels to private individuals).

in the economy, preventing closings could serve the broader interest of benefit the entire public.

## 2.        Hawaii Housing Authority v. Midkiff

A more recent Supreme Court case, which effectively broadened the public use definition, is *Hawaii Housing Authority v. Midkiff*.<sup>64</sup> *Midkiff* involved the constitutionality of a Land Reform Act<sup>65</sup> enacted by the Hawaii Legislature in 1967.<sup>66</sup> The purpose of the Act was to reduce the perceived social and economic evils inherent in the existing large land estates whose origins were traceable to the feudal chiefs of the pre-statehood Hawaiian Islands.<sup>67</sup> To achieve the purpose of the act, the State of Hawaii created the Hawaii Housing Authority (the “Authority”), whose mission was, by use of a land condemnation scheme, to take title to the real property from the lessors, condemn it, compensate the lessors for the taking, and then sell the property to the lessees inhabiting the land at the time it was condemned.<sup>68</sup> The process was instituted only after it was determined by the Authority that the acquisition of the tract would promote the public purposes of the act.

The Hawaii Housing Authority determined that taking the land held by the lessors would serve the act’s purposes and directed the lessors to negotiate the sale of the land to its lessees. When these negotiations failed, the Authority ordered the lessors to submit to

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<sup>64</sup> *Midkiff*, 467 U.S. at 229.

<sup>65</sup> *Id.* at 234-35.

<sup>66</sup> *Id.* at 233.

<sup>67</sup> *Id.* at 232-33 (explaining that the legislature attempted to redress these problems of concentrated land ownership through the Act).

compulsory arbitration, as required by the act. Rather than comply with the order, the lessors filed suit in federal district court, arguing that the act was unconstitutional. The district court held the compulsory arbitration and compensation formulas of the Act unconstitutional, but upheld the remainder of the act under the Fifth Amendment's public use requirement.<sup>69</sup> The Ninth Circuit Court of Appeals reversed, holding that the act violated the public use requirement of the Fifth Amendment.<sup>70</sup>

On appeal, the Supreme Court unanimously reversed the court of appeals.<sup>71</sup> The Supreme Court noted and dispelled the court of appeals' concern that "[s]ince Hawaiian lessees retain possession of the property for private use throughout the condemnation process, . . . the act exacted takings for private use."<sup>72</sup> In response to this concern the Court stated that:

The 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. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." . . . [What] in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair.<sup>73</sup>

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<sup>68</sup> *Id.* at 233-34.

<sup>69</sup> *Midkiff v. Tom*, 483 F. Supp. 62, 70 (D. Haw. 1979).

<sup>70</sup> *Midkiff v. Tom*, 702 F.2d 788, 789 (9th Cir. 1983).

<sup>71</sup> *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

<sup>72</sup> *Id.* at 243.

<sup>73</sup> *Id.* at 243-44 (citations omitted).

Justice O'Connor, writing for a unanimous Court, reinforced the principles of a broad public use doctrine surrounding legislative authorizations of eminent domain and indicated the role of the judiciary in these types of proceedings:

The "public use" requirement is thus coterminous with the scope of the sovereign's powers. There is, of course, a role for the courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made it clear that it is "an extremely narrow" one.<sup>74</sup>

The *Midkiff* ruling endorsed the use of eminent domain as a tool to redistribute private resources within society in order to accomplish certain widely drawn public purposes. *Midkiff*, *Berman*, and other federal court decisions<sup>75</sup> also exemplify the expansive interpretation now given the public use requirement on the federal level.<sup>76</sup>

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<sup>74</sup> *Id.* at 240.

<sup>75</sup> See *supra* note 64.

<sup>76</sup> For a general discussion of the presently broad interpretation the judiciary has given to the "public use" stipulation on both the federal and state level, see Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings" Clause, 53 HASTINGS L.J. 1245 (2002); Camarin Madigan, *Taking for Any Purpose?*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 179 (2003); Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543 (2002); Rachael A. Lewis, Note, *Strike That, Reverse It: County of Wayne v. Hathcock: Michigan Redefines Implementing Economic Development Through Eminent Domain*, 50 VILL. L. REV. 341 (2005); Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 MICH. ST. L. REV. 901 (2001); Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783 (1999); 2A NICHOLS ON EMINENT DOMAIN § 7.02 (2005); Suzanne LaBerge, *The Public Use Requirement in Eminent Domain: A Constantly Evolving Doctrine*, 14 STETSON L. REV. 649 (1985); Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 814 (1985); M. King, Note, *Rex Non Protest Peccare???: The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 DICK. L. REV. 266 (1971); Thomas J. Coyne, Note, *Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 NOTRE DAME L. REV. 388 (1985); Mark C. Landry, Note, *The Public Use Requirement in Eminent*

Additionally, these cases suggest the limited judicial role of questioning the advisability of eminent domain decisions. Thus, if some entity could successfully petition its state legislature for an enactment permitting the use of eminent domain in certain business closing situations, the judiciary's ability to restrain that action would be severely limited.

### 3. *Summary*

By 1986, property rights had long lost their privileged position under the Constitution. According to post-*Carolene Products* decisions, property could be regulated so long it was reasonable, with great deference given to legislatures to define reasonableness. Similarly, the Court granted legislatures broad deference to define what constituted a valid public use, and to take private property for a variety of reasons. Both of these assaults bothered conservatives,<sup>77</sup> leaving them with hope that a Rehnquist Court would reverse this attack on property rights.

## II. THE FIRST PROPERTY RIGHTS TRILOGY

The 1986 Term marked the beginning of William Rehnquist's

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*Domain--A Requiem*, 60 TUL. L. REV. 419 (1985); Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355 (1983); E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); E. F. PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (1987); Jonathon Neal Portner, Comment, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BALT. L. REV. 542 (1988).

<sup>77</sup> See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (Cambridge: Harvard University Press 1985); ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (New Brunswick, NJ: Transaction Publishers 1988) (sharply criticizing then recent trends in eminent domain and advocating increased protection for property rights). See also Schwartz, *supra* note 5, at 98-137 (reviewing the

tenure as Chief Justice. For conservatives, his ascension to Chief Justice, along with the confirmation of Justice Scalia, portended a reversal of many of the Warren Court's decisions and renewed a concern for and emphasis on the protection of property rights.<sup>78</sup> Three decisions during the 1986 Term, which encompasses the first trilogy, signaled that hopes for a property rights revival under the Rehnquist Court would actually be realized.

#### A. Keystone Coal Association v. DeBenedictis

The first case in the trilogy is *Keystone Coal Association v. DeBenedictis*,<sup>79</sup> which involved a Pennsylvania Bituminous Mine Subsidence and Land Conservation Act.<sup>80</sup> Sections four and six of the act, required companies to leave fifty percent of the coal in the ground to preclude flattening and depression of the soil.<sup>81</sup> The Act was a response to the devastating effects of subsidence to the soil and to structures on the surface. The fifty percent rule was to allow for enough subsurface soil structure to support surface structures.<sup>82</sup> Keystone Coal Association (the "Association") filed suit claiming that the Act, specifically the sections that limited the amount of coal the companies could extract from the ground, was an unconstitutional

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conservative critique of recent eminent domain decisions).

<sup>78</sup> See SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION: THE QUEST FOR A NEW FEDERALISM (Princeton: Princeton University Press 1989) (examining Rehnquist's political philosophy and arguing that protecting property rights was at the apex of his agenda); DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA (1996) (discussing the central role of property rights in Scalia's jurisprudence).

<sup>79</sup> 480 U.S. 470 (1987).

<sup>80</sup> *Id.* at 474.

<sup>81</sup> *Id.* at 477-78.

<sup>82</sup> *Id.*

taking without compensation. The Association also claimed that the Act violated the Contract Clause because, as a result of the act, the Association was forced to terminate leases it had with other private persons giving the Association the rights to mine.<sup>83</sup> The Association argued that their case was similar to *Pennsylvania v. Mahon*,<sup>84</sup> where the Court ruled that an earlier version of the Pennsylvania subsidence law<sup>85</sup> effected an unconstitutional taking.<sup>86</sup> The Association also relied on *Penn Central Transportation Co. v. New York*<sup>87</sup> to argue that the fifty percent requirement denied them substantial investment-backed expectations and therefore effected a taking.

The majority ruled against the association and distinguished it from *Mahon*. Justice Stevens, writing for a majority that included Justices Brennan, White, Marshall, and Blackmun, stated that in *Mahon* only one private building was to be saved by the Kohler Act.<sup>88</sup> Thus, it was questionable whether the law served a substantial public purpose.<sup>89</sup> In this case, many structures including cemeteries were involved, and thus a significant public interest was served in

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<sup>83</sup> *Id.* at 478-79.

<sup>84</sup> 260 U.S. 393 (1922).

<sup>85</sup> *Id.* at 412.

<sup>86</sup> *Id.* at 414. *Mahon* is famous for being the first case where the Court recognized what has become called a "regulatory taking." By that, according to Justice Holmes who wrote the majority opinion in the case, at some point regulation or the police power goes too far, and at that point "[w]hen it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413.

<sup>87</sup> 438 U.S. 104 (1978).

<sup>88</sup> *Keystone*, 480 U.S. at 483.

<sup>89</sup> *Id.* at 484 ("In the advisory portion of the Court's opinion, Justice Holmes rested on two propositions, both critical to the Court's decision. First, because it served only private interests, not health or safety, the Kohler Act could not be 'sustained as an exercise of the police power.'").



saving them.<sup>90</sup>

The second difference concerned the degree of regulation. In *Mahon*, the act denied all use of the property for mining.<sup>91</sup> Whereas the Pennsylvania act still allowed for fifty percent mining, Justice Stevens noted that even without the fifty percent rule, companies never extracted all the coal because much of it was needed to support the mine tunnels.<sup>92</sup> The questions raised, then, were whether the fifty percent rule served a reasonable public purpose, and whether the rule had a substantial impact on the value of the property as a whole. The majority answered the first question in the affirmative, noting that two state or public interests supported the act. First, the act served the health and safety of the people of Pennsylvania by protecting the surface land,<sup>93</sup> and second, as a result of legislative findings, the act prevented the mining of certain types of coal, which proved commercially impractical because of cost or safety concerns.<sup>94</sup> Because not all of the coal could be extracted, the Association did not suffer a loss of investment-backed expectations and therefore no taking had occurred.<sup>95</sup>

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<sup>90</sup> *Id.* at 504-05 (discussing that the Commonwealth has a strong public interest in preventing this kind of harm that supersedes private agreements with contracting parties).

<sup>91</sup> *Id.* at 485-86.

<sup>92</sup> *Id.* at 499 (explaining that the petitioners here cannot even show that they have been denied economic use of this property being that a certain percentage of coal must remain in tact to support the structures beneath the ground).

<sup>93</sup> *Keystone*, 480 U.S. at 485-86. The Court explained that both the district court and the court of appeals held that the legislative purposes were “genuine, substantial, and legitimate, and [it has] no reason to conclude otherwise.” *Id.*

<sup>94</sup> *Id.* at 491, 496 (enumerating that the Act not only furthers a governmental interest in preventing activities similar to public nuisances, but also that “nowhere near all of the underground coal is extractable even aside from the . . . Act”).

<sup>95</sup> *Id.* at 499. The record indicates that only about 75% of petitioners’ underground coal can be profitably mined in any event, and there is no showing that petitioners’ reasonable ‘investment-backed expectations’ have been materially affected by the additional duty to

In their dissent, Chief Justice Rehnquist, and Justices Powell, O'Connor, and Scalia agreed with the Association that *Mahon* was controlling.<sup>96</sup> Although the regulations in this case and *Mahon* served public purposes, both placed substantial burdens on private property such that a taking had occurred.<sup>97</sup> Even though the law in *Keystone* served a valid public purpose, the dissenters argued that the fifty percent rule denied association members significant "investment-backed expectations," and was not a regulation, but a regulatory taking and was therefore an act of eminent domain requiring compensation.<sup>98</sup> The basis of their argument was first that one had to look at how the regulation affected a particular segment of the property, not the parcel as a whole.<sup>99</sup> Second, regardless of how much coal would have to remain in the ground, the purchase of the subsurface mining rights that was affected by the subsistence act does destroy some of the value of the interest.<sup>100</sup> Thus, when the value of the interest of a segmented portion of property is destroyed, a taking

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retain the small percentage that must be used to support the structures protected by § 4. *Id.*

<sup>96</sup> *Id.* at 506-07.

<sup>97</sup> *Id.* at 510. The dissent explains that the Court in *Mahon* "made clear" that a finding of a public purpose was not enough to free the government from the requirements of just compensation, and that the Act in this case rested on similar grounds. *Id.* (Rehnquist, C.J., dissenting).

<sup>98</sup> 480 U.S. at 515-16. The dissent argues that the Court refuses to recognize that the coal is a "separate segment of property for takings purposes" and simply because the government's act is "regulatory" should not change the effect of property rights. Furthermore, such "regulatory action" can still constitute a "taking." *Id.*

<sup>99</sup> *Id.* at 514-15 (citing *Penn Cent.*, 438 U.S. at 149, n.13 (Rehnquist, J., dissenting)).

<sup>100</sup> *Id.* at 520. ("Purchase of this right, therefore, shifts the risk of subsidence to the surface owner. Section 6 of the Subsidence Act, by making the coal mine operator strictly liable for any damage to surface structures caused by subsidence, purports to place this risk on the holder of the mineral estate regardless of whether the holder also owns the support estate. Operation of this provision extinguishes petitioners' interests in their support estates, making worthless what they purchased as a separate right under Pennsylvania law. Like the restriction on mining particular coal, this complete interference with a property right extinguishes its value, and must be accompanied by just compensation.").

has occurred.<sup>101</sup>

Implicit in the dissenting opinion was the foreshadowing of a return to a more heightened judicial scrutiny of legislation affecting property rights. The Court indicated this by questioning the legislative findings of fact and purposes in ways not recently common for the Court. A return to strict scrutiny for economic legislation would mean that the line between regulation and eminent domain would be subject to a more acute analysis. This is exactly what happened in the next two cases, *Nollan v. California Coastal Commission*,<sup>102</sup> and *First English Evangelical Church v. County of Los Angeles*.<sup>103</sup>

#### **B.        *Nollan v. California Coastal Commission***

*Nollan v. California Coastal Commission*<sup>104</sup> was a land development case. The Nollans had a contract to purchase beachfront property, tear down the existing structure, and replace it with a three-bedroom house.<sup>105</sup> They were granted a permit on the condition that they provide a narrow public easement along their property, which allowed people to walk to the public beach.<sup>106</sup> Similar easements had been required for other houses along the

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<sup>101</sup> *Id.*

<sup>102</sup> 483 U.S. 825 (1987).

<sup>103</sup> 482 U.S. 304 (1987).

<sup>104</sup> 483 U.S. 825 (1987).

<sup>105</sup> *Nollan*, 483 U.S. at 827-28. The Nollans owned property on which there stood a bungalow that had fallen into despair. In order to build the house that they wanted on the property, the Nollans were required to obtain a “coastal development permit from the California Coastal Commission.” *Id.*

<sup>106</sup> *Id.* at 828.

beach.<sup>107</sup> The California Coastal Commission justified the easement as necessary to inform the public that they could use the beach because a house obstructing the view of the water would lead the public to suspect the beach was private.<sup>108</sup> The Nollans objected to the requirement and brought suit claiming the easement was an uncompensated taking.<sup>109</sup>

Justice Scalia, writing for the majority, which included Chief Justice Rehnquist, and Justices White, Powell, and O'Connor, agreed with the Nollans and held that the mandatory easement violated the Fifth Amendment.<sup>110</sup> Justice Scalia stated that the right to exclude is one of the most fundamental rights attached to ownership.<sup>111</sup> He then explained that past precedent was clear in that when there was a permanent physical occupation of an owner's property, the Court has concluded that this constitutes a taking.<sup>112</sup> He then concluded that in demanding the permanent easement across the Nollans' property, the California Coastal Commission effected a permanent physical occupation of their property because the public was being given unrestricted access and right to "pass to and fro" across it.<sup>113</sup>

The Court then turned to an examination of any pre-existing

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<sup>107</sup> *Id.* at 829.

<sup>108</sup> *Id.* at 828-29 (explaining that the house, without an easement, would discourage the public from using the beachfront because the public would believe that the beach was for private use only).

<sup>109</sup> *Id.* at 829.

<sup>110</sup> *Nollan*, 483 U.S. at 841-42 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. CONST. amend. V; but if it wants an easement across the Nollans' property, it must pay for it.").

<sup>111</sup> *Id.* at 831 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

<sup>112</sup> *Id.* (citing *Loretto*, 458 U.S. at 432-23).

public access rights and the purported goals of the beachfront access requirement imposed by the Commission. In undertaking this analysis, Justice Scalia effectively used some type of heightened scrutiny, asking what the legitimate objectives of the law and the access ruling were, and then demanded that the means advance those interests.<sup>114</sup> First, Justice Scalia found nothing in the California Constitution or case law indicating that the public had a right to access the beach from private property.<sup>115</sup> However, the Commission never sought to offer this argument in support of the required easement.<sup>116</sup> Second, Justice Scalia asked whether the easement requirement invoked a legitimate governmental interest.<sup>117</sup> The Commission contended that a wall of houses would create a “psychological barrier” that would prevent or preclude the public from viewing and visiting a coast that they had every right to visit.<sup>118</sup> Justice Scalia responded by stating that assuming the easement requirement invoked a governmental interest, the vertical easement would not further this goal because the houses would still preclude a view of the beach and the public access would not rectify the

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<sup>113</sup> *Id.* at 832.

<sup>114</sup> *Id.* at 834-35 (citing *Agins v. Tiburon*, 447 U.S. 255, 260-62 (1980)); *see also* *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 127 (1978).

<sup>115</sup> *Nollan*, 483 U.S. at 832-33. (“[T]he right of way sought here is not naturally described as one *to* navigable water (from the street to the sea) but *along* it; it is at least highly questionable whether the text of the California Constitution has any prima facie application to the situation before us.”). *See* CAL. CONST. art. X, § 4. “California cases suggest that . . . to obtain easements of access across private property the State must proceed through its eminent domain power.” *Id.* *See also* *Bosla Land Co. v. Burdick*, 90 P. 532, 534-35 (Cal. 1907); *Oakland v. Oakland Water Front Co.*, 50 P. 277, 286 (Cal. 1897); *Heist v. County of Colusa*, 163 Cal. App. 3d 841, 851 (1984); *Aptos Seascape Corp. v. Santa Cruz*, 138 Cal. App. 3d 484, 505-06 (1982).

<sup>116</sup> *Id.* at 833.

<sup>117</sup> *Nollan*, 483 U.S. at 834-35.

<sup>118</sup> *Id.* at 828-29, 835.

problem.<sup>119</sup> In other words, Justice Scalia looked to whether there was a “nexus” between the easement and the state’s goal of removing the psychological barrier.<sup>120</sup> Finding none, he rejected the Commissions’ arguments that the easement is equivalent to a denial of a zoning permit.<sup>121</sup> In addition, relying on *Armstrong v. United States*,<sup>122</sup> he concluded that if the Nollans were being asked to assume privately, “public burdens which, in all fairness and justice, should be borne by the public as a whole,” then their property has been taken.<sup>123</sup>

Thus, in effect, the Commission asked the Nollans to give up part of their property for the public good. Though the access might or might not have diminished the value of their property, the real question was not one of property values, but one of basic rights of ownership. The building permit was not a simple regulation but “extortion” on the part of the Commission to force owners to give

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<sup>119</sup> *Id.* at 838-39 (“It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any ‘psychological barrier’ to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans’ new house.”).

<sup>120</sup> *Id.* at 837.

<sup>121</sup> *Id.* at 836-37 (“If a prohibition designed to accomplish that purpose would be legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.”).

<sup>122</sup> 364 U.S. 40 (1960). *Armstrong* dealt with materialmen liens held by the United States Government, acquired by a contract with the primary contractor in the building of naval ships. The Supreme Court held that “[s]ince this acquisition was for a public use . . . whether with an intent and purpose of extinguishing the liens or not, the Government’s action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment.” *Id.*

<sup>123</sup> *Nollan*, 438 U.S. at 835 n.4 (quoting *Armstrong v. United States* 364 U.S. 40, 49 (1960)).

away part of their land in return for certain uses.<sup>124</sup> This requirement did not serve the objectives of the act but rather constituted an uncompensated taking.

In his dissenting opinion, Justice Brennan criticized the majority's use of significant judicial scrutiny of legislative purpose and means of a regulation. He stated that the "first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."<sup>125</sup> Justice Brennan argued that the majority went so far as offering judicial notice of what constituted reasonable regulation to fulfill the stated objects.<sup>126</sup> The majority, not granting latitude to the legislature, had questioned the reasonableness and substance of the statute, and had imposed upon the Commission "a precise match between the condition imposed and the specific type of burden on access created by the appellants."<sup>127</sup>

Justice Brennan questioned the majority's use of strict scrutiny, noting its use had not been accepted for fifty years. He contended that the easement furthered a substantial public purpose<sup>128</sup> and did not involve a unilateral government act denying use of the

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<sup>124</sup> *Id.* at 837 ("[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981))).

<sup>125</sup> *Id.* at 842.

<sup>126</sup> *Id.* at 864 ("The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck.").

<sup>127</sup> *Id.* at 849.

<sup>128</sup> *Nollan*, 483 U.S. at 863 ("[T]he State emphasized the general point that *overall* access to the beach had been preserved, since the diminution of access created by the project had been offset by the gain in lateral access. This approach is understandable.").

property.<sup>129</sup> The easement requirement took effect only when a building permit was obtained,<sup>130</sup> and even then the permit would require the easement only under certain conditions. Justice Brennan concluded that no taking had occurred because no preexisting investment-backed expectations were damaged.

### C. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles

The third case in the 1986 property rights trilogy is *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>131</sup> The facts of the case are simple. After floods destroyed some of First Lutheran's buildings, the County of Los Angeles declared a temporary and total construction ban on properties in the plane, including that owned by the church.<sup>132</sup> The law stated that "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area."<sup>133</sup> Less than a month after the ordinance was passed denying them the right to rebuild, First Lutheran challenged the ordinance in court claiming that it constituted an inverse condemnation that had effectively denied them all use of their property, and therefore the County of

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<sup>129</sup> *Id.* at 864 ("State agencies therefore require considerable flexibility in responding to private desires for development in a way that guarantees the preservation in public access to the coast.").

<sup>130</sup> *Id.* at 861 ("The Coastal Commission has drawn on its expertise to preserve the balance between private development and public access, by requiring that any project that intensifies development on the increasingly crowded California coast must be offset by gains in public access.").

<sup>131</sup> 482 U.S. 304 (1987).

<sup>132</sup> *Id.* at 307.

<sup>133</sup> *Id.* (quoting County of Los Angeles Interim Ordinance 11,855 (Jan. 1979)).



Los Angeles had taken their property without just compensation.<sup>134</sup> They failed to secure declaratory judgments in both California Superior Court and the California Court of Appeals. The California Supreme Court would not hear the case.<sup>135</sup>

In a majority opinion by Chief Justice Rehnquist, which was joined by Justices Scalia, White, Brennan, Marshall, and Powell, the Court held that the temporary yet total ban on the use of property constituted a taking.<sup>136</sup> The Court determined that, for the time the ban was in effect, the total use of the property was enjoined.<sup>137</sup> In other words, during the time the ban was in place, the property could not be used.<sup>138</sup> The question then was whether “the Just Compensation Clause require[d] the government to pay for ‘temporary’ regulatory takings.”<sup>139</sup>

In ruling for the first time that temporary takings are compensable, Chief Justice Rehnquist explained that the Fifth Amendment does not preclude the taking of private property; instead, it merely places conditions upon the conditions under which property may be taken.<sup>140</sup> Second, the Court noted how a condemnation of property, or even a regulatory taking that goes too far, would require

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<sup>134</sup> *Id.* at 308.

<sup>135</sup> *Id.* at 308-09. Both the California Superior Court and the California Court of Appeals held that First Lutheran was seeking damages for a regulatory taking by the government. *Id.*

<sup>136</sup> *First Lutheran*, 482 U.S. at 310-11 (holding that pursuant to the Fifth Amendment, as applied to the states by the Fourteenth Amendment, compensation is a remedy for a temporary taking).

<sup>137</sup> *Id.* at 318 (“These cases reflect the fact that ‘temporary’ takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”).

<sup>138</sup> *Id.* at 308, 318.

<sup>139</sup> *Id.* at 313.

<sup>140</sup> *Id.* at 314. *See Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S.

the government to compensate the owner for the interest acquired.<sup>141</sup> However, Chief Justice Rehnquist stated that past Court decisions have not resolved whether this rule of compensation is required for temporary takings.<sup>142</sup>

In reviewing cases such as *Kimball Laundry Co. v. United States*,<sup>143</sup> where the government had temporarily acquired private property during World War II, Chief Justice Rehnquist cited Justice Brennan's dissent in *San Diego Gas & Electric Company*<sup>144</sup> when he concluded that the Constitution does not treat temporary takings differently from permanent ones. Thus, because this was a taking that temporarily denied total use of the church's property, the Fifth Amendment required that they be compensated.<sup>145</sup>

In their dissent, Justices Stevens, Blackmun, and O'Connor saw serious implications in requiring compensation for a temporary ban that was reasonable for public protection.<sup>146</sup> The ban was

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264, 297 n.40 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

<sup>141</sup> *First Lutheran*, 482 U.S. at 317-18. See also *United States v. Dow*, 357 U.S. 17, 26 (1958).

<sup>142</sup> *First Lutheran*, 482 U.S. at 318 (“[W]e have not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land.”).

<sup>143</sup> 338 U.S. 1 (1949).

<sup>144</sup> 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

<sup>145</sup> *First Lutheran*, 482 U.S. at 322 (“Here we must assume that the Los Angeles County ordinance had denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.”).

<sup>146</sup> *Id.* at 325-26 (“[I]n order to protect the health and safety of the community, government may condemn unsafe structures . . . . When a governmental entity imposes these types of health and safety regulations, it may not be ‘burdened with the condition that [it] must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.’ ” (quoting *Mugler v. Kansas*, 123 U.S. 623, 668-69)).

temporarily important<sup>147</sup> because it was adopted only so long as necessary to protect public health and safety.<sup>148</sup> The temporary nature of the ban was important to the dissenters. The minority rejected the majority's contention that had this ban been permanent it would have been considered a taking because it was a valid police power regulation necessary to protect the public.<sup>149</sup> Thus, temporary takings may fulfill significant public interests and do not have a permanent impact upon the use or investment in the property.

#### D. Evaluating the First Trilogy

What do these rulings in the first trilogy say about the Court, property rights, and eminent domain at the start of the Rehnquist Court era? Legal commentaries on these three rulings argued that the Court became even more divided than before on the takings versus regulation issue,<sup>150</sup> specifically as to what protections exist for property against legislative action. Dennis Coyle argued that *Nollan* and *First Lutheran* represent the (reluctant) revival of property rights.<sup>151</sup> This claim may be somewhat extreme because these decisions do not substantively revive property rights to the status of

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<sup>147</sup> *Id.* at 326-27.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 323.

<sup>150</sup> See, e.g., Donald Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 52-54 (1987); Frank R. Strong, *On Placing Property Due Process Center State Center in Takings Jurisprudence*, 49 OHIO ST. L.J. 591, 598-600 (1988).

<sup>151</sup> Dennis J. Coyle, *The Reluctant Revival of Landowner Rights*, Unpublished paper presented at the 1987 American Political Science Association Annual Convention, Chicago (Sept. 1987).

*Lochner*. The thin substantive protections that the Court seemed to want to extend to property interests in *Nollan* and in *First Lutheran* (and the minority in *Keystone*) were compensatory rights. Compulsory rights are not the same as rights afforded pursuant to substantive due process, which involve widespread judicial review and limitation of the police power to protect private property. As Daniel Farber noted,<sup>152</sup> the Court seemed to be expressing some inclination that regulation has “gone too far” and needs to be trimmed. *Nollan* and *First Lutheran* represented first trimmings, but not a gutting of either the police or eminent domain powers.

What else can be learned from the first property rights trilogy? First, in two of the three cases, the Court acknowledged that landowners had property interests. The *Nollan* decision hinted at some increased scrutiny for property interests, and such scrutiny had not been used since perhaps before the New Deal. Moreover, a breakdown of the votes in the three cases also reveals an interesting pattern.

**Table I**

**Individual Justice Voting in the First Property Rights Trilogy**

	1986-87 Term		
	<i>Keystone</i>	<i>Nollan</i>	<i>First English</i>
Rehnquist	P	P	P
Brennan			P

<sup>152</sup> Daniel A. Farber, *Taking Liberties*, NEW REPUBLIC, June 27, 1988, at 19.

White		P	P
Marshall			P
Blackmun			
Stevens			
Powell	P	P	P
O'Connor	P	P	
Scalia	P	P	P

P= voted to support property rights.

First, whatever revival of property rights that did occur did not happen solely with conservative Justices. For example, in *First Lutheran*, Justices Brennan and Marshall provided critical votes. Without these votes, the decision would not have been a victory for property rights, especially in light of the fact that Justice O'Connor voted in the minority. Second, Chief Justice Rehnquist and Justice Scalia voted for property rights in all three cases, suggesting that, as conservatives hoped, they would be reliable defenders of ownership interests. The fact that the Court had not scored a perfect three-for-three victory for property rights was perhaps a consequence of the fact that either conservatives, such as Justice O'Connor, were not as supportive as originally thought, or that the Court was preparing the doctrine for future rulings. Still, others argued that the conservatives had not taken control and instead, the moderates and liberals still had the balance of power.<sup>153</sup> Finally, with Justice Scalia's opinion in *Nollan*, which suggested greater scrutiny for property, perhaps the replacement of one or two Justices would portend the end or altering of the logic of the post-*Carolene Products* Era and the placement of new restrictions on the use of eminent domain.

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<sup>153</sup> JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST

### III. THE SECOND PROPERTY RIGHTS TRILOGY

During the 2004 Term, the Rehnquist Court confronted its second trilogy of property rights cases. This trilogy, coming nearly a generation after the first one, should have been a more solid victory for property owners. Since 1987, several Justices had left the Court—most notably the liberals—Justices Brennan and Marshall, who were replaced by the conservatives—Justices Souter and Thomas. In addition, Justice Powell, who voted for property owners in all three of the first trilogy cases, was replaced by another supposed conservative—Justice Kennedy. Finally, Justice Blackmun, who voted against the owners in all three cases, was also replaced. In addition, with cases such as, *Dolan v. City of Tigard*,<sup>154</sup> and *Lucas v. South Carolina Coastal Council*<sup>155</sup> the Rehnquist Court imposed new protections for property owners, suggesting a Court poised to complete a property rights revolution. However, in *Kelo v. City of New London*,<sup>156</sup> *Lingle v. Chevron U.S.A. Inc.*,<sup>157</sup> and *San Remo Hotel L.P. v. City and County of San Francisco*,<sup>158</sup> the Court ruled against property interests in all three cases. The Court unambiguously stated that promoting economic development is a valid public use,<sup>159</sup> the judiciary should not ordinarily second-guess

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COURT (1995).

<sup>154</sup> 512 U.S. 374 (1994).

<sup>155</sup> 505 U.S. 1003 (1992).

<sup>156</sup> 125 S. Ct. 2655 (2005).

<sup>157</sup> 125 S. Ct. 2074 (2005).

<sup>158</sup> 125 S. Ct. 2491 (2005).

<sup>159</sup> *Kelo*, 125 S. Ct. at 2668 (“As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court’s authority, however, extends only to determining whether the City’s proposed condemnations are for a “public use” within the

legislative determinations in the area of economic policy,<sup>160</sup> and there was no exception to the Full Faith and Credit Clause that would allow owners to sue in federal court after their claims had been heard at the state level.<sup>161</sup>

### A. **Kelo v. City of New London, Connecticut**

*Kelo v. City of New London, Connecticut*<sup>162</sup> raised the hope of many conservatives that eminent domain authority would be curtailed. In part, hopes were up because certiorari was granted on September 28, 2004,<sup>163</sup> less than two months after the Michigan Supreme Court in *County of Wayne v. Hathcock*,<sup>164</sup> overturned *Poletown Neighborhood Council v. City of Detroit*,<sup>165</sup> and ruled that the taking of private property for economic development purposes violated the state constitution.<sup>166</sup> In overturning *Poletown*, the

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meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.”).

<sup>160</sup> *Id.* at 2668 (“Just as we decline to second-guess the City’s considered judgments about the efficacy of its development plan, we also decline to second-guess the City’s determinations as to what lands it needs to acquire in order to effectuate the project.”); *Chevron*, 125 S. Ct. at 2085 (“The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable [to the Takings Clause].”).

<sup>161</sup> *San Remo Hotel*, 125 S. Ct. at 2505 (“Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims. Consequently, we apply our normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal.”).

<sup>162</sup> 125 S. Ct. 2655 (2005).

<sup>163</sup> 125 S. Ct. 27 (2004).

<sup>164</sup> 684 N.W.2d 765 (Mich. 2004).

<sup>165</sup> 304 N.W.2d 455 (Mich. 1981).

<sup>166</sup> *Hathcock*, 684 N.W.2d at 787 (“Because *Poletown*’s conception of a public use—that of ‘alleviating unemployment and revitalizing the economic base of the community’—has no support in the Court’s eminent domain jurisprudence before the Constitution’s ratification, its interpretation of “public use” in art 10, § 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the *Poletown* analysis provides no legitimate support for the condemnations proposed in this case and, for

Supreme Court dismantled what many called the requiem for property rights.<sup>167</sup> This raised anticipation that the Court's decision to review *Kelo* would place new limits on eminent domain under the Federal Constitution.

In *Kelo v. City of New London, Connecticut*, the United States Supreme Court affirmed the decision of the Connecticut Supreme Court, which held that the taking of unblighted private property for economic development purposes constituted a valid public use under both the state and federal constitutions.

In *Kelo*, the City of New London, a municipal corporation, and the New London Development Corporation attempted to use a state law<sup>168</sup> to take unblighted land to build and support economic

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the reasons stated above, is overruled.”).

<sup>167</sup> For analysis and reaction to *Poletown* see Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245 (2002); Camarin Madigan, *Taking for Any Purpose?*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 179 (2003); Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the “Public Use” Requirement*, 87 MINN. L. REV. 543 (2002); Rachel A. Lewis, *Strike That, Reverse It: County of Wayne v. Hathcock: Michigan Redefines Implementing Economic Development Through Eminent Domain*, 50 VILL. L. REV. 341 (2005); Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 MICH. ST. L. REV. 901 (2001); Jennifer.M. Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783 (1999); 2A SACKMAN ET AL, NICHOLS ON EMINENT DOMAIN § 7.02 (Matthew Bender and Company Inc. 1997) (1997); Jonathan Portner, Comment, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BAL. L. REV. 542 (1988); Susan LaBarge, *The Public Use Requirement in Eminent Domain: A Constantly Evolving Doctrine*, 14 STETSON L. REV. 649 (1985); Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 814 (1985); T. Coyne, *Hawaii Housing Auth. v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?*, 6 NOTRE DAME L. REV. 388 (1985); Mark Landry, Note, *The Public Use Requirement in Eminent Domain-A Requiem*, 60 TUL. L. REV. 419 (1985); T. Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. L.J. 355 (1983); Errol Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); ELLEN F. PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (Transaction Publishers 1987) (1987); M. King, Note, *Rex Non Protest Peccare???: The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 DICK. L. REV. 266 (1971).

<sup>168</sup> CONN. GEN. STAT. § 8-188 (2005):

Any municipality which has a planning commission is authorized, by



revitalization of the city's downtown.<sup>169</sup> In its plan, New London divided the development into seven parcels, some of which included public waterways and museums. However, one lot, known as Parcel 3, would be a ninety thousand square foot high-technology research and development office space and parking facility for the Pfizer Pharmaceutical Company.<sup>170</sup> Several plaintiffs in Lot 3 challenged the taking of their property, claiming that the condemnation of unblighted land for economic development purposes violated both the state and federal constitutions.<sup>171</sup>

More specifically, they argued that the taking of private property under the state law and the handing of it over to another private party did not constitute a valid public use, or at least, the public benefit that was produced was incidental to the private benefit generated.<sup>172</sup> The Connecticut Supreme Court rejected the plaintiff's claims under both the state and federal constitutions. The United States Supreme Court granted certiorari to answer the federal

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vote of its legislative body, to designate the economic development commission or the redevelopment agency of such municipality or a nonprofit development corporation as its development agency and exercise through such agency the powers granted under this chapter, except that the Quinnipiac Valley Development Corporation, organized and existing by virtue of the provisions of number 625 of the special acts of 1957, may be designated as a development agency, for the purposes of this chapter, to act as such within the geographical area specified in section 2 of said special act. Any municipality may, with the approval of the commissioner, designate a separate economic development commission, redevelopment agency or nonprofit development corporation as its development agency for each development project undertaken by the municipality pursuant to this chapter.

<sup>169</sup> *Kelo*, 125 S. Ct. at 2660 (“There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.”).

<sup>170</sup> *Id.* at 2659.

<sup>171</sup> *Kelo v. City of New London*, 843 A.2d 500, 507-08 (Conn. 2004).

<sup>172</sup> *Id.* at 508.

question of whether the taking of private property for economic development purposes, when it involved the transferring of the land from one private owner to another, constituted a valid public use under the Fifth and Fourteenth Amendments.<sup>173</sup> Writing for a divided Court, Justice Stevens ruled that the taking did not violate the public use requirement of the Fifth Amendment.<sup>174</sup>

In reaching this decision, Justice Stevens first noted how the case pitted two propositions against one another:

[T]he sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future “use by the public” is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.<sup>175</sup>

However, he contended that neither of these rules resolved the case.<sup>176</sup> Instead, Justice Stevens, relying on *Hawaii Housing Authority v. Midkiff* reaffirmed that a taking for purely private benefit would be unconstitutional. Yet, in this case, there was no private taking because the decision to acquire the property was part of a “ ‘carefully considered’ development plan” that did not reveal a

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<sup>173</sup> *Kelo*, 125 S. Ct. at 2658.

<sup>174</sup> *Id.* at 2665. *See also id.* at 2659 (stating that the Court noted that the purpose of the economic redevelopment plan was to revitalize the waterfront, bring new businesses to the area, generate tax revenue, and increase employment).

<sup>175</sup> *Id.* at 2661.

<sup>176</sup> *Id.* at 2661-63 (stating that the purpose was not an illegitimate conferral of benefit to a private party and also that solely because the land in question would not be technically used by the general public was not dispositive of its constitutionality, as use by the general public is not a requirement necessary to a constitutional taking).

hidden motive to convey a private benefit.<sup>177</sup>

Second, the Court rejected arguments that because the property would eventually be used and transferred to a private party and would not be used by the public, it failed the public use requirement.<sup>178</sup> Justice Stevens stated that the “ ‘Court long ago rejected any literal requirement that condemned property be put to use for the general public,’ ”<sup>179</sup> and instead, repudiated the narrow reading of public use in favor of a broader reading of the public use doctrine.<sup>180</sup> Thus, as Justice Stevens defined the issue, the case turned on whether the taking served a valid public purpose.<sup>181</sup> He ruled that the Court should adhere to the long established judicial tradition of deferring to legislative determinations on this matter,<sup>182</sup> as evidenced by its decisions in *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*.<sup>183</sup> In short, given the broad and flexible meaning attached to the public use stipulation, and past judicial deference to legislative determinations of what is considered a public purpose, Justice Stevens and the majority concluded that the taking of private property for economic development purposes was a valid public use.<sup>184</sup>

Finally, Justice Stevens rejected arguments that the Court carve out an economic development exception to the broad public use

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<sup>177</sup> *Id.* at 2661.

<sup>178</sup> *Kelo*, 125 S. Ct. at 2662-63.

<sup>179</sup> *Id.* at 2662 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984)).

<sup>180</sup> *Id.* at 2662-63.

<sup>181</sup> *Id.* at 2663-64.

<sup>182</sup> *Id.*

<sup>183</sup> *Kelo*, 125 S. Ct. at 2662, 2664.

<sup>184</sup> *Id.* at 2668.

doctrine.<sup>185</sup> He rejected this new rule as unworkable, stating that it would be impossible to distinguish economic development from other valid public purposes.<sup>186</sup> He also rejected assertions that the taking for economic development purposes blurred the distinction between a public and a private taking.<sup>187</sup> Instead, Justice Stevens stated:

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.<sup>188</sup>

Here, Justice Stevens offered what the Court might consider to be evidence of a taking for private use, i.e., a taking not backed up by a comprehensive plan. Absent such a plan, it might appear that the taking was intended to convey a private benefit. When there is a plan, especially one replete with legislative findings, it would provide evidence that the taking was part of a broader public purpose and therefore not primarily aimed at conveying a private benefit.

In many ways, *Kelo* did not make new law in terms of taking private property for economic development purposes. As Justice Stevens pointed out, the City could not take private property for the private benefit of a private party.<sup>189</sup> He also noted that the more

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<sup>185</sup> *Id.* at 2665-66.

<sup>186</sup> *Id.* at 2665.

<sup>187</sup> *Id.* at 2666.

<sup>188</sup> *Kelo*, 125 S. Ct. at 2226-27.

<sup>189</sup> 125 S. Ct. at 2661 (“[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”).

narrow conception of public use had long since been abandoned<sup>190</sup> and governments have long had the power to take property for a variety of public welfare purposes, including economic development.<sup>191</sup> *Kelo* simply reaffirmed a trend that already existed in the law. Overall, *Kelo* seemed to cap a recent line of jurisprudence, giving governments broad authority to take private property, even for economic development purposes.

However, two additional points in *Kelo* should be mentioned. First, the one new area where law was created was perhaps in the appeal to a comprehensive or redevelopment plan as a sign or check to distinguish takings for public as opposed to private uses. Second, the majority in *Kelo* made it clear that their holding did not preclude states from imposing greater restrictions on the taking of property for economic development purposes. Specifically, the Court stated:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.<sup>192</sup>

In effect, while the Fifth and Fourteenth Amendments permit the taking of unblighted private property for purely economic

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<sup>190</sup> *Id.* at 2662 (explaining that the narrow view of public use has “eroded” over time since the 19th century, claiming that it was impractical “given the diverse and always evolving needs of society”).

<sup>191</sup> *Id.* at 2665 (rejecting petitioners’ argument by claiming that economic development has been a traditional and long accepted function of our government with regard to takings).

<sup>192</sup> *Id.* at 2668.

development purposes, states, either under their own constitutions or by statute, may impose more restrictive conditions upon what constitutes a valid public use. In fact, the Court cited to the recently decided *County of Wayne v. Hathcock*<sup>193</sup> as an example of action by a state.<sup>194</sup> Thus, *Kelo* did not overrule state decisions that already placed more restrictions on takings for a public use if the case was decided under the state's own constitutional or statutory grounds.

In his concurring opinion, Justice Kennedy agreed that so long as a taking was rationally related to a public purpose, it should be upheld, whether or not it is condemnation for economic development purposes.<sup>195</sup> However, he also argued that whether “a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.”<sup>196</sup> Justice Kennedy noted how pretextual takings intended to benefit a private party have long been forbidden,<sup>197</sup> and that in situations involving these types of takings—especially those involving a transfer of property from one private individual to another—a more heightened standard of review might be needed.<sup>198</sup> However, because the trial

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<sup>193</sup> 684 N.W.2d 765 (Mich. 2004).

<sup>194</sup> *Kelo*, 125 S. Ct. at 2668 n.22.

<sup>195</sup> *Id.* at 2669 (explaining that the rational basis review here mirrors that which is applied to both the Due Process and Equal Protection Clauses).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (“A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.”).

<sup>198</sup> *Id.* at 2670 (“[A] more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is

judge in this case did not find that the taking was primarily for a private benefit, heightened scrutiny was not required.<sup>199</sup>

In dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia, and Thomas, acknowledged that there are three situations where the Court has upheld the taking of private property under a broad public use doctrine.<sup>200</sup> The first is when the property is transferred to public ownership for the construction of a hospital, road, or military base.<sup>201</sup> Second, transfers of private property to another private owner are permitted when common carriers, such as railroads, take possession because ultimately the public gets to use the property.<sup>202</sup> However, Justice O'Connor identified a third category of takings: when property was being used in a harmful manner, as a type of sanction, the Court will find the taking to be a valid public use.<sup>203</sup> In her dissenting opinion, Justice O'Connor reexamined both *Berman v. Parker*, which dealt with the removal of blight, and *Hawaii Housing Authority v. Midkiff*, which dealt with the skewing effects of concentrated ownership on the real estate market.<sup>204</sup> These cases exemplified the evils which legislatures sought to abate through regulation.<sup>205</sup> However, Justice O'Connor

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so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”).

<sup>199</sup> 125 S. Ct. at 2670 (explaining that there was nothing in the record indicating that respondents were motivated by private factors because the plan was to develop and revitalize the economy; for these reasons, the case had survived rational basis review).

<sup>200</sup> *Id.* at 2673.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> 125 S. Ct. at 2673-74.

<sup>205</sup> *Id.* at 2674 (noting the importance of deferring to “legislative judgments about public purpose”).

did not see the New London condemnation as one seeking to alleviate some bad that the Kelo property was inflicting on others.<sup>206</sup> Instead, Justice O'Connor's dissent argued that the majority opinion moved "from [the Court's] decisions sanctioning the condemnation of harmful property use . . . [and] significantly expand[ed] the meaning of public use."<sup>207</sup> Hence, Justice O'Connor concluded that because the taking of the Kelo's property did not fit into one of these three categories, it should not be permitted.<sup>208</sup>

Justice O'Connor's dissent is notable for a several reasons. First, she acknowledged the broad deference that generally should be given to legislatures when it comes to making public use decisions.<sup>209</sup> Second, notably absent from her opinion was a clear indication that she wished to increase the level of scrutiny for public use decisions. Granted that Justice O'Connor would carve out three types of takings as permitted public uses, while excluding others, she did not suggest heightened scrutiny of legislative motives.<sup>210</sup>

Justice Thomas was the only Justice willing to move towards offering property more substantive protection. In his solo dissent, he argued for a return to the original meaning of the Public Use Clause.<sup>211</sup> For Justice Thomas, public use was not the same as public

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<sup>206</sup> *Id.* at 2675.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 2673. After enumerating the three categories of takings, O'Connor speaks of "economic development" as an issue of first impression and concludes that a taking of this kind would be unconstitutional. *Id.*

<sup>209</sup> 125 S. Ct. at 2674. However, she later states that "[t]he case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated." *Id.* at 2675. This is a clear backing away from her equivocation of the two in *Midkiff*.

<sup>210</sup> *Id.* at 2675 (questioning Justice Kennedy's search for intent or motives of the taking).

<sup>211</sup> *Id.* at 2678 ("Today's decision is simply the latest in a string of our cases construing



welfare or purpose,<sup>212</sup> and property may only be taken to further an expressly enumerated power.<sup>213</sup> He refused to afford deference to legislatures when defining what is to be considered a public use,<sup>214</sup> and contrary to what the Court previously held, *Berman* and *Midkiff* were wrong<sup>215</sup> The Constitution imposes a substantive limit on the power of the government to take private property.<sup>216</sup> In fact, he invoked the *Carolene Products* “footnote four” logic and the protection it affords to minorities and to those subjected to eminent domain.<sup>217</sup>

### B.        **Lingle v. Chevron, U.S.A. Inc**

In addition to *Kelo*, the Supreme Court in 2005 reaffirmed broad legislative authority to make determinations about economic issues related to takings. In *Lingle v. Chevron, U.S.A. Inc.*,<sup>218</sup> the Court evaluated the constitutionality of a Hawaii rent control law that limited the amount that an oil company may charge a lessee-dealer. Chevron contended that the rent control law constituted a taking. Chevron relied on *Agins v. Tiburon*,<sup>219</sup> where the Court stated that

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the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.”).

<sup>212</sup> *Id.* at 2679.

<sup>213</sup> *Id.* at 2680.

<sup>214</sup> 125 S. Ct. at 2684 (“There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a ‘public use.’ ”).

<sup>215</sup> *Id.* at 2686 (“The ‘public purpose’ test applied by *Berman* and *Midkiff* also cannot be applied in principled manner.”).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 2687 (“If ever there were justification for intrusive judicial review of constitutional provisions that protect ‘discrete and insular minorities,’ surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects.” (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938))).

<sup>218</sup> 125 S. Ct. 2074 (2005).

<sup>219</sup> 447 U.S. 255 (1980).

zoning laws that fail to substantially advance a state interest constitute a taking. Here, Chevron argued that the rent control law failed to substantially advance a state goal, and therefore should be viewed as a form of a compensable taking.

The Court rejected this argument. First, it stated there are only two forms of per se takings that the Court has recognized: when the government permanently physically takes property and when its actions totally deprive an owner of all economic use of the property.<sup>220</sup> Second, the Court explained that *Agins* had been misread and the “substantially advances” language of this case does not constitute a takings test. Instead, owners must show some “magnitude or character of the burden” associated with the law on property rights such that it affects a taking.<sup>221</sup> Third, the Court stated that the mere interference with property rights does not necessarily constitute a taking. Instead, if a taking is alleged, then an independent analysis regarding whether it was for a valid public use is required.<sup>222</sup>

In rejecting the lower court’s questioning of the rent cap, Justice O’Connor, writing for the Court, stated:

We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation . . . . The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they

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<sup>220</sup> *Chevron*, 125 S. Ct. at 2081.

<sup>221</sup> *Id.* at 2084.

<sup>222</sup> *Id.*

are no less applicable here.<sup>223</sup>

The significance of the *Lingle* opinion is that it effectively reaffirms the early claims made in *Berman* and *Midkiff*, which gave government significant discretion to interpret “public use” broadly, including for economic development purposes. Along with this, *Lingle* reaffirmed broad judicial deference to legislative decisions regarding economic regulation.

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

*San Remo Hotel v. San Francisco*<sup>224</sup> is the third takings case decided by the Court last Term and it addressed a simple procedural question growing out of a complex litigation history. The Sam Remo Hotel was built in San Francisco shortly after the great earthquake that hit the city in 1906.<sup>225</sup> Responding to a shortage of affordable rental housing for the elderly, disabled, and other selected populations, the city issued a moratorium in 1979 on the conversion of residential hotel units into tourist units.<sup>226</sup> “Two years later, the City enacted the first version of the Hotel Conversion Ordinance [HCO] to regulate all future conversions.”<sup>227</sup> The ordinance required that each hotel “file an initial unit usage report containing” the “number of residential and tourist units in the hotel[s] as of September 23, 1979.”<sup>228</sup> In the 1981 version of the HCO, hotel

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<sup>223</sup> *Id.* at 2085 (citing *Exxon Corp. v. Maryland*, 437 U.S. 117, 124-25 (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 730-32 (1963)).

<sup>224</sup> 125 S. Ct. 2491 (2005).

<sup>225</sup> *Id.* at 2495.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 2496.

<sup>228</sup> *Id.*

owners could not convert residential units into tourist units unless they obtained a conversion permit. The “permits could be obtained only by constructing new residential units, rehabilitating old ones, or paying an ‘in lieu’ fee into the City’s Residential Hotel Preservation Fund Account.”<sup>229</sup> Jean Iribarren, who was operating the San Remo on lease from the owners, submitted an initial usage report for the hotel.<sup>230</sup> This report “erroneously reported that all of the rooms in the hotel were ‘residential’ units.”<sup>231</sup> In fact, the Hotel operated as a tourist establishment for years.<sup>232</sup> Due to that error and zoning restrictions in the area, owners and operator were required to apply for a conditional use permit (CUP) to operate as a tourist hotel.<sup>233</sup> “In 1993, the City Planning Commission granted petitioners’ requested conversion and conditional use permit, but did so only after imposing several conditions.”<sup>234</sup> One condition was “the requirement that petitioners pay a \$567,000 ‘in lieu’ fee.”<sup>235</sup> The owners and operator objected, contending that the fee was unconstitutional as it applied to their hotel.<sup>236</sup>

Petitioners filed in federal court for the first time in 1993, alleging four counts of violations of due process, substantive and procedural, and takings, facial and as-applied, under the Fifth and Fourteenth Amendments to the United States Constitution. One

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<sup>229</sup> *San Remo Hotel*, 125 S. Ct. at 2496.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *San Remo Hotel*, 125 S. Ct. at 2496.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

count sought “damages under Rev. Stat. § 1979, 42 U.S.C. § 1983, for those violations, and one pendent state-law claim.”<sup>237</sup> Following the initial filing, there were numerous subsequent administrative, state and federal court appeals claiming a regulatory taking. Petitioners won and lost some of these appeals. However, a federal district court granted respondents summary judgment. “[T]he court found that petitioners’ facial takings claim was untimely under the applicable statute of limitations, and the as-applied takings claim was unripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*<sup>238</sup>.”<sup>239</sup> “On appeal to the Court of Appeals for the Ninth Circuit, petitioners took the unusual position that the court should not decide their federal claims, but instead should abstain . . . because a return to state court could conceivably moot the remaining federal questions.”<sup>240</sup> The court of appeals granted the request with respect to the facial challenge.<sup>241</sup> The court also “affirmed the District Court’s determination that petitioners’ as-applied takings claim” was not ripe because they “had failed to pursue an inverse condemnation action in state court, [and] had not yet been denied just compensation as contemplated by *Williamson County*.”<sup>242</sup> The Ninth Circuit’s opinion also indicated that “petitioners [were] free to raise their federal takings claims in the

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<sup>237</sup> *Id.* at 2497.

<sup>238</sup> 473 U.S. 172 (1985).

<sup>239</sup> *San Remo Hotel*, 125 S. Ct. at 2497.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

California courts.”<sup>243</sup> “However, [if] they wanted to ‘retain [their] right to return to federal court for adjudication of [their] federal claim, [they] must make an appropriate reservation in state court.’”<sup>244</sup>

The petitioners sought this when they reactivated the California case.<sup>245</sup> Here, the standard of review governing their case was at issue.<sup>246</sup> The California Supreme Court did not rule in their favor on the substantive claim. The Court decided both state and federal issues, despite petitioners’ reservation of the federal claims.<sup>247</sup> They then sought to return to federal court because they felt they had addressed the *Williamson County* ripeness issue.<sup>248</sup> The federal court ruled that since the California court had already addressed the takings claim, the Full Faith and Credit Clause precluded a rehearing.<sup>249</sup> The Ninth Circuit affirmed the decision and the Supreme Court granted certiorari.<sup>250</sup>

The issue before the Court was a possible exception to the Full Faith and Credit Clause so that the federal takings claims could be heard in federal court.<sup>251</sup> Writing for the Court, Justice Stevens

<sup>243</sup> *Id.*

<sup>244</sup> *San Remo Hotel*, 125 S. Ct. at 2497 (quoting *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 at 1106, n.7 (9th Cir. 1998)).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 2498 (“The principal constitutional issue debated by the parties was whether a heightened level of scrutiny applied to the claim.”).

<sup>247</sup> *San Remo Hotel*, 125 S. Ct. at 2498 (“[D]espite the fact that petitioners sought relief only under California law, the state court decided to ‘analyze their takings claim under the relevant decisions of both this court and the United States Supreme Court.’” (quoting *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 101 (Cal. 2002))).

<sup>248</sup> *San Remo Hotel*, 125 S. Ct. at 2499.

<sup>249</sup> *Id.* at 2499-2500 (citing 28 U.S.C. § 1738 (2006)).

<sup>250</sup> *Id.* at 2500.

<sup>251</sup> *Id.* at 2501 (“[W]hether we should create an exception to the full faith and credit statute . . . in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just

ruled that no exception was permitted.<sup>252</sup> He began his analysis discussing the history of the Constitution's full Faith and Credit Clause,<sup>253</sup> which requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."<sup>254</sup> In noting how Congress first enacted legislation in 1790 pursuant to this Clause, Justice Stevens argued that precluding parties from relitigating issues that have been previously resolved by another court predates the Republic.<sup>255</sup> This rule, however, comes into conflict with the *Williamson* mandate that cases may not be heard in federal court until there is a final state judgment denying compensation.<sup>256</sup> Thus, how does one resolve this conflict between full faith and credit versus ripeness?

Stevens resolved this apparent conflict by responding to the appellants' claim that, under *England v. Louisiana Board of Medical Examiners*,<sup>257</sup> federal courts should disregard state court decisions of reserved federal claims de novo.<sup>258</sup> In that case, plaintiffs were challenging in federal court the constitutionality of a state chiropractic-licensing requirement.<sup>259</sup> The court stayed the claim,

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compensation.").

<sup>252</sup> *Id.* at 2507 ("[W]e are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.").

<sup>253</sup> U.S. CONST. art. IV, § 1.

<sup>254</sup> *San Remo Hotel*, 125 S. Ct. at 2500.

<sup>255</sup> *Id.* at 2500-01.

<sup>256</sup> *Id.* at 2501.

<sup>257</sup> 375 U.S. 411 (1964).

<sup>258</sup> *San Remo Hotel*, 125 S. Ct. at 2501.

<sup>259</sup> *Id.* at 2502 (citing *England v. Louisiana Bd. of Med. Exam'rs*, 375 U.S. at 421, 413).

giving the state judiciary an opportunity to clarify whether a state education rule actually applied to chiropractors.<sup>260</sup> When the state court addressed this issue, it also examined the constitutionality of the law in dispute, leading the federal court to then dismiss the petitioners' claims.<sup>261</sup> According to Justice Stevens, the Supreme Court reversed because *England* stands for the proposition that when the federal courts abstain from deciding an issue so that a state court may resolve a question, litigants may reserve their federal claims only when the state and federal claims are distinct from one another.<sup>262</sup> Unlike in *England*, Justice Stevens found that the state and federal issues in *San Remo Hotel* were so interconnected and interrelated that *England* did not apply.<sup>263</sup>

Having dismissed the *England* argument, the Court then addressed the argument that issue preclusion should not apply when a case is removed to the state courts because of *Williamson County*.<sup>264</sup> This claim was also rejected. First, Justice Stevens rejected arguments in *Santini v. Connecticut Hazardous Waste Management Service*,<sup>265</sup> which held that parties required to litigate their state-law takings claims in state court "pursuant to *Williamson County* cannot be precluded from having those very claims resolved 'by a federal

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

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 2502-03 (explaining that in *England*, "the antecedent state issue requiring abstention was distinct from the reserved federal issue").

<sup>263</sup> *San Remo Hotel*, 125 S. Ct. at 2503 ("By broadening their state action beyond the mandamus petition to include their 'substantially advances' claims, petitioners effectively asked the state court to resolve the same federal issues they asked it to reserve.").

<sup>264</sup> *Id.* at 2504.

<sup>265</sup> 342 F.3d 118 (2d Cir. 2003).



court.’ ”<sup>266</sup> He stated that the Second Circuit opinion cited no law to support its contention and that the Court, as with the litigants in *San Remo*, simply seemed to assume that they had a right to have their federal takings claims heard in federal court.<sup>267</sup> The Court held that they do not have that right.<sup>268</sup> Moreover, the Court stated that it may not simply create exceptions to the Full Faith and Credit Clause because the Court rejected such exceptions in the past and because there is no indication that Congress intended there to be an exception.<sup>269</sup>

Finally, Justice Stevens concluded by arguing that the petitioners over-relied on *Williamson*. By that, *Williamson* did not prevent them from challenging the facial validity of the San Francisco ordinance while at the same time seeking compensation in state court for the takings.<sup>270</sup> These are two distinct issues, which could have been litigated at the same time or pursued under the *England* rule.<sup>271</sup>

In concurrence, Chief Justice Rehnquist, joined by Justices O’Connor, Kennedy, and Thomas, did not object to holding that an issue already litigated in state court precluded relitigation at the federal level.<sup>272</sup> Instead, they argued that perhaps the time had come to revisit the *Williamson County* rule demanding that “once a

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<sup>266</sup> *San Remo Hotel*, 125 S. Ct. at 2504 (citing *Santini*, 342 F.3d at 130).

<sup>267</sup> *Id.* at 2504.

<sup>268</sup> *Id.* (citing *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984); *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980)).

<sup>269</sup> *Id.* at 2505-06 (citing *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981)).

<sup>270</sup> *Id.* at 2506.

<sup>271</sup> *San Remo Hotel*, 125 S. Ct. at 2506.

government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court."<sup>273</sup> Their argument, in part, was that *Williamson County* created "anomalies" such as that found in this case that prevent litigation of some issues, or that the *Rooker-Feldman* doctrine might read the case as requiring state courts to deny compensation as an essential component of a Fifth Amendment claim.<sup>274</sup>

#### D. Explaining the Second Trilogy and the Failed Property Rights Revolution

Property rights failed during the 2004 term. They lost all three cases and, more significantly, there were only a total of four votes for owners among the three cases. As shown in Tables II and III, even the most ardent defenders of property interests, such as Scalia and Rehnquist, based upon their support in 1986, cast only one vote each for new limits or remedies in eminent domain action. There also seemed to be little sympathy for heightened scrutiny of property rights claims, with Thomas alone supporting this in *Kelo*. In many ways, 2004 was a retreat from the possibilities hinted at in 1986-87. What happened, and what does it mean for the future?

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<sup>272</sup> *Id.* at 2507.

<sup>273</sup> *Id.* 2508.

<sup>274</sup> *Id.* at 2509 ("[O]ur holding today ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. And, even if preclusion law would not block a litigant's claim, the *Rooker-Feldman* doctrine might, insofar as *Williamson County* can be read to characterize the state courts' denial of compensation as a required element of the Fifth Amendment takings claim." (citing *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 554 U.S. 280 (2005))).

**Table II**  
**Individual Justice Voting in the First Property Rights Trilogy**

<b>2004 Term</b>			
	<i>Kelo</i>	<i>Lingle</i>	<i>San Remo Hotel</i>
Rehnquist	P		
Stevens			
O'Connor	P		
Kennedy			
Scalia	P		
Souter			
Thomas	P		
Ginsburg			
Breyer			

P= voted for property rights

**Table III**  
**First and Second Trilogy Voting Records**

	<b>1986 Term</b>			<b>2004 Term</b>		
	<i>Keystone</i>	<i>Nollan</i>	<i>First English</i>	<i>Kelo</i>	<i>Lingle</i>	<i>San Remo Hotel</i>
Rehnquist	P	P	P	P		
Stevens						
O'Connor	P	P		P		
Scalia	P	P	P	P		

P= voted for property rights

What happened, in part, was that even the conservatives, who were once thought to be pro-property rights, apparently modified their votes. Simply put, the conservatives did not vote as conservatives. Also, at least one of the victories (*First Lutheran*) in 1987 was driven by the liberals. No liberals crossed over, meaning that, part of the first trilogy victories were driven by a consensus of liberals and conservatives, not the latter. In effect, the first trilogy was a victory from the middle and not the extreme right,<sup>275</sup> whereas the second trilogy was a victory for the liberals, or at least it illustrated that the conservatives did not still control the Court.<sup>276</sup>

A second explanation is that the conservative Justices were never as pro-property rights as some of the zealots had hoped. In other words, while Justice Scalia might have hinted at heightened scrutiny in *Nollan* and Justice Thomas the same in *Kelo*, the Rehnquist Court was not really prepared to retrench and return to the *Lochner* era. The conservatives, then, were conservative in their respect for precedent, and not radical, wishing to return to *Lochner*. A third explanation is that when pushed, the Rehnquist Court and its conservatives may not be as supportive of property rights as they are of the state or government power, or they may favor economic development over property rights.

Finally, one can argue that conservatives failed to get a true believer on the Court. Justices O'Connor and Kennedy failed to live up to their conservative promise. However, to say that neither Chief

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<sup>275</sup> JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* (1995).

<sup>276</sup> David G. Savage, *Ascendant Stevens: O'Connor's Retirement Wasn't the Only*

Justice Rehnquist, Justice Scalia, nor Justice Thomas were conservative because they did not vote for property owners in all three cases, would be odd. Whatever the reasons may be, the property rights revolution failed to go as far as many thought it would travel.

What does the second trilogy say about the future? With the replacement of Chief Justice Rehnquist with Chief Justice Roberts, and Justice O'Connor with Justice Alito, there may not be much change in the direction of the Court regarding property rights. While the confirmation hearings did not reveal any significant insight into how the new Chief Justice may vote when it comes to property rights and eminent domain, if one assumes he will vote the same as the late Chief Justice Rehnquist, then no major doctrinal shift in land use law is on the horizon. Conversely, if he is more supportive of property rights over state power, or views the relationship between the two in a light different than Rehnquist, some minor changes may occur. However, since the late Chief Justice Rehnquist was not viewed as a swing vote on property rights cases, presumptively the same could be said about Chief Justice Roberts because he is generally viewed as a conservative. Therefore no realignment will occur. This suggests that the real battle for the future of the Court, even with property rights and eminent domain, may be with Justice Alito who replaced Justice O'Connor because as the latter has come to be seen as the swing vote on the Court.

Even with the replacement of Justice O'Connor, it may not

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*Surprise, as the Senior Justice Held Sway*, 91 A.B.A.J. 52 (2005).

make much difference for ownership rights. Even if she changed her votes in *Lingle* and *San Remo*, property interests still would not have won. At a minimum, at least one of the other six Justices would have to leave and be replaced by a pro-property rights Justice for the Court to really change its direction. Although this may someday occur, it is not likely that it will happen in the near Term.

#### IV. CONCLUSION

Property rights lost in the 2004 Supreme Court Term and generally failed to be reinvigorated under the Rehnquist Court in the way that many of its proponents had hoped. Even with the replacement of Chief Justice Rehnquist's with Chief Justice Roberts and Justice O'Connor's departure, there is no indication that there is a real movement or sense that ownership interests are destined for a major resuscitation such that the return to the *Lochner* Era jurisprudence is near. Instead, a comparison of the first and second property rights trilogies of the Rehnquist Court suggest tepid support for trimming back eminent domain authority and giving new life to property rights. Despite anticipated Court vacancies in the future, the property rights revolution appears to have stalled.