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We give a special thanks to Dean and Distinguished Professor Rick Niswander, College of Business, East Carolina University, Greenville, North Carolina 27858, for his support of our research agendas and in particular, for awarding Professor Holloway the College of Business Research Fellowship for 2006-2008. A version of parts of this article that addressed the impact of standards of review for public use claims on real estate was presented at the American Real Estate Society (ARES) Meeting in Sarasota, Florida in April 2005. We thank our colleagues at the ARES Meeting for their suggestions and comments on the exercise of eminent domain to further real estate and economic development projects. A version of parts of this article that examined the standards of review for takings claims were presented at the Academy of Legal Studies in Business (ALSB) Meeting on August 3-8, 2005, in San Francisco, California. We thank our colleagues at the ALSB Meeting for their suggestions and comments on the standards of review for the exercise of eminent domain to further municipal economic development policies. After presenting at those meetings, the authors chose in February 2005, to outline why the United State Supreme Court would not establish heighten scrutiny for public use claims. *See* James E. Holloway & Donald C. Guy, *The Nature and Structure of the Standard of Review for Public Use Claims in Light of More Recent Takings Jurisprudence*, 33 REAL ESTATE L.J. 27 (Winter 2004). We found no constitutional doctrine or theory to support a constitutional justification to underpin heightened scrutiny that had been established by the Rehnquist Court to protect the right to just compensation. However, we intimated that public use claims could invoke both the right to just compensation and a fairness and justice doctrine to justify heightened scrutiny.

A few readers may have noticed that Don has a new title, Professor Emeritus. Don retired at the end Spring Semester 2007. I dedicate this article to Don. I give him my utmost thanks for his courage and support during the last 18 years. We have published articles on takings law in legal, real estate and conservation journals and reprints in land

I. Introduction

The legacy of the Rehnquist Court's takings Jurisprudence may have been determined long before its natural end. This becomes apparent upon close examination of the takings decisions in the October 2004 term of the Rehnquist Court. At its close, the Rehnquist Court dealt with what had proven to be its greatest jurisprudential challenge, perhaps an even intractable constitutional question. Specifically, judicial standards of review under the Takings Clause[1] were central to the Rehnquist Court's takings jurisprudence, providing greater constitutional protection for land and other private property rights.[2] Consequently, the Rehnquist Court's climax would have been reached on takings issues involving more stringent standards of review- patently absent from decisions at or near its end. Earlier success, or perhaps the climax, would have been reached on two regulatory taking decisions that appear of limited value as precedents today when federal courts review established land use regulation.[3] Our examination of the Rehnquist Court's climax in takings jurisprudence begins at the end of its last term by analyzing *Kelo v. City of New London*,[4] *Lingle v. Chevron, U.S.A. Inc.*,[5] and *San Remo Hotel, L.P. v. City and County of San Francisco*.[6] Our analysis ascertains whether the standards of review or other principles in *Kelo*, *Chevron* and *San Remo Hotel* provide any greater protection for private property than the Rehnquist Court had provided under its Takings Clause jurisprudence that sought to provide greater

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use books. Our academic backgrounds are as diverse as our persons, and thus the conditions have not always been as pleasant as we would have liked but Don's courage never failed him. We must also recognize Mary, his wife, and Joyce, my wife, and our children, Laura and Bobby Guy and James, Jr., Jenine and Jason Holloway who had to endure also. God willing, we look forward to another 18 years, and this article is just the first of many.

1. U. S. CONST. amend. V. The Takings Clause of the Fifth Amendment of the United States Constitution is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

2. *See,* Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post Lochner Era*, 102 DICK. L. REV. 327, 327-353 (1998); *see infra* Part II.B and accompanying notes (discussing the fashioning of a means-ends analysis in the Rehnquist Court).

3. *See* James E. Holloway & Donald C. Guy, *Tahoe-Sierra Preservation Council, Inc.: A Shift or Compromise in the Direction of the Court on Protecting Economic and Property Right*, 10 ALB. L. ENVTL. OUTLOOK J. 229, 272 & 284-85 (2005) (measuring land values to evade constitutional protection for property rights under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and limiting Dolan v. City of Tigard, 512 U.S. 374 (1994) to conditional demands, perhaps only land dedications conditions).

4. Kelo v. City of New London, 545 U.S. 469 (2005).

5. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

6. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).

scrutiny of some land use regulation. *Kelo*, *Chevron* and *San Remo Hotel* signal how the Rehnquist Court wound up its Takings Clause jurisprudence as essentially a search for standards of review of social and economic regulation, along with its public purposes and objectives.

A. Discovering the Climax of the Rehnquist Court as it Approached its End

Kelo, *Chevron* and *San Remo Hotel* do not add any fundamental substance, in either doctrine or principle, to effect justifying or fashioning federal standards of review or means-ends tests of Takings Clause jurisprudence. Likewise, they show an almost unrelenting reluctance and deference to interpretations of Fifth Amendment limitations—namely takings,[7] public use[8] and just compensation[9]—as the Rehnquist Court moved from its beginning through its climax and to its natural and mature end. Its end includes a heavy acquiescence or reliance on safe precedents, cautious reluctance and more deference in takings jurisprudence to legislative policies. In reaching its climax long before the end of its era, the Rehnquist Court's interpretations of takings, public use and just compensation limitations created a mixed bag of results. This includes how the *per se* approach of *Lucas v. South Carolina Coastal Council*[10] shares little, if any, doctrinal similarity to the ad hoc, deferential approach of *Penn Central Transp. Co. v. New York City.*[11]

The Rehnquist Court's takings jurisprudence is peppered with sentiments of the Warren Court, where Chief Justice Rehnquist sat as an Associate Justice. This article consists of eight parts, including the conclusion. Part I, the Introduction, sets forth precedents and recognizes the reluctance of the Court to involve itself in local policy-making. Part I also explains efforts by the Rehnquist Court to follow precedents and be prudent when judging land use, economic development and other

7. *See* Brown v. Washington Legal Found., 538 U.S. 216, 231-32 (2003). In *Brown*, the United States Supreme Court states that: "[w]hile it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a "public use" and "just compensation" must be paid to the owner. . . ." *Brown*, 538 U.S. at 231-32.

8. *See Brown*, 538 U.S. at 231-32; *see also infra* Part II.C (discussing the Court's interpretation of the public use doctrine prior to Kelo v. City of New London, 545 U.S. 469 (2005)).

9. *Brown*, 538 U.S. at 231-32; *see also* First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 311 (1987) (discussing the remedial nature of the Just Compensation Clause for the temporary and permanent takings but not addressing the takings issue. *First English*, 482 U.S. at 311.).

10. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

11. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

governmental affairs of American cities and counties that may have only one thing in common, their constitutional democracies. The Rehnquist Court reached its takings jurisprudential climax by both rejecting and accepting both old and new constitutional doctrines and takings principles. The resultant decisions would greatly influence the means and ends of federal and state court review of regulatory takings disputes.

Part II reviews federal takings jurisprudence and explains takings, just compensation and public use provisions, focusing mostly on the development of regulatory takings law and the parallel development of public use law. The Rehnquist Court reached its takings jurisprudential end and closed at the very last term with little changes to any standard of review by relying heavily on prudence, reluctance and deference. In recognizing a divided Rehnquist Court, that had two justices moderately positioned on takings issue, the ultimate climax may have come in the last term when the Court relied too heavily on precedents in *Kelo* and exhibited reluctance in rejecting dicta in *Chevron* and deference or avoidance in *San Remo Hotel.*

Parts III-V discuss *Kelo*, *Chevron*, and *San Remo Hotel*, respectively, and explain how each decision fits in the Takings Clause jurisprudence of the Rehnquist Court. Parts VI and VII examine the Rehnquist Court's development of Takings jurisprudence, highlighting the Rehnquist Court's effort to advance the protection of private property rights, though its confusing and limited decisions have had little precedential value beyond *Penn Central Transp. Co.* Moreover, in reaching its climax so early, the Rehnquist Court's takings history is most consistent with the history of Takings Clause jurisprudence that is known more for its confusion and ad hoc approach than clarity and bright line tests.[12] Part VIII, the Conclusion, finds that the Rehnquist Court reached an early climax with *Lucas* and *Dolan v. City of Tigard*,[13] but ends with *Kelo* energizing American public policy regarding the need to protect property rights under more stringent review by courts.[14] In fact,

12. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322-32 (2002). In *Tahoe-Sierra Preservation Council*, Justice Stevens applies Armstrong. v. U.S., 364 U.S. 40 (1960), to justify not finding or using a bright line test, *Tahoe-Sierra Pres. Council*, 535 U.S. at 335-41, and flatly refuses to find viable connection between regulatory and physical takings laws. *Tahoe-Sierra Pres. Council*, 535 U.S. at 323-24. For an analysis of Tahoe-Sierra Preservation Council and its impact and implications on takings jurisprudence, *see* Holloway & Guy, *Tahoe Sierra*, *supra* note 3, at 252-92.

13. Dolan v. City of Tigard, 512 U.S. 374 (1994).

14. *See e.g.,* Richard Dolesh & Douglas Vaira, *Property Rights and Wrongs*, PARKS & RECREATION, Mar. 2007, at 59, 59-63 (examining the debate regarding use of eminent domain and regulation to create and protect parks and other lands); Maria Lameiras, *States Take Action to Limit Eminent Domain,* THE AMERICAN CITY & COUNTY, Jan. 2007, at 8, 8-9 (discussing state actions to limit the use of eminent domain to further

state and federal policy-makers were forced, for the time being, to consider the need for highly restrictive limitations on exercises of eminent domain. This included the power to take or condemn land and the exercise of police power to regulate private property in a finite number of municipalities facing an infinite number of political and social circumstances and economic and natural resource conditions that do not lend themselves to either bright line test or total deference.[15]

B. Recognizing Judicial Limit on the Rehnquist Court's Response to Constitutional Circumstances

A constitutional perspective on Takings Clause jurisprudence points out how the structure of a takings analytical framework and the nature of the substantive takings principles of the Rehnquist Court's interpretations of Takings, Public Use and Just Compensation Clauses brought on little Federal Constitutional change. This held true despite the Rehnquist Court's effort to provide more judicial scrutiny of the more burdensome land use and other regulations. This jurisprudential structure and nature rest and rely on judicial deference and reluctance to government policy-making in refusing to grant greater decisional authority to lower federal courts reviewing social and economic regulation and its underlying objectives.[16] On the path to reaching its early climax on standards of review, the Rehnquist Court encountered a strong precedent-based preference for local circumstances to determine regulatory takings,[17] a steadfast judicial concession of deference to state and municipal governments,[18] a constitutional disdain for *per se* and heightened scrutiny of economic regulation,[19] a reluctance to judge purely local land

development).

15. *See Kelo* and Potential Congressional Responses: *Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005); *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing before the S.Comm. on the Judiciary,* 109th Congress (2005).

16. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (signaling an end to the *Lochner* era that had permitted courts to apply closer scrutiny of government regulation); Lochner v. New York, 198 U.S. 45 (1905); *see also* Nebbia v. New York, 291 U.S. 502 (1934)).

17. *See Tahoe-Sierra Preservation Council*, 535 U.S. at 335 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)).

18. *See id.* at 342.

19. *See id.*; *but see* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (holding that a categorical or *per se* test applies when the owner is denied all economically viable use). In *Lucas*, the Court states that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. . . . This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's

use decisions,[20] and an underdeveloped body of constitutional doctrine to justify heightened scrutiny.[21] This constitutional perspective shows little grading or scrutiny of municipal policy choices, and then finds the fewest circumstances constitutionally intolerable under the *Penn Central* deferential inquiry or *Dolan's* heightened means scrutiny or *Lucas'* strict *per se* test.

These analytical frameworks determine whether the outcome of a takings dispute between a landowner and government is subject to one particular standard of review or a means-ends test. Such a standard determines whether a regulation and its purposes and objectives represent a sufficiently needed and proportional policy adjustment to natural resources conditions, environmental quality, social conditions and business environments involving exercises or uses of private property rights under municipal, state and federal policy-making and regulation. Looking closely at the relative nature of policy-making, both the climax and end of the Rehnquist Court era may offer little, if any, protection to private property rights. This protection of private property offers more choices regarding economic and social wants and expectations, such as acquiring wealth and improving one's lifestyle, as defined by well-established economic principles and analysis, such as return on investment and risk-return analysis, directly related to economic and social interests of private property.[22] In the Rehnquist Court era, takings jurisprudence shows little development of takings doctrines and principles that enforce or invoke conditional limitations and broaden or expand just compensation to limit or scrutinize exercises

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power over, the "bundle of rights" that they acquire when they obtain title to property." *Lucas*, 505 U.S. at 1027.

20. *See Tahoe-Sierra Preservation Council*, 535 U.S. at 332 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)).

21. *See Tahoe-Sierra*, 535 U.S. at 333-34 (no regulatory takings doctrine to justify a takings or just compensation for taking caused by a moratorium that existed only for a term of years, but shows strong reliance on justice and fairness of *Armstrong*, 364 U.S. at 40, though not treated as a precedent); *see also* Holloway & Guy-Tahoe Sierra, *supra* note 3, at 263-275 (explaining the jurisprudential role and status of *Armstrong* in *Tahoe-Seirra Preservation Council*); *see also* Jeffrey M. Gaba, *Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569 (2007) (arguing that the Armstrong's fairness and justice under the Takings Clause set forth distribution justice in its interpretations but distributive justice may only call for a limited roll for the Court).

22. *See generally* James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 DICK. J. OF ENVTL. L. & POL'Y 1 (2001) [hereinafter Holloway & Guy—Social Welfare] (examining the impact of interpretations of the Takings Clause on the use exactions and other land use policies to achieve social welfare goals, such as housing, jobs and recreation facilities.

of government powers.

C. *Overcoming the Court's Predilection for Judicial Deference, Prudence and Reluctance*

The backdrop for the Rehnquist Court's foray into takings jurisprudence emerged while Chief Justice Rehnquist was sitting as an Associate Justice on the Warren Court, where he dissented fervently in *New York City v. Penn Central Transp. Co.*[23] Associate Justice Rehnquist took issue with the Court's deference, prudence and reluctance on takings issues involving municipal land use regulation.[24] With Chief Justice Rehnquist sitting as an Associate Justice in 1978, the Court decided *Penn Central Transp. Co.* and established a three-prong, ad hoc objective test to determine whether a historical preservation regulation is a regulatory taking of private property for public use and responded favorably, concluding that the circumstances of the disputes should be the controlling factors in regulatory takings disputes. The Court also showed a strong affinity to deferring to local policy-making and its regulation of land use.[25] In 1980, the Court decided *Agins v. City of Tiburon,*[26] holding that a facial challenge must establish that a government regulation fails to substantially advance a government interest[27] and denies all economically viable use of the land and posited that a facial taking claim is an uphill or extremely difficult battle to win.

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23. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

24. Penn Cent. Transp. Co., 438 U.S. at 138 (Rehnquist, J., dissenting). Then Associate Justice Rehnquist wrote the dissent and concluded that:

> Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. [393], 416 (1922). The Court's opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

Id. at 152-53. In fact, then Associate Justice Rehnquist was joined by Associate Justice Stevens. *Id.* at 138. Later, Chief Justice Rehnquist and Associate Justice Stevens would be on opposing sides of takings issues involving the Court's decision in *Penn Central Transp. Co.*

25. *Id.* at 124.

26. Agins v. Tiburon, 447 U.S. 255 (1980).

27. *See* Chevron, 544 U.S. at 545 (concluding that *substantially advances* language is merely dicta and not an intermediate standard of review for land use regulation, such as rent control).

On the other hand, the Court signaled its reluctance to intervene in many land use, social and other local matters not affecting fundamental rights.[28] In 1985, the Court decided *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[29] and fashioned a takings ripeness doctrine to prevent the premature involvement of federal courts in state, county and municipal policy-making; it required a plaintiff to pursue litigation for just compensation in a state court and posited that state taking claims must be brought in state courts to seek just compensation.[30] Again, the Court signaled its reluctance to involve itself in local matters. *Penn Central Transp. Co., Agins* and *Williamson County* appear to form an intriguing, obfuscated backdrop for the Rehnquist Court's development of Takings Clause Jurisprudence.

Against the backdrop at the dawn of the Rehnquist Court era, the newly emergent Rehnquist Court would seek early to reshape Takings Clause jurisprudence by putting forth, in the late 1980s and early 1990s, standards of review in takings cases. This view explicitly shows disdain for the reluctance of the Court to intercede in government policy-making involving private property. Most obviously, the Rehnquist Court had to limit or narrow circumstances permitting deference to government through establishing takings principles permitting less deferential standards of review, including heightened scrutiny or a *per se* test, to review takings claims.

In 1986, the Rehnquist Court decided *Nollan v. California Coastal Commission.*[31] *Nollan was* thought to be the earliest signal of a definite shift in Takings Clause jurisprudence. It established a standard of review, an essential nexus test, to determine whether there was a relationship or connection between a conditional demand and its declared purpose.[32] Although the essential nexus is not a true ends test, *Nollan's* purpose-based standard initiated a departure from the view that recognized a loose relationship between means and ends, characterizing a highly deferential standard of review while only affecting a land dedication condition of state policy-making.[33]

In 1992, the Rehnquist Court decided *Lucas v. South Carolina Coastal Council*[34] that established a *per se* test or strict standard of

28. *See* Agins, 447 U.S. at 260 n.6; *but see Chevron*, 544 U.S. at 545 (concluding that substantially advances language of *Agins* was not an intermediate standard of review but merely dicta).

29. Williamson County Reg'l Planning Comm'n v. Hamilton Back of Johnson City, 473 U.S. 172 (1985).

30. *See Williamson County*, 473 U.S. at 172.

31. Nollan v. Ca. Coastal Comm'n, 483 U.S. 825 (1987).

32. *Nollan*, 483 U.S. at 838-39.

33. *Id.*

34. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

review for an environmental regulation that denied all economically viable use and thus signaled even greater protection for private property rights than had been protected under common law principles.[35] Two years later, in 1994, the Rehnquist Court decided *Dolan v. City of Tigard*[36] establishing a higher standard of review, namely the rough proportionality test, between a conditional demand and the impact of the development on the community. The decision explicitly signaled greater protection for property rights under the right to just compensation and was protected by the unconstitutional conditions doctrine.[37] *Dolan* was a definite move to a less deferential standard of review or intermediate standard of review for the same set of circumstances of *Nollan*, namely the request or demand for a land dedication.[38]

Although the Rehnquist Court did find the existence of another narrow set of circumstances to apply heightened scrutiny, the composition of the Rehnquist Court played a quintessential role and showed the difficulty of forming a majority willing to rethink or limit the *Penn Central* inquiry. In the Rehnquist Court, the Rehnquist Block consists of the Chief Justice and Associate Justices Scalia and Thomas. On the other side, the Stevens Coalition consists of Senior Associate Justice Stevens and Associate Justices Ginsburg, Souter and Breyer. Moving between the Rehnquist Block and Stevens Coalition, Associate Justices O'Connor and Kennedy made the majority in takings decision and determined the fate of takings jurisprudence in the Rehnquist Court. However, probability greatly favored the Stevens Coalition, and the *Penn Central* inquiry withstood constitutional muster in several takings disputes.

The Rehnquist Block faced several opportunities to set forth another unique set of circumstances that demanded heightened scrutiny and that would echo the standards of review set forth in *Lucas* or *Dolan*. Ultimately, this would not take place. In 2002, the Rehnquist Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[39] but failed to establish a categorical or *per se* taking to prohibit the use of moratoria or interim development controls, banning residential or other development. Both Justices O'Connor and Kennedy defected to join the Stevens Coalition.[40] This Court's quest for bright-

35. *Lucas*, 505 U.S. at 1030-31.

36. Dolan v. City of Tigard, 512 U.S. 374 (1994).

37. *Dolan*, 512 U.S. at 383.

38. *Id.* (finding that the City of Tigard demanded two land dedications to create a drainage easement and bicycle path).

39. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (finding no need for a *per se* test to review interim development controls or moratoria).

40. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 552-53; *see also* Donald C.

line tests, both heightened scrutiny and *per se* tests, had existed for a decade or more with little success. Yet the Rehnquist Court had yet to face its greatest challenge in reasserting control over Takings Clause jurisprudence with new or old takings doctrine or judicial logic to protect or limit abuse of the right to receive just compensation. This challenge was not far off.

In its very last term, 2004-2005, the Rehnquist Court's decisions in *Kelo v. City of New London*,[41] *Lingle v. Chevron, U.S.A. Inc.*,[42] and *San Remo Hotel, L.P. v. City and County of San Francisco*[43] strongly support the point that the climax of Rehnquist Court in takings jurisprudence had become a historical fact long before *Tahoe-Sierra Preservation Council.* The last takings decisions of the Rehnquist Court involved municipal and state policy concerns of condemnation, rent control and conditional demands in *Kelo, Chevron* and *San Remo Hotel*, respectively. *Chevron* involved a takings challenge regarding the application of intermediate scrutiny of a rent control statute that created a premium for a lessee in the sale of a retail gasoline station operating under a rent control statute. *San Remo Hotel* involved deferential scrutiny of a housing ordinance that imposed on a hotel owner and investor a heavy public burden to provide public housing. Lastly, *Kelo* involved the application of a strict scrutiny standard to a municipal redevelopment program that condemned private residences and land in non blighted areas and transferred the land to third party or land developers to further municipal economic development policies and objectives. Amongst the three decisions, the Rehnquist Court did not find that these concerns raised the need to consider a justification for a standard of review that would protect the right to just compensation of the Takings Clause and that would limit public burdens and guard private property interests of the 21st Century's global business climate.

Emerging from *Kelo,* and most consistent with *Tahoe-Sierra Preservation Council*, the Rehnquist Court demonstrated a reliance on deference to precedents where the takings issue arose from the fear and

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Guy & James E. Holloway, *Finding the Development Value of Wetlands and Other Environmentally Sensitive Lands under the Extent of Interference with Reasonable Investment-Backed Expectations*, 19 J. LAND USE & ENVTL L. 297, 316-28 (2004) [hereinafter Guy & Holloway—Development Value] (examining the impact of conflicting arguments by Justices Scalia and Justice O'Connor Penn Central inquiry or analysis for determining a regulatory taking after *Palazzolo*, 533 U.S. at 606). For another analysis of *Tahoe-Sierra Pres. Council, see* Daniel L. Siegel, *The Impact Of Tahoe-Sierra On Temporary Regulatory Takings Law*, 23 UCLA J. ENVTL. L. & POL'Y 273 (2005); *see infra* Part IV and accompanying notes (analyzing *Chevron* and setting forth its impact and implications on takings jurisprudence).

41. Kelo v. City of New London, 545 U.S. 469 (2005).

42. Lingle v. Chevron, U.S.A. Inc, 544 U.S. 528 (2005).

43. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).

outrage of ordinary citizens who were greatly disturbed by exercises of eminent domain and police powers to terminate ownership of a life long residence and give it to a third party to fulfill the government's economic expectations. The takings issues of *Chevron* and *San Remo Hotel* fit this norm of the Rehnquist Court where the public burdens of government regulation were shifted to business organizations and eventually will cause unfavorable economic effects, such as reducing profits or increasing costs, to the benefit of another party, not necessarily the whole public. These takings issues involved homeowners, landowners and business organizations that had expected the Rehnquist Court to give greater constitutional protection to private property rights. As the article exclaims, these individuals found too little proportionality between government responses and landowners' burdens or obligations.

Kelo, *Chevron* and *San Remo Hotel* show that little, if any, protection had already been given by the Rehnquist Court to private property rights, notwithstanding *Nollan* and *Dolan*. These disputes arose under limitations of the Fifth Amendment's Takings Clause. They show how the prudence, deference and reluctance of the Rehnquist Court limit the development of takings jurisprudence in the latter half of the Rehnquist Court era. *Chevron* shows how dicta led to a null standard of review and casts suspicion on the utility of the *Lucas per se* test that emanated from other language in *Agins*.

Next, *San Remo Hotel* curtails the path to the federal court under a constitutional doctrine and judicial prudence, in that once the takings plaintiff has his or her day in the state court on the just compensation issue, this plaintiff can no longer look forward to pursuing a takings claim in the federal trial court. Of course, the plaintiff can faithfully hope for a writ of certiorari from the Court.

Finally, *Kelo* shows the reluctance of the Court to interfere or intervene in local matters and gives even greater deference to state and municipal policy-makers. Yet some municipal regulations can be considered wise or just on almost any grounds, but denying courts the power to review the most onerous regulations leaves many landowners and developers at the mercy of municipal policy-makers in determining or justifying the public need for municipal economic development, redevelopment or revitalization.

In conclusion, *Kelo*, *Chevron* and *San Remo Hotel* touch fundamental takings limitations of the Fifth Amendment and strongly signal that the climax of the Rehnquist Court may have been *Lucas* or *Dolan* on stringent standards of review to provide greater protection for private property rights of land and business.[44]

44. *See* James W. Ely Jr., *Property Rights And The Takings Clause: "Poor*

II. Takings Clause, Means-Ends Analyses and Public Use

The Fifth Amendment of the United States Constitution reads "[n]or shall private property be taken for public use, without just compensation."[45] The Takings Clause recognizes that government can take private property but only subject to the requirements of public use and just compensation.[46] Government has taken private property by exercising powers and using other means, such as eminent domain and its condemnations,[47] construction contracts and lien enforcement,[48] and the police power and its regulation.[49] Just Compensation and Public Use Clauses give Fifth Amendment protection to property rights against a taking by regulation, condemnation and contract.[50] Just compensation is a constitutional condition that is triggered by the event of a government taking[51] and awards the landowner just compensation, or more accurately, the fair market value of the land.[52] The Public Use Clause requires a public use for the property taken by government.[53] Public use includes public welfare or purpose,[54] such as schools, parks, roads,

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Relation" Once More: The Supreme Court And The Vanishing Rights Of Property Owners, 2005 CATO SUP. CT. REV. 39 (2004/2005). Professor Ely concludes that Rehnquist Court's approach to the protecting property rights was dominated New Deal intellectual thinking, thus showing great deference to government policy-makers and less protection to property rights in interpreting the Takings Clause. *Id.* at 69. Professor Ely's ending paragraph of his article points up the beginning of the downward spiral of the Rehnquist Court in Takings Jurisprudence:

> In 1994 Chief Justice Rehnquist proclaimed: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation." [Dolan v. City of Tigard, 512 U.S. 374, 392 (1994)] The promise implicit in this comment—that the Takings Clause should receive the same level of judicial protection as other provisions of the Bill of Rights—has never been realized in the post-New Deal era and now seems further away than ever. It is a sad day for individual liberty and American constitutionalism.

Id.

45. U. S. CONST. amend. V. The Takings Clause of the Fifth Amendment of the United States Constitution is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

46. *See* Guy & Holloway, *supra* note 2, at 327-353.

47. *See* Berman v. Parker, 348 U.S. 26 (1954).

48. *See* Armstrong v. United States, 364 U.S. 40, 48 (1960).

49. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922); Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

50. U. S. CONST. amend. V; *see* Brown v. Legal Found. of Washington, 538 U.S. 216 (2003).

51. U. S. CONST. amend. V; *see* Berman v. Parker, 348 U.S. 26 (1954).

52. Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001) (citing *see, e.g.*, Olson v. United States, 292 U.S. 246, 255 (1934); 4 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.01 (rev. 3ed. 2000)).

53. U. S. CONST. amend. V; *see Berman*, 348 U.S. at 26.

54. *See Berman*, 348 U.S. at 26.

streets and other public infrastructure.[55] The Takings Clause forces government to bear the public burden for public needs and wants and therefore, requires that *in all fairness and justice* the public must pay or provide for its own needs and wants and not force or extract them from property owners.[56]

A. Regulation and Takings Clause Jurisprudence of the Rehnquist Court

The Takings Clause protects landowners and other property owners against regulation that takes land and other property by regulatory, physical and *per se* takings. First, a physical taking by regulation takes a property interest or gives authority to another person to take a property interest, such as possession or use.[57] *Loretto v. Teleprompter Manhattan CATV Corp.*[58] involves a physical taking where a city government authorized the use of an extremely small space on a rooftop for the erection of a privately owned antenna.[59] Second, a regulatory taking is a regulation that takes use, development and other interests by imposing an unreasonable burden.[60] *Penn Central Transp. Co. v. New York City*[61] establishes an ad hoc approach to determine when land use and other regulations amount to regulatory takings of private property for public use.[62] Third, a *per se* or categorical taking is developed in *Lucas v. South Carolina Coastal Council*[63] that held any government regulation to be a taking if it denies *all economically viable use* of the land, namely the development of beachfront property.[64] The Court reviews few takings claims challenging regulation under the *per se* or physical takings, which are narrow standards of review under the Takings Clause.

The Court reviews most regulations under a deferential means analysis, focusing primarily on the needs for the regulation and its resultant economic effects. Precariously, the Court's lack of judicial preference for *per se* and physical takings and its ever increasing reliance on deference to government policy-makers have led to few intermediate

55. *See id.* at 32. In *Berman*, the Court observed that public purpose includes but is not limited to the following: "[p]ublic safety, public health, morality, peace and quiet, law and order. . . ." *Id.*

56. *Armstrong*, 364 U.S. at 60.

57. *See* U. S. CONST. amend. V; *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

58. Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982).

59. *Teleprompter Manhattan CATV Corp.*, 458 U.S. at 419.

60. *See Pa. Coal Co.*, 260 U.S. at 415-16.

61. *See* Penn Central Transp. Co. v. City of New York , 438 U.S. 104, 137 (1978).

62. *See id.*

63. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

64. *Lucas*, 505 U.S. at 1027.

standards of review for government regulation of property rights.[65] Moreover, the Court has shown great reluctance to get involved in local land use matters. Takings standards of review for the scrutiny of the nature of government action have consequently been mostly deferential means analysis for legislative actions, with little ends analysis to scrutinize public ends or objectives.

B. The Rehnquist Court and Fashioning a Means-Ends Analysis

State courts interpret state takings provisions in claims raising federal and state takings issues and often give similar interpretations to federal and state takings provisions.[66] The Supreme Court permits state courts to fashion standards of review or means-ends tests under the Federal Takings Clause. The Federal Takings Clause protects private property rights by creating the right to just compensation, but the states may grant greater protection to the property rights of their citizens by making it more challenging for municipal and county governments to justify land use, financial and other burdens imposed on private property.[67] State courts fashion federal standards consistent with state public policy.[68] The Court has slowly adjusted state means-ends analyses that applied different levels of scrutiny to similar or identical state and federal regulatory taking claims in reviewing local regulations.[69] The Court in *Nollan v. California Coastal Commission*[70] and *Dolan v. City of Tigard*[71] together fashioned a two-prong standard of review for regulatory taking claims arising in challenges to the imposition of land dedication conditions by local commissions.[72] *Dolan* adopted the reasonable relationship test[73] that had been "adopted by a majority of the state courts"[74] and that was "closer to the federal constitutional norm than either"[75] the more deferential standard or

65. *See Supra* Part II.B and accompanying notes (discussing the Rehnquist Court's development of means-ends analysis for the regulation of property and economic rights).

66. *See* Dolan v. City of Tigard, 512 U.S. 374, 389-90 (1994); *see also* James E. Holloway & Donald C. Guy, *The Impact of a Federal Takings Norm on Fashioning a Means-Ends Fit Under Takings Provisions of State Constitutions*, 8 DICK. J. ENV. L. POL. 143, 191-247 (1999) [hereinafter Holloway & Guy—State Standards] (examining the standards of review applied to the state courts to development impact exactions challenged as regulatory takings).

67. *See* Dolan v. City of Tigard, 512 U.S. 374, 389-90 (1994).

68. *See id.* at 390-91.

69. *See id.* at 389.

70. Nollan v. Ca. Coastal Commission, 483 U.S. 825 (1987).

71. Dolan v. City of Tigard, 512 U.S. 374 (1994).

72. *Dolan*, 512 U.S. at 386.

73. *Id.* at 390-91.

74. *Id.*

75. *Id.*

heightened scrutiny.[76] The more deferential state standards are invalid under *Dolan's* higher standard for taking claims challenging land dedication conditions.

The Rehnquist Court decided *Dolan* but left courts and commentators with a question regarding the application of *Dolan* in reviewing land use controls other than land dedication conditions. The question was whether the Rehnquist Court sought in *Dolan* to give greater protection to private property rights by providing less deference to the means and ends of local regulations and their purposes and objectives. In *City of Monterey v. Del Monte Dunes, Ltd.*,[77] the Court limits *Dolan* to land dedication conditions adjudicated by local boards and commissions and thus removes any doubt about a heightened standard of review for exercises of police power to enact zoning, growth management or environmental regulations.

The City of Monterey (City) denied approval of several applications and other requirements submitted for the development of a tract of land by Del Monte Dunes of Monterey, Ltd. (Del Monte Dunes).[78] Del Monte Dunes filed takings claims, among others, against the City, and the court of appeals applied heightened scrutiny to a review the City's decision.[79] The Court concluded that *Nollan* and *Dolan* do not apply to regulatory taking claims that challenge the validity of a regulatory denial for a site development permit.[80] The Court observed that the reasonably related test is the standard of review for legislative decisions, such as land use controls and regulatory denials.[81] The Court's observation limits *Dolan*'s rough proportionality to land dedication conditions, but remains silent on whether they are adjudicative or legislative decisions.[82] The Court has shown little inclination to use heightened scrutiny or a *per se* test, actually a bright line test, to protect property rights against

76. *Id.*

77. City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999).

78. *See Del Monte Dunes*, 526 U.S. at 698.

79. *Id.* In *Del Monte Dunes*, Del Monte Dunes of Monterey, Ltd. (Del Monte Dunes) filed takings and other claims against the City in the United States District Court for the Northern District of California. *Id.* The United States Court of Appeals for the Ninth Circuit concluded that *Dolan* and *Nollan* should have been applied to the inverse condemnation claim based on the denial of a development permit. *Id.* The United States Supreme Court granted a *writ of certiorari* to the Ninth Circuit and concluded that *Nollan* and *Dolan* did not apply to a regulatory denial and other zoning decisions. *Del Monte Dunes*, 526 U.S. at 702-03.

80. *Del Monte Dunes*, 526 U.S. at 702-03.

81. *Id.* at 706.

82. *See id.* at 703. The exercise of eminent domain power under redevelopment and development plans approved by development agencies or local governments is a legislative action.

legislative decisions.[83] This Court's logic or reasoning is not limited to the Takings Clause.

C. *The Rehnquist Court and Its Review of Eminent Domain Power*

The Public Use Clause shares the same fate as the Takings Clause, but the public use limitation is most applicable to review of exercises of eminent domain power. Eminent domain power is a means to an end.[84] Its scope is coterminous with police power and involves government action for public needs and welfare.[85] It is well settled that eminent domain power can be exercised by government to take private property for public use, such as schools, parks, highways and buildings.[86] Moreover, the exercises of eminent domain power to condemn land for municipal redevelopment and efficient land markets, and the transfer of land to private parties for ownership have already raised substantial federal questions, and the outcomes of those issues have enlarged eminent domain power.[87]

The seminal precedent involved a taking or condemnation of commercial land for public use to further municipal public policy regarding economic growth and development in a blighted area.[88] In *Berman v. Parker,*[89] the Court interpreted the Public Use Clause to determine whether an exercise of eminent domain power to redevelop an area of the city had taken land for a public use.[90] Congress enacted the District of Columbia Redevelopment Act of 1945[91] (Redevelopment Act).[92] Congress found that housing and other conditions within areas of the District of Columbia (District) were injurious or harmful to the public health and welfare, and must be eliminated to protect and promote the

83. *See e.g.*, Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 939-41 (2003) (discussing the use of a *Nollan-Dolan* standard in disputes under the Public Use Clause). The public use issue should be considered in the broader context of constitutional theory, takings jurisprudence and the Rehnquist Court. The Rehnquist Court has not show any preference or favor for *per se* or heightened scrutiny tests under the Takings Clause, except where the protection of property rights could be grounded in constitutional or common law doctrine. *See* James E. Holloway & Donald C. Guy, *The Nature and Structure of the Standard of Review for Public Use Claims in Light of More Recent Takings Jurisprudence,*, 33 REAL ESTATE L.J. 270, 297-98 (Winter 2004) [hereinafter Holloway & Guy—Public Use].

84. *See* Berman v. Parker, 348 U.S. 26, 33 (1954).

85. *See* Midkiff v. Haw. Housing Auth., 467 U.S. 229, 240-41 (1984).

86. *See id.* at 229; Berman v. Parker, 348 U.S. 26 (1954).

87. *See Midkiff*, 467 U.S. at 229; *Berman*, 348 U.S. at 26.

88. *See Berman*, 348 U.S. at 28.

89. Berman v. Parker, 348 U.S. 26 (1954).

90. *Berman*, 348 U.S. at 26.

91. D.C. Code §§ 5-701 - 5-719 (1951).

92. *See Berman*, 348 U.S. at 28.

public welfare of the residents and citizens of the District.[93] Congress found that the "acquisition of property is necessary to eliminate housing conditions"[94] and that private enterprise could not do the redevelopment alone.[95] The first project of the District Redevelopment Agency and Planning Commission was the redevelopment of Area B in southwest Washington, D.C.[96] The plan for Area B established land uses and detailed the types of dwelling with one-third of the dwellings designated as low-income.[97]

The appellants, Parkers and others, owned commercial enterprises, such as a department store and other retail businesses, in Areas B.[98] They claimed that their commercial "property may not be taken"[99] for redevelopment because it is "not residential"[100] and "not slum housing."[101] Moreover, they claimed that this property will be taken and placed under management of a private agency and "redeveloped for private . . . use."[102] The Court concluded that public welfare was broadly defined under the police power and permitted expansive public objectives,[103] such as the removal of structures likely to cause future slums.[104] It also observed that the legislative branch determined the public needs of society and that courts can only play a very narrow role in reviewing decisions of the legislative branch.[105] The Court reaffirmed that the judiciary must defer to the exercise of police power in determination of public needs and that the exercise of eminent domain power was not an exception to this deference,[106] thus continuing its reluctance to intervene in purely local matters. A direct corollary of *Berman is* that municipal redevelopment or slum clearance projects permit private developers to implement municipal development policies and their objectives by acquiring access and control of land and perhaps, securing access to capital or gaining the ability to make a reasonable

93. *See id.* at 28.
94. *See id.*
95. *See id.* at 29.
96. *See Berman*, 348 U.S. at 30.
97. *See id.* at 30-31.
98. *See id.* at 31.
99. *Berman*, 348 U.S. at 31.
100. *Id.*
101. *Id.*
102. *See id.*
103. *See Berman*, 348 U.S. at 32.
104. *See id.* at 35.
105. *See id.* at 32 (citing Olsen v. Nebraska, 313 U.S. 236 (1941); Lincoln Union v. Northwestern Co., 335 U.S. 525 (1949); Ca. State Association v. Maloney, 341 U.S. 105 (1951)).
106. *See Berman*, 348 U.S. at 32 (citing Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925); United States ex rel. T. V. A. v. Welch, 327 U.S. 546, 552 (1946)).

return on there investment.

The other precedent displays both deference and reluctance and was decided while then Associate Justice Rehnquist was sitting on the Court. This case involved a taking or condemnation of private land solely to redistribute ownership to private parties to further a state public policy of creating efficient land markets as a public use. In *Midkiff v. Hawaii Housing Authority*,[107] the Court relied heavily on *Berman* and gave great deference to local policy-makers, thus showing deference to state government and a reluctance to get overly involved in local matters even when they appear patently unjust. The state of Hawaii had made repeated efforts to subdivide the private lands of Hawaii among landowners, tenants and citizens, but these efforts had failed, and thus Hawaii's land market was ineffectual to transfer ownership of land.[108] In the mid-1960s, the Hawaii legislature successfully "enacted the Land Reform Act of 1967[109] (Land Act) that created a mechanism for condemning residential tracts and transferring ownership of this condemned land."[110] In February 1979, Midkiff and others filed a claim under the Public Use Clause arguing that the Land Act was unconstitutional under the Fifth Amendment.[111] The United States District Court for the District of Hawaii held that the Land Act's arbitration and compensation provisions were unconstitutional but held that the Land Act's condemnation provisions were not arbitrary, capricious or selected in bad faith under the Public Use Clause.[112] The United States Court of Appeals for the Ninth Circuit held that the public purpose of the Land Act was sufficiently related to a legitimate state interest but simply took property from A and transferred it to B.[113] The Supreme Court granted a writ of certiorari.[114]

Relying heavily on *Berman* and its deference to municipal governments, the Court noted that the judiciary could not second guess the legislature in determining important public needs.[115] The Court stated that the exercise of eminent domain and payment of just compensation require a "justifying public purpose."[116] The Court stated that when "the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated

107. *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).
108. *See Midkiff*, 467 U.S. at 233.
109. HAW. REV. STAT. § 516 (1967).
110. *See Midkiff*, 467 U.S. at 233.
111. *See id at 234.*
112. *See id.* at 235 (citing Midkiff v. Tom, 483 F.Supp. 62 (Haw. 1979)).
113. *See id.* (citing Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983)).
114. *See* Haw. Housing Authority v. Mitkiff, 464 U.S. 932 (1983).
115. *See Midkiff*, 467 U.S. at 239.
116. *See id.* at 241.

taking to be proscribed by the Public Use Clause."[117] The Court held that the Land Act was constitutional because its purpose was to reduce a land oligopoly that had been created by past monarchs.[118] The Court reasoned that the Land Act was a "comprehensive and rational approach to identifying and correcting market failures"[119] and concluded that the Land Act must pass scrutiny under the Public Use Clause."[120] The Court demonstrated reluctance to intervene in mostly state matters. A direct corollary of *Midkiff* is that the redistribution of landownership to establish efficient land markets impacts both state public policy and private economic choices when the exercise of eminent domain power spreads or diffuses private land wealth and increases access to land.

Berman and *Midkiff* are the Court's creation and expansion of a deferential standard of review for public use in reviewing exercises of eminent domain power, plainly refusing to intervene in acquiring land for municipal redevelopment and establishing efficient land markets. *Berman* and *Midkiff* create a deferential means-ends scrutiny to protect the right to just compensation in legislative decision-making. In fact, *Berman* and *Midkiff* create a means-ends test or standard of review that loosely reviews or scrutinizes the means of exercising eminent domain power and totally defers to public ends or objectives, such as creating efficient land markets and clearing blighted areas of a city.[121] This

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117. *See id.* (citing Berman v. Parker, 348 U.S. 26 (1954); Rindge Co. v. Los Angeles, 262 U.S. 700 (1923); Block v. Hirsh, 256 U.S. 135 (1921); *cf.* Thompson v. Consolidated Gas Corp.,(300 U.S. 55, 80 (1937)) (invalidating an uncompensated taking)).

118. *See id.* at 241-42. The Court stated that:

> The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.

Id. at 242 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); Block v. Hirsh, 256 U.S. 135 (1921); *see also* People of Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir. 1946), *cert. denied*, 329 U.S. 772 (1946)).

119. *Id.* at 242.

120. *See id.*

121. *See* Kelo v. City of New London, 545 U.S. 469, 480-83 (2005). In *Kelo*, the Court also examined Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). *Id.* at 482. In *Ruckelshaus*, the Court concluded that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not take trade secrets or company data for public use and found that subsequent applicants would receive a benefit from the data and these applicants would pay just compensation. 467 U.S. at 1014-15. The *Ruckelshaus* Court followed *Berman* and *Midkiff*. *See id.* at 1015.

In *Kelo*, Justice Thomas did not agree that slum clearance and removal of blighted areas for urban renewal or development projects always benefited African-Americans who were moved to other locations. *See Kelo*, 545 U.S. at 522 (Thomas, J., dissenting) (citing, Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003)). Justice

Berman-Midkiff standard of review is not unlike the standard of review applied to many regulatory taking disputes fashioned under the character of government action of *Penn Central Transp. Co.*[122]

Berman, Midkiff and *Penn Central Transp Co.* establish takings principles that were addressed by the Rehnquist Court, but as the Rehnquist Court moved to its end, these principles are consistent with the holdings of *Tahoe-Sierra Preservation Council* and *Palazzolo* in that these holdings established case law that has all of the trappings or earmarking of the Court's reliance on deference, reluctance and precedents. *Berman, Midkiff* and *Penn Central Transp. Co.* were not dominant jurisprudential forces behind new takings doctrines and principles in *Lucas* and *Dolan* near the middle of the Rehnquist Court era. In the latter part, especially the last term of the Rehnquist Court era, the doctrinal creativity or initiative of *Lucas* and *Dolan* went noticeably missing, as the Court showed mostly deference. Parts III-V point out underdeveloped or missing Takings Clause jurisprudence.[123]

III. Analysis of Kelo and Public Use Jurisprudence

The Court's decision in *Kelo v. City of New London*[124] supports the

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Thomas also noted that "[o]ver 97 percent of the individuals forcibly removed from their homes by the 'slum-clearance' project upheld by this Court in *Berman* were black." *Id.* (citing *Berman*, 348 U.S., at 30). Justice Thomas would not defer to state or local government and would also find that the exercise of eminent domain power for economic development is *per se* unconstitutional. *See id.* at 521.

122. *See* Holloway & Guy—Public Use, *supra* note 83, at 297-98 (In not second guessing the Court, which is fool's play, this article was published before *Kelo* was decided by the Rehnquist Court in its last term.). The article explains that *Kelo* may not provide a judicial opportunity under the Public Use Clause for the Court to deviate from the line of Fifth Amendment reasoning it had use repeatedly to resolve regulatory takings disputes under the Takings Clause. The article concluded that like *Dolan* and *Lucas*, the outcome of *Kelo* would depend on a doctrinal argument justifying the need for heightened scrutiny. *See id.* In *Kelo*, the dissents put forth bare property rights and unresolved interpretive theory. *See Kelo*, 545 U.S. at 494-505 (O'Connor, J. dissenting) (protecting the landowner's interest); *see id.* at 505-21 (Thomas, J., dissenting) (setting forth the Framers' intent).

123. For commentary on the legacy of the Rehnquist Court and the role of Justice Stevens, *see, e.g.*, Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906 (2006); John Yoo, *National Security and the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144 (2006); Robert Post & Reva Siegel, *Originalism As A Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Shelley Ross Saxer, *The Rehnquist Court And The First Amendment: A Property Rights View: Commentary on Property and Speech by Robert A. Sedler,* 21 WASH. U. J.L. & POL'Y 155 (2006); Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331 (2006) (symposium keynote speech assessing the legacy of Chief Justice Rehnquist); John D. Echeverria, *The Triumph Of Justice Stevens And The Principle Of Generality*, 7 VT. J. ENVTL. L. 22 (2005/2006); John Paul Stevens, *Learning On The Job*, 74 FORDHAM L. REV. 1561 (2006).

124. Kelo v. City of New London, 545 U.S. 469 (2005). *Kelo* has been the source of

much commentary by professors, students and other commentators who have examined the impact of *Kelo* of takings jurisprudence and requested either heightened scrutiny or a less deferential standard of review for American communities and towns under siege by foreign competitors other than terrorists. *See generally* Jennie C. Nolon, Note, *Kelo's Wake: In Search of a Proportional Benefit*, 24 PACE ENVTL. L. REV. 271 (2007); Eric L. Silkwood, Note, *The Downlow On* Kelo*: How An Expansive Interpretation Of The Public Use Clauses Has Opened The Floodgates For Eminent Domain Abuse*, 109 W. VA. L. REV. 493 (2007); Peter G. Sheridan, Kelo v. City of New London*: New Jersey's Take on Takings,* 37 SETON HALL L. REV. 307 (2007); Marc L. Roark, *The Constitution as Idea: Describing—Defining—Deciding in Kelo*, 43 CAL. W. L. REV. 363 (2007); Sharon A. Rose, Note, Kelo v. City of New London*: A Perspective on Economic Freedoms*, 40 U.C. DAVIS L. REV. 1997 (2007); 2 Christina M. Senno, Note, *A Threat to the Security of Private Property Rights: Kelo v. City of New London and a Recommendation to the Supreme Court of Rhode Island*, 11 ROGER WILLIAMS U. L. REV. 721 (2006); Paul W. Tschetter, Note, Kelo v. New London*: A Divided Court Affirms the Rational Basis Standard of Review in Evaluating Local Determinations of 'Public Use,'* 51 S.D. L. REV. 193 (2006); Brent Nicholson & Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in* Kelo v. City Of New London, 41 GONZ. L. REV. 81 (2005/2006); Viola Vetter, Kelo*—Midkiff's Latest Victim*, 16 TEMP. POL. & CIV. RTS. L. REV. 257 (2006); Ryan Sevcik, Note, *Trouble in Fort Trumbull: Using Eminent Domain for Economic Development in* Kelo v. City of New London, 85 NEB. L. REV. 547 (2006); Bradley C. Davis, Note, *Substantially Advancing Penn Central: Sharpening the Remaining Arrow in the Property Advocate's Quiver for the New Age of Regulatory Takings*, 30 NOVA L. REV. 445 (2006); Haley W. Burton, Note, *Property Law—Not So Fast: The Supreme Court's Overly Broad Public Use Ruling Condemns Private Property Rights with Surprising Results.* Kelo v. City of New London*, 125 S. Ct. 2655 (2005)*; 6 WYO. L. REV. 255 (2006); Charles E. Cohen, *Eminent Domain After* Kelo v. City Of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491 (2006); David Schultz, *What's Yours Can be Mine: Are There Any Private Takings After* Kelo v. City of New London*?*, 24 UCLA J. ENVTL. L. & POL'Y 195 (2006); Lia Sprague, Note, Kelo v. City Of New London, 32 OHIO N.U. L. REV. 381 (2006); Asmara Tekle Johnson, *Correcting for* Kelo*: Social Capital Impact Assessments and the Re-Balancing of Power Between "Desperate" Cities, Corporate Interests, and the Average Joe*, 16 CORNELL J. L. & PUB. POL'Y 187 (2006); Randy J. Bates, II, Note, *What's the Use? The Court Takes a Stance on the Public Use Doctrine in* Kelo v. City of New London, 57 MERCER L. REV. 689 (2006); James Freda, Note, *Does New London Burn Again?: Eminent Domain, Liberty And Populism in the Wake Of* Kelo, 15 CORNELL J.L. & PUB. POL'Y 483 (2006); Eric Rutkow, Note, *Kelo v. City of New London*, 30 HARV. ENVTL. L. REV. 261 (2006); David Schultz, *Economic Development And Eminent Domain After* Kelo*: Property Rights and "Public Use" Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41 (2006); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335 (2006); R. Ashby Pate, Note, *Constitutional Law—Public Use Clause—Use of Eminent Domain to Promote Economic Development Held Constitutional*, 36 CUMB. L. REV. 407 (2005/2006); J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131 (2005); Justin Morgan Crane, Note, *The Privatization of Public Use: Why Rational Basis Review of A Private Property Condemnation is a Violation of a Fundamental Civil Right*, 28 WHITTIER L. REV. 511, 517-32 (2006); Sonya Jones, Note, *That Land is Your Land, This Land is My Land . . . Until the Local Government Can Turn it for a Profit: A Critical Analysis of* Kelo v. City of New London, 20 BYU J. PUB. L. 139 (2005); Christian M. Orme, Note, Kelo v. New London*: An Opportunity Lost to Rehabilitate the Takings Clause*, 6 NEV. L.J. 272 (2005); Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake Of*

point that the climax of Rehnquist Court in Takings Clause jurisprudence had been reached much earlier. *Kelo's* outcome should not have been unexpected in light of the Court's strong deference to government in *Berman* and *Midkiff*. *Kelo* continues the Court preference for a highly deferential standard of review in resolving disputes requesting Fifth Amendment protection and found no manageable exception for intermediate or strict scrutiny in reviewing disputes arising under the Public Use Clause. *Kelo* is evidence that the climax of the Rehnquist Court had literally been *Dolan*.

Kelo still gives the Public Use Clause new stature in takings jurisprudence. *Kelo i*s consistent with Rehnquist Court decisions under the Takings Clause and shares both the flawed analytical and substantive nature of regulatory takings decisions involving exercises of police powers. *Kelo* lacks the Rehnquist Block's reliance or insistence on constitutional or common law doctrine to underpin a new standard of review, namely moving the deferential standard to the left. Part III analyzes *Kelo* to explain how its contributions to the analytical framework and substantive principles of public use doctrine fit within an overarching constitutional perspective on takings jurisprudence that includes a most deferential standard of review for an exercise of eminent domain power under the Public Use Clause.[125]

A. Business and Policy Circumstances of the Public Use Dispute

Kelo was the Rehnquist Court's first review of a seminal public use dispute. The public use issue presents the classic jurisprudential confrontation on a standard of review or means-ends analysis between the Rehnquist Block and Stevens Coalition, with either Justice O'Connor, Justice Kennedy or both choosing to defect or leave temporarily the Rehnquist Block.[126] In *Kelo*, the City of New London

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Kelo v. City Of New London, 54 DRAKE L. REV. 171 (2005); Julia D. Mahoney, Kelo*'s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103 (2005); Nancy Kubasek & Garrett Coyle, *A Step Backward is Not Necessarily a Step in the Wrong Direction*, 30 VT. L. REV. 43 (2005); Arden Reed Pathak, Comment, *The Public Use Doctrine: In Search of a Limitation on the Exercise of Eminent Domain for the Purpose of Economic Development*, 35 CUMB. L. REV. 177 (2004/2005).

125. In *Kelo*, Justice Stevens, writing for the majority, reveals the Court's reliance on deference when he states that:

> Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

Kelo, 545 U.S. at 484.

126. *See* Holloway & Guy—Tahoe-Sierra, *supra* note 3, at 246-52.

(New London) is located at the junction of the Thames River and the Long Island Sound in southeastern Connecticut.[127] New London was in serious economic decline, actually recognized by a Connecticut agency as a "distressed municipality."[128] Moreover, the Naval Undersea Warfare Center (Center) in the Fort Trumbull Area of New London, which employed over 1,500 people, closed in 1996.[129] In 1997, the state of Connecticut sought to revitalize the economy of New London,[130] while at the same time, New London was experiencing a decline in population. Its 1998 population was the lowest since 1920.[131]

In state economic development policy-making in 1998, the state of Connecticut approved two bond issues to support economic revitalization planning by New London's agent, the New London Development Corporation (NLDC), and to create a Fort Trumbull State Park.[132] At approximately the same time, Pfizer announced that it would build a $30 million research facility next to the Fort Trumbull State Park.[133] Local planners hoped that the Pfizer research facility would be an economic boost to the area.[134] In 2000, New London approved a development plan that would increase employment and tax revenues, and revitalize the downtown and the waterfront areas.[135] A few months later, NLDC received permission from the city council to submit its development plans to the state for approval.[136] When the NLDC later received approval, it finalized a development plan for 90 acres in Fort Trumbull area.[137]

The Fort Trumbull area is located on a peninsula in the Thames

127. *Kelo*, 545 U. S. at 473.
128. *Id.*
129. *Id.*
130. *Id.* Ms. Kelo and perhaps other residents settled or acquired real estate in City of New London (New London) in 1997 or even decades earlier. *Id.* at 475. Yet, the State initiated its revitalization policy-making and programs for New London in 1998 and conducted bond issue in January of 1998. *Id.* at 473. Although it would of little consequence in *Kelo*, landowners would purchase for homeownership or investment on or near the eve of a state revitalization policy-making and planning for a community development should not be treated the same Ms. Dery who had been a life long residence for decades. *See Kelo*, 545 U. S at 475. We stop short of saying that buying for homeownership or speculation in the clear presence of state and municipal economic development or revitalization policy-making and planning is too risky or should not be protected under the Takings Clause. However, homeowners and speculators should understand that courts are more likely to follow precedents unless significant changes are publicly present in norms, traditions and practices underlying public policy.
131. *Id.* at 473.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 474-75.
136. *Kelo*, 545 U.S. at 473.
137. *Id.* at 473-74.

River.[138] Fort Trumbull consisted of 115 privately owned properties.[139] The Fort Trumbull State Park occupied 18 acres.[140] NLDC includes seven parcels in its integrated economic development plans.[141] The parcels and their planned uses are described as follows:

> Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses.[142]

The NLDC plans are intended to increase economic revitalization, improve recreational opportunities and increase aesthetic qualities.[143] In 2000, the city council approved NLDC's integrated development plans and designated NLDC as its agent, thus authorizing it to purchase the property or condemn it by an exercise of eminent domain power.[144]

B. Economic Revitalization as a Public Use under Court Precedents

Economic development and revitalization are legitimate public interests, but not all landowners have been or are willing to sell their land, homes and businesses to the state, county and municipal governments for economic development and revitalization projects. In *Kelo*, NLDC was not successful in acquiring the land it needed for the development project and proposed to use eminent domain to acquire the

138. *Id.* at 474.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Kelo*, 545 U. S. at 474.
143. *Id.* at 474-75.
144. *Id.* at 475.

other land.[145] NLDC initiated condemnation to acquire those parcels where owners were not willing or ready to sell.[146] Fifteen landowners of various residential, ownership and durational statuses sought to challenge the condemnation.[147] The Court lists and describes the landowners as follows:

> Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties.[148]

These fifteen properties were not in blighted areas but were all located in the development area on Fort Trumbull and thus needed for the development project.[149]

In December 2000, Kelo and others filed an action in the New London Superior Court claiming the condemnation by NLDC was in violation of the Public Use Clause of the Fifth Amendment.[150] While litigation was pending in the state trial court, NLDC also announced that it would transfer by lease some of the land to a private developer for a nominal rent of $1.00.[151] The trial court held for the petitioners who owned land in Parcel 4A but against petitioners who owned land in Parcel 3.[152] Both respondent and petitioners appealed to the Supreme Court of Connecticut the issue of whether the condemnations or takings were in violation of the public use restriction of the Fifth Amendment.[153]

The Supreme Court of Connecticut reviewed their issue arising under the Public Use Clause and decided "that all of the City's proposed takings were valid."[154] Moreover, it affirmed the state lower court's

145. *Id.*
146. *Id.*
147. *Id.*
148. *Kelo*, 545 U.S. at 475.
149. *Id.*
150. *Id.*
151. *Id.* at 476, n.4. "While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer." *Id.* (*citing Kelo*, 268 Conn. 1, 9, 61, 843 A.2d 500, 509-510, 540 (2004)).
152. *Kelo*, 545 U.S at 476.
153. *Id.*
154. *Id.*

determination that the takings were authorized by chapter 132, the State's municipal development statute.[155] It found "[t]hat . . . [Chapter 132] expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest."[156] Finally, "relying on . . . [*Berman* and *Midkiff*], the supreme court held that such economic development qualified as a valid public use under both the Federal and State Constitutions."[157] Relying even further on *Berman* and *Midkiff, the* Supreme Court of Connecticut asked, "first, whether the takings of the particular properties at issue were 'reasonably necessary' to achieving the City's intended public use . . .,"[158] and, second, whether the takings were for 'reasonably foreseeable needs.' . . ."[159] Finally, in justifying and supporting its holding, the Supreme Court of Connecticut reasoned that New London's use of the land was "reasonably definite" and had been given "reasonable attention" during the planning processing.[160]

The United States Supreme Court granted a writ of certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment.[161] The Court held that economic development, as economic revitalization of a town or city in serious, long term decay, including depopulation, justifies the use of eminent domain power to take habitable residential and investment properties for public use.[162] Justice Stevens, writing for the majority, carefully reviewed the social and economic effects of industrial and business decline and subsequent revitalization and then addressed the concerns of landowners, especially those holding ownership in a distressed city or town.[163] Justice Stevens noted that the economic development has a legitimate state interest and

155. *Id.* (citing Conn. Gen. Stat. § 8-186 *et seq.* (2005)).

156. *Id.* (citing 268 Conn., at 18-28, 843 A. 2d, at 515-521).

157. *Kelo*, 545 U.S. at 476 (*citing Kelo,* 268 Conn., at 40, 843 A. 2d, at 527, Hawaii *Housing Authority* v. *Midkiff*, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984), and *Berman* v. *Parker*, 348 U.S. 26, 99 L. Ed. 27, 75 S.Ct. 98 (1954)).

158. *Id.* (citing *Kelo*, 268 Conn., at 82, 843 A. 2d, at 552-553).

159. *Id.* (citing *Kelo*, 268 Conn., at 93, 843 A. 2d, at 558-559).

160. *Id. at* 477. Justice Stevens, writing for the majority, also noted that:

> The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A. 2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

Id.

161. Kelo v. City of New London, 542 U.S. 965 (2004).

162. *Kelo*, 545 U.S. at 487-88.

163. *Id.* at 488.

that limited use of condemned land by the public does not rob the land of its public use.[164] Justice Stevens reviewed the Court's precedents, *Berman* and *Midkiff*, and reaffirmed that economic developments and other uses may give private benefits but still remain a public use.[165] Justice Stevens stated explicitly that Court precedent favored deference[166] and subsequently rejected heightened scrutiny or a *per se* test as requiring unnecessary delays in the development process.[167] Justice Stevens bestows upon the municipality considerable authority to make economic development policies that need to bring speculators and unreasonable holdouts to the negotiating table and to preserve the both public and private property interests of its citizens when the neighborhood is declining and lacks readily available investors[168].

The Court imposes an *ultra* deferential standard of review under the Federal Constitution and greatly diminishes the right to receive just compensation by placing it under the control of municipal funding programs that have the means to pay for land as a public use. This gravely diminished the right to receive just compensation and makes just compensation no more than a constitutional voucher to collect a constitutional dole on government land grabs when cash or debt is plentiful.

The Court cannot find any intermediate ground on which to fashion a means-ends test nor does it settle upon a universal standard of review to govern such truly unique circumstances or factual patterns. Both dissents do no better than Justice Stevens when community policies and property rights clash. Justice O'Connor, who is joined by Chief Justice

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164. *Id.* at 478, n.6, citing *Kelo*, 268 Conn., at 159, 843 A. 2d, at 595 (Zarella, J., concurring in part and dissenting in part) ("The record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront."). . . ."

Moreover the Court notes that when the municipal plans and policies require the transfer of condemned land to a third party and the identity of the third party is not known, this future transfer would not undermine the purpose of the economic development. *Id.* at 478n.6. The Court states that:

> And while the City intends to transfer certain of the parcels to a private developer in a long-term lease—which developer, in turn, is expected to lease the office space and so forth to other private tenants—the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown.

Id.

165. *Kelo*, 545 U.S. at 479-83.

166. *Id.* at 479.

167. *Id.* at 484-85.

168. *Id.* at 488-89.

Rehnquist and Justices Scalia and Thomas, dissented and would apply a bright line test or heightened scrutiny to protect private property rights and interests of landowners from the wrongful impact of corporate induced economic development.[169] Justice O'Connor would require community blight as a condition for the exercise of eminent domain power to engage in economic development for community revitalization[170] and prohibit the transfer of condemned land to private parties for economic development projects.[171] But Justice O'Connor did not offer a workable test or approach to address holdouts and competing interests in reviewing challenges to exercises of eminent domain power. First, her per se approach would not give a community the leverage, namely eminent domain power, to bring wealth-maximizing speculators and recalcitrant landowners to the negotiating table. Second, her per se approach would not weigh and then choose among competing and often conflicting interests of business corporations, landowners, and business speculators in community development projects. Justice O'Connor would find that condemnation of Parcels 3 and 4 were takings in violation of the Public Use Clause.[172]

Justice Thomas also wrote a dissenting opinion that would overturn well established precedents, namely *Berman* and *Midkiff*.[173] Justice Thomas would institute a broader bright-line test that would roll back *Berman* and *Midkiff* under constitutional theory relying on the original intent of the Framers of the Takings Clause.[174] Justice Thomas seemed willing to give speculators a windfall and allow a few landowners to dictate public policy if they owned or purchased before or even during

169. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).
170. *Id.* at 501-02 (O'Connor, J., dissenting).
171. *Id.* at 502-03 (O'Connor, J., dissenting).
172. *Id.* at 505 (O'Connor, J., dissenting).
173. *Kelo*, 545 U.S. at 514-15 (Thomas, J., dissenting).
174. *Id.* at 509-10 (Thomas, J., dissenting). Justice Thomas states that:

> Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. *See ibid.* ("Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. *See S*ales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L. J. 339, 367-368 (1999) [hereinafter Sales] (noting contrast between, on the one hand, the term "'public use" used by 6 of the first 13 States and, on the other, the terms "public exigencies" employed in the Massachusetts Bill of Rights and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786). The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking."

the policy-making planning process.[175] Justice Thomas' interpretation of

Id. (Thomas, J., dissenting).

175. *See id.* at 521 (Thomas, J., dissenting). Justice Thomas' return to original meaning of the Public Use Clause empowers property owners who often may not own ghettos and poor neighborhoods or even live in the community. Justice Thomas states that "[f]or all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property." *Id.* (Thomas, J., dissenting). This narrow interpretation of the Public Use Clause would give leverage to speculators and homesteaders, who just may not live in the community, but purchase or hold land to extort wealth or policy-making favors when communities seek to revitalize or redevelop areas most likely to face imminent decline and eventual blight or deterioration.

Justice Thomas sees another scenario in finding that the majority opinion would have tragic outcomes for communities but communities are often driven by motives other than profits and may respond to public and private needs and guard against hardship imposed by wealth maximizing individuals or corporations. Justice Thomas' does not weigh the private property interests and public interests in finding that communities may abuse or misuse eminent domain power. He states that

> The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. . . .

Id. (Thomas, J., dissenting). Many communities are doing what slumlords or risk adverse investors would not attempt to do. Shutting down the marketplace because communities have yet to be fair in relocating African-American, Latino and other minorities is just not logical. Why not use constitutional authority to bring about social fairness rather than shutting economic opportunities. *See, e.g.* J. Peter Bryne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131 (2005); David A. Dana, *The Law And Expressive Meaning Of Condemning The Poor After Kelo*, 101 NW. U.L. REV. 365 (2007); Olga V. Kotlyarevskaya, *"Public Use" Requirement In Eminent Domain Cases Based On Slum Clearance, Elimination Of Urban Blight, And Economic Development*, 5 CONN. PUB. INT. L.J. 197 (2006); Matthew J. Parlow, *Unintended Consequences: Eminent Domain And Affordable Housing*, 46 SANTA CLARA L. REV. 841 (2006) (Symposium); Harry P. Carroll, *Where to Go After Kelo? Back to the Future!*, 29 W. NEW ENG. L. REV. 75 (2006).

Justice O'Connor shares Justice Thomas' flaw of proselytizing about social welfare and not giving similar analysis or weigh to the economics of public use. *See Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Justice O'Connor states that

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. . . .

Id. (O'Connor, J., dissenting). Justices O'Connor and Thomas failed to see the need for compromise that would encourage both landownersand corporation to participate in policy-making involving economic and social concerns.

the Takings Clause permits land to be used as economic and political leverage to acquire higher prices and maintain the status quo, respectively, while municipalities redevelop or revitalize the community around them. But he would prohibit the use of eminent domain power to counterbalance small pockets of economic and political leverage.[176]

One must not believe that the Framers and the King before them did not consider basic economic principles, and thus they always chose not to take land ,but rather to purchase it in a scarce land market. As any effective ends conditions, public use must not allow government to execute or abuse a landowner's right to just compensation or abuse this right to further public policy by providing economic incentives. The right to just compensation is not a private stick to thwart or deter the making of social, economic or other policies.

Obviously, eminent domain permits the government to avoid or seek a compromise in negotiating with a few private parties or landowners regarding the direction and benefits of social, economic and other policies. Imposing a strict standard of review, under some circumstances, turns the right of just compensation into a private or personal policy stick to deter and thwart community policies. Justices O'Connor and Thomas would impose a higher standard of review under the Federal Constitution on public use decisions. Justices O'Connor and Thomas would base this standard on the need to protect against corporate inducement of policy-makers and follow the original intent of the Framers, respectively, with little or no constitutional theory to protect against an enlargement of the right to receive just compensation. The enlarged right to receive just compensation turns public use decision-making into a governmental process where a sentimentalist, speculator, holdout or another landowner could use this process to influence community policy-making and control community policies.

C. *Intermediate Means-Ends Analysis or Scrutiny of Burdensome Community Policy-Making*

Unequivocally, both means and perhaps ends of a few exercises of eminent domain power are worthy of heightened scrutiny and are not worthy of total deference to city, county and state policy-makers. These individuals must decide between real estate market failure and spreading community stagnation that may lead to eventual blight.[177] Although our

176. *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting); *see also infra* Part IV.C and accompanying text (explaining the impact on communities if courts review public use decision under heightened scrutiny, especially a broadly designed *per se* test).

177. Professors, students and commentators have had much to say regarding the nature of the standard of review for public use claims similar to *Kelo*. *See, e.g.*, Eric

notions of heightened scrutiny do not always rise to the level of *per se* and strict scrutiny tests under the Takings Clause,[178] they still permit state and federal courts to conduct closer scrutiny or review of a highly repugnant condemnation process and its public purposes, objectives and needs set forth by community policy-makers as public policy.[179]

In the context of takings jurisprudence, heightened scrutiny would treat an exercise of eminent domain power as government means to particular ends or objectives, and these means would be justified by public ends or objectives that are attributable to unique community circumstances causing and justifying the need to preserve or restore the

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Silkwood, Student Note, *The Downlow On Kelo: How An Expansive Interpretation Of The Public Use Clauses Has Opened The Floodgates For Eminent Domain Abuse*, 109 W. VA. L. REV. 493 (2007) (suggesting a narrow interpretation that would entail strict or *per se* scrutiny); Christina M. Senno, Note, *A Threat to The Security of Private Property Rights: Kelo v. City of Mew London and a Recommendation to the Supreme Court of the Rhode Island*, 11 ROGER WILLIAMS U. L. REV. 721 (2006) (suggesting the Court should have applied heightened scrutiny to protect property rights); Paul Tschetter, Student Note, *Kelo v. New London: A Divided Court Affirms The Rational Basis Standard Of Review In Evaluating Local Determinations Of 'Public Use,'* 51 S.D. L. REV. 193 (2006) (finding that the Court's deferential review supports the needs of local government); Brent Nicholson & Sue Ann Mota, *From Public Use To Public Purpose: The Supreme Court Stretches The Takings Clause In Kelo v. City Of New London*, 41 GONZ. L. REV. 81 (2006) (discussing the implications and impacts of *Kelo* in policy-making for economic development); Viola Vetter, *Kelo—Midkiff's Latest Victim, Temple Political & Civil Rights Law Review*, 16 TEMP. POL. & CIV. RTS. L. REV. 257 (2006) (concluding that *Midkiff* had been wrongly decided and that *Kelo* should have imposed heightened scrutiny); J. Peter Bryne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131 (2005) (finding the need for a deferential review to support of low-income residents in urban neighborhoods but advocating a broader interpretation of just compensation is broaden); Justin Morgan Crane, Student Note, *The Privatization Of Public Use: Why Rational Basis Review Of A Private Property Condemnation Is A Violation Of A Fundamental Civil Right*, 28 WHITTIER L. REV. 511, 527-28 (2006) (finding that private property rights should be a fundamental rights and thus heighten scrutiny apply); Christian M. Orme, *Note, Kelo v. New London: An Opportunity Lost to Rehabilitate the Takings Clause*, 6 NEV. L.J. 272 (2005) (suggesting the Court should have applied heightened scrutiny to protect property rights).

178. *See Dolan*, 512 U.S. at 388-89. In *Dolan*, the Court examined and discussed the merits of three standards of review for takings disputes. *Id.* The Court settled on an intermediate standard of review in fashioning the rough proportionality test to review takings claims involving land dedication conditions. *Id.* at 393-95.

179. *See County of Wayne v. Hathcock*, 684 N.W.2d 675 (Mich. 1975), *overruling*, Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981). In *Hathcock*, the Supreme Court of Michigan held that condemnation of land for economic development, namely a business and technology park, was not a public use under the Michigan Constitution, MICH. CONST. ART. 10, § 2, in that this park would not be subject to public oversight once it was developed and that the park lacked any public significance. *Hathcock*, 684 N.W.2d at 783-85. In *Hathcock*, the Supreme Court of Michigan applied heightened scrutiny to determine whether the taking of private land was for a public use. *Id.* at 785.

economic and social characters of the community.[180]

Moreover, these objectives of condemnations must be governed by state and community planning and plans[181] where old market conditions and solutions may have already failed or will likely fail in sustaining community growth and development in the global marketplace of the technology, knowledge or information economy.[182] The ineffectiveness or total failure of old market solutions and conditions, such as textile, steel and other manufacturing industries, once the staple of many local economies, is evidence of an imminent or actual deterioration or degradation of the most fundamental community interests, such as new business expansion, quality schools, affordable housing, better jobs, public safety, community security and others.[183] Notwithstanding an eventual need for government intervention in sustainable city and county economic development and growth, repugnant condemnations or abuses of eminent domain power still undermine the right to just compensation by allowing government to impose on itself a liability that is merely the price of land and not the public burden of viable public interests and private needs. Therefore, the protection of the right to just compensation justifies heightened scrutiny to avoid a public subsidy of infeasible and unprofitable real estate, commercial or industrial developments that may appear to be evidence of a larger tax base but show little visible impact on other public interests, other than a job or two.[184]

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180. *See Dolan*, 572 U.S. at 388-89 (explaining that heighten scrutiny or an intermediate standard of review gave closer scrutiny of the objectives and means). In *Dolan*, the Court applies heighten scrutiny to land dedication conditions and found that these condition did further their objectives. *Id.* at 362.

181. *See* Kelo v. City of New London, 545 U.S. 469, 483-84 (discussing the process established by the legislature in the state of Connecticut).

182. *Id.* at 472-73 (declining industries, closure of a military base and declining populations foretell the eventual demise of New London in a technology- and knowledge-based economies).

183. *See also* James H. Johnson, Jr., *A Conceptual Model for Enhancing Community Competitiveness in the New Economy*, 37 URB. AFF. REV. 763, 773 (2002) [hereinafter Johnson-Urban Affairs]. Professor Johnson finds that a community needs six sources of competitive assets or capital to compete in knowledge-based global economy: "polity, physical, financial, human, cultural, and social." *Id.* at 764. Professor Johnson states that:

> It is imperative to note that the absence of any one of the six types of capital discussed above can seriously encumber the ability of a community to compete in the new economy. . . .
>
> Thus, to ensure that the full complement of capital is present, a local community's polity capital assets have to be agile and flexible, not static or beaucratic. To foster and enhance community competitiveness, the local government has to assume the role of managing partner.

Id. at 773-74.

184. *See* Holloway & Guy—Social Welfare, *supra* note 22, at 27-30. Residential, commercial and other development may not pay for itself by increasing the tax base or providing job, and this development may control public budgets and expenditures. *Id.*

A few circumstances would trigger heightened scrutiny that would avoid giving great deference to community policy-makers. Taking and transferring more land than a developer needs, giving land, tax and other development incentives to initiate development, failing to weigh the economic risk and financial liability of an infeasible alternative, and responding directly to a request by a private developer would trigger heightened scrutiny.[185] Moreover, the exercise of eminent domain to further a business organization, major community employer or private developer would trigger heightened scrutiny.[186] However, heightened scrutiny would not apply to blighted communities that suffer from population shifts or the refusal or inability of owners to restore needed housing and commerce that causes or would eventually cause a substantial threat to public health, safety and welfare.[187] On the other hand, heightened scrutiny would apply to the exercise of eminent domain power to take blighted properties where their condition was caused or substantially hastened by a natural disaster[188] followed by a subsequent capital market failure or shortage of capital funds. Such insufficient capital makes redevelopment prohibitively costly for the former residents and owners, especially when the new uses of real estate is so substantially different from past uses. Thus, a standard of heightened scrutiny effectively protects the community's residents and owners from being forced to relocate when natural or other circumstances force

185. *Kelo*, 545 U.S. at 502-03 (O'Connor, J., dissenting) (recognizing that economic development to benefit a private corporation under some circumstances justifies heightened scrutiny).

186. *See id.* (O'Connor, J., dissenting) (finding that New London's objectives for or condemnation were merely to satisfy Pfizer's research center needs); *see also* County of Wayne v. Hathcock 684 N.W.2d 765, 675 (Mich. 2004). The Supreme Court of Michigan held that the condemnation of land for economic development, namely a business and technology park, was not a public use under the Michigan Constitution. *Id.* at 783-85.

187. *See* Parker v. Berman 348 U.S. 26, 35 (1954).

188. Hurricanes Rita and Katrina devastated Gulf Coast urban and rural communities that included sizable low income populations and communities. Eventually, many old and a new structures must be replaced or renovated due to wind or water damage and thus may give some communities an entirely different appeal and look to both old and new residents. *See generally* Brian Duffy et al., *Anatomy of a Disaster: Monday, August 29; "I knew that rainwater didn't cause flooding like that."*, U.S. NEWS & WORLD REPORT, Sept. 26, 2005, at 30 (describing making of crisis unfolding on Monday, Aug. 29, 2005); John W Day, Jr., et al., *Restoration of the Mississippi Delta: Lessons from Hurricanes Katrina and Rita*, 315 SCIENCE 1679 (Mar. 23, 2007) (discussing the impact of human activity on the deterioration of the coastline).

Other commentators have recognized that the exercise of eminent domain may be needed to address housing shortages caused by natural disasters and community conditions. Carol Necole Brown & Serena M. Williams, *The Houses That Eminent Domain And Housing Tax Credits Built: Imagining A Better New Orleans*, 34 FORDHAM URB. L.J. 689 (2007); Symposium, *Addressing Housing Needs In The Post Katrina Gulf Coast*, 31 T. MARSHALL L. REV. 327 (2006).

temporary to permanent changes in the economic, social and political life of a community.[189]

Heightened scrutiny of land transactions or development to provide real estate market products and services, such as commercial space and the best location, must include financial and market analyses.[190] We expect that the Court includes a few justices who can recognize wipeouts and windfalls[191] and also understand that market risks and financial returns weigh heavily in economic development decisions, such as real estate development.[192] Real estate developers generally have expectations of making greater than normal returns, thus avoiding any development project offering a lesser return.[193] In the case of publicly managed development, the state or local government may not depend entirely on a greater than market returns, but public coffers must find or contain sufficient capital or acquire it for economic development projects. Another factor is the complexity of the project. A private developer with real estate market and development experience might be best suited to complete a proposed real estate development project that includes greater than normal risks and exceeds local government expertise. Private developers normally have engaged in commercial, industrial or residential developments, thus bringing knowledge and experience of costs, risks and other considerations. Notwithstanding the developer's expertise, heightened scrutiny is justified for development projects with demonstrated high financial risk and providing reasonably low returns, while being heavily subsidized by a government grant or transfer of land.

IV. Analysis of *Chevron, U.S.A.* and Regulatory Taking Jurisprudence for a Means-Ends Analysis

The Court's decision in *Lingle v. Chevron, U.S.A., Inc.*[194] supports

189. *See generally* Jason David Rivera & DeMond Shondell Miller, *Continually Neglected: Situating Natural Disasters in the African American Experience*, 37 J. BLACK STUDIES 502 (Mar. 2007) discussing the impact of natural disasters on the African American experience).

190. *See* Guy & Holloway—Development Value, *supra* note 40, at 307-08 (discussing real estate development interests and market risks).

191. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (Scalia, J., concurring). For an analysis of *Palazzolo* and its implications for the resolution of takings disputes raising economic impact issues under the Takings Clause, *see* James E. Holloway & Donald C. Guy, Palazzolo's *Impact on Determining the Extent of Interference with Investment-Backed Expectations*, REAL ESTATE L.J. 19-45 (Summer 2003) [hereinafter Holloway & Guy—*Palazzolo's* Impact]; Holloway & Guy—Development Value, *supra* note 40, at 288-343.

192. *See* Guy & Holloway - Development Value, *supra* note 40, at 307-08.

193. *See id.* at 307.

194. Lingle v. Chevron, 544 U.S. 528 (2005).

the point that the climax of the Rehnquist Court in Takings jurisprudence had been *Dolan, circa* 1994. *Chevron* shows how dictum leads to an almost meaningless *per se* takings standard of review and likewise unjustifiable intermediate takings standard of review. *Chevron* is a familiar episode of regulatory takings jurisprudence that frequently addresses whether a particular takings claim should be subjected to heightened scrutiny under the Takings Clause. As usual, *Chevron* is another example of the Court choosing to defer to policy objectives of municipal and state governments. This deference, coupled with a reluctance to interfere with local matters, makes *Lucas* and *Dolan* appear to be less viable precedents as they become difficult to apply in the Court and other federal appellate courts.[195] Part IV analyzes *Chevron* to explain how its analytics and substance fit within an overarching constitutional perspective on an almost pre-disposed takings jurisprudence that has greatly favored a deferential standard of review for exercises of police power under the Takings Clause.

A. The Policy Objectives of the Dispute under the Takings Clause

Rent control is a well-established government interest to provide or secure adequate housing for local residents and their families.[196] The Rehnquist Court decided whether a rent control ordinance raised a regulatory taking issue in *Yee v. City of Escondido.*[197] With Justice O'Connor writing for the majority, the Rehnquist Court concluded that a physical taking did not occur in *Yee* under the physical takings principles of *Loretto v. Teleprompter Manhattan CATV Corp.*,[198] where the tenant in *Yee* received a premium on the transfer of the leasehold estate so long as the owner retained rights in the mobile home slab, and thus the rent control ordinance was not a regulatory taking.[199] In *Yee*, the Court found that City of Escondido's rent control ordinance was not a physical occupation.[200] Emphatically, the Court stated that "[p]ut bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government."[201] The Court found that the rent control ordinance regulated the use of land by governing the relationship between the

195. *See* Holloway and Guy—Tahoe-Sierra, *supra* note 3, at 289 (discussing the efforts to apply *Lucas* and *Dolan* in other takings claims).
196. *See* Yee v. City of Econdido, 503 U.S. 519 (1992).
197. *Id.*
198. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
199. *Yee*, 503 U.S. at 538.
200. *Id.* at 528.
201. *Id.* (citing FCC v. Florida Power Corp., 480 U.S. 245, 252-253 (1987)).

landlord and tenant.[202] The Court concluded that the rent control ordinance was not a physical taking.[203] In *Yee*, the Court also concluded that petitioners did not properly raise a regulatory takings question regarding the validity of rent control ordinance.[204]

Rent control ordinances or statutes are legislative determinations that do not routinely fit among land use controls and other regulations that have been subject to heightened or intermediate scrutiny.[205] Rent control legislation is neither a physical occupation[206] nor a conditional demand,[207] and thus it benefits tremendously from deference the Court permits under the *Penn Central* inquiry in addressing housing policy choices made by municipal and state policy-makers and boards.[208]

Curiously, in *Chevron*, the United States Court of Appeals for the Ninth Circuit deviated substantially from the Court's well-established position on federal judicial intervention that has been mostly reluctance and reticence, more often giving great deference to municipal and county policy-makers for land use, growth management and other regulation.[209]

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202. *Id.*

203. *Id.* at 533.

204. *Id.*

205. *See* City of Monterey v. Del Monte Dunes at Montery, Ltd., 526 U.S. 687, 702-03 (1999) (describing nature the of land use controls and development impact exactions in the field of land use regulation). In *Del Monte Dunes*, the Court states that:

> Although in a general sense concerns for proportionality animate the Takings Clause . . . we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. *See Dolan*, 512 U.S. 374, 385; Nollan v. Ca. Coastal Comm'n, 483 U.S. 825, 841, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

Del Monte Dunes, 526 U.S. at 702-03.

206. *Yee*, 503 U.S. at 538 (finding rent control ordinance is not a physical invasion under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) and thus not a regulatory taking).

207. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (establishing heightened scrutiny that found a land dedication condition imposed on private property rights was protected by the right to receive just compensation).

208. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (setting forth a ad hoc test to determine whether a land use regulation amounts to a regulatory taking); *see also supra* Part II.B and accompanying notes (discussing the development of regulatory takings law during Chief Justice Rehnquist's tenure on the Court, including his tenure as an Associate Justice).

209. *See supra* Part II.B and accompanying notes (discussing the Rehnquist Court's efforts to adopt *per se* test and its eventual reliance on a highly deferential test that is mostly an ad hoc factual inquiry).

In fact, the Ninth Circuit intervened by applying intermediate or heightened scrutiny to a state rental control ordinance that involved a commercial leasehold estate, thus giving more protection to the corporation's economic needs or market interests and not Hawaii's social objectives. We are pressed to ask what dicta in *Agins* became so seductive that the Ninth Circuit could not resist foregoing its logic in *Chevron* by trying to mimic *Dolan* with little if any constitutional foundation akin to or an equivalent to the Unconstitutional Conditions Doctrine.[210]

In *Chevron,* Hawaii's wholesale market for oil products is highly concentrated due to its size and location.[211] In 1997, Chevron, U.S.A., Inc. (hereinafter Chevron) was Hawaii's largest refiner and marketer of gasoline.[212] In fact, its market share for refined gasoline produced and refined in state was 60 percent.[213] Its market share for the wholesale gasoline market was 30 percent.[214] In Hawaii, gasoline is sold at retail service stations.[215] "About half of these stations are leased from oil companies by independent lessee-dealers, another 75 percent or so are owned and operated by 'open' dealers, and the remainder are owned and operated by the oil companies."[216] Chevron sells its gasoline and other oil products through 64 independent lessee-dealer stations.[217] In these arrangements, Chevron usually "charges the lessee-dealer a monthly rent, defined as a percentage of the dealer's margin on retail sales of gasoline and other goods."[218] The lessee-dealer must also enter into a supply contract that requires the lessee-dealer to "purchase from Chevron whatever is necessary to satisfy demand at the station for Chevron's product.[219] Chevron unilaterally sets the wholesale price of its product."[220]

In June 1997, the Hawaii Legislature enacted Act 257 to address market concentration of retail gasoline wholesalers and its effects on gasoline prices.[221] Act 257 sought "to protect independent dealers by imposing certain restrictions on the ownership and leasing of service

210. *See infra* Part IV.B and accompanying note (explaining *Agins'* substantially advances language and its role as a standard of review).
211. *Chevron*, 544 U.S. at 532.
212. *See id.*
213. *See id.*
214. *See id.*
215. *See Chevron*, 544 U.S. at 532-33.
216. *Id.* at 533.
217. *See id.* at 532-33.
218. *Id.* at 533.
219. *Id.*
220. *See Chevron*, 544 U.S. at 533.
221. *See id*; *see also* H.B. 1451, 19th State Leg., 1997 Haw. Sess. Laws 257.

stations by oil companies,"[222] such as Chevron. Act 257 "prohibits oil companies from converting existing lessee-dealer stations to company-operated stations and from locating new company-operated stations in close proximity to existing dealer-operated stations."[223] "More importantly for present purposes, Act 257 limits the amount of rent that an oil company may charge a lessee-dealer to 15 percent of the dealer's gross profits from gasoline sales plus 15 percent of gross sales of products other than gasoline."[224]

B. The Economic Nature of the Issue under Review

Government regulation can confer or force the transfer of an economic benefit by one landowner to another landowner or party and not always provide any satisfactory or equivalent reciprocity of advantages to the transferor that presumptively transfers an economic benefit to another person who may convey, in some instances, this benefit to another person for a premium in a property transaction. In *Chevron*, Chevron sued the Governor and Attorney General of Hawaii in the United States District Court for the District of Hawaii.[225] Chevron raised a takings claim, among others, claiming that Act 257, a rent control act, is a facial taking that is, in effect, a taking of Chevron's property in violation of the Fifth and Fourteenth Amendments.[226] The parties sought summary judgment and agreed on the four stipulated circumstances or facts listed immediately below in this paragraph.[227] First, "Act 257 reduces by about $207,000 per year the aggregate rent that Chevron would otherwise charge on 11 of its 64 lessee-dealer stations. . . ."[228] Second, Act 257 "allows Chevron to collect more rent than it would otherwise charge at its remaining 53 lessee-dealer stations, such that Chevron could increase its overall rental income from all 64 stations by nearly $1.1 million per year. . . ."[229] Third, "Chevron has not fully recovered the costs of maintaining lessee-dealer stations in any State through rent alone. Rather, the company recoups its expenses through a combination of rent and product sales. . . ."[230] Fourth, "Chevron has earned in the past, and anticipates that it will continue to earn under Act 257, a return on its investment in lessee-dealer stations in

222. *Chevron*, 544 U.S. at 533.
223. *Id*; *see also* Haw. Rev. Stat. §§ 486H-10.4(a), (b) (1998).
224. *See Chevron*, 544 U.S. at 533; *see also* § 486H-10.4(c)).
225. *See Chevron*, 544 U.S. at 533.
226. *See id.*
227. *See id* at 533-34.
228. *Id.* at 534.
229. *Id.*
230. *Id.*

Hawaii that satisfies any constitutional standard. . . ."[231]

The United States District Court for the District of Hawaii granted summary judgment to Chevron. In *Chevron U.S.A. Inc.* v. *Cayetano*[232] *(Chevron I),* the district court held that "Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments."[233] The district court found that the intent of Act 257 was to reduce market concentration and reduce gasoline prices.[234] However, the district court concluded that Act 257 would not reduce lessee-dealers' business costs and retail gasoline prices and thus did substantially advance a legitimate state interest.[235] Moreover, the district court found that a rent cap would not allow incumbent lessee-dealers to gain a premium on transferring the lease, and since incoming lessee-dealers' expenses would not change, there would be no savings to pass on to the consumers.[236] The district court concluded that "the oil company lessor would unilaterally raise wholesale fuel prices in order to offset the reduction in their rental income."[237] The State of Hawaii appealed the district court's judgment, and the United States Court of Appeals for the Ninth Circuit vacated and remanded *Chevron I* to the district court for it to determine whether Act 257 would benefit consumers.[238]

On remand of *Chevron I,* the district court entered a judgment for Chevron.[239] In *Lingle v. Chevron, U.S.A., Inc.*[240] *(Chevron II),* the "district court . . . concluded that oil companies would raise wholesale gasoline prices to offset any rent reduction required by Act 257, and that the result would be an increase in retail gasoline prices."[241] The district court found that consumers would not receive any savings in gasoline[242] and that incumbent lessee-dealers could sell their leaseholds at a premium and that incoming lessee-dealers would not benefit from the

231. *Id.*
232. Chevron U.S.A. Inc. v. Cayetano, 57 F. Supp. 2d 1003 (D. Haw. 1998) [hereinafter *Chevron*].
233. *Chevron,* 544 U.S. at 534 (citing *Chevron I,* 57 F. Supp. 2d at 1014).
234. *See id.*
235. *See id*; *see also Chevron I,* 57 F. Supp. 2d at 1010-1012.
236. *See Chevron,* 544 U.S. at 534-35; *see also Chevron I,* 57 F. Supp. 2d at 1009-1010.
237. *Chevron,* 544 U.S. at 535 (citing *Chevron I,* 57 F. Supp. 2d at 1012-1014).
238. *See id*; *see also* Chevron U.S.A. Inc. v. Cayetano, 224 F.3d 1030, 1037-1042 (9th Cir. 2000).
239. *See generally Chevron I,* 57 F. Supp. 2d at 1003; *see also* Chevron U.S.A., Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1183 (D. Haw. 2002) [hereinafter *Chevron II*].
240. *Chevron,* 544 U.S. at 528.
241. *Id.* at 535 (citing *Chevron II,* 198 F. Supp. 2d at 1187-89.).
242. *Id.* at 535 (citing *Chevron II,* 198 F. Supp. 2d at 1189.).

rent cap.[243] The district court acknowledged that oil companies could not raise the rent to constructively evict lessee-dealers but no evidence existed to establish that oil companies would do so.[244] The district "court concluded that Act 257 would in fact decrease the number of lessee-dealer stations because the rent cap would discourage oil companies from building such stations"[245] and thus held that "Act 257 effected an unconstitutional regulatory taking given its failure to substantially advance any legitimate state interest."[246] The Ninth Circuit affirmed and held that *Chevron I* barred Hawaii from challenging the application of the "substantially advances" test to Chevron's takings claim or from arguing for a more deferential standard of review.[247]

Chevron requested review of the Ninth Circuit's decision. The United States Supreme Court granted a writ of certiorari[248] and reversed the decision of United States Court of Appeals for the Ninth Circuit.[249] The Court decided what was obvious in *Penn Central Transp. Co.* and its progeny, that heightened scrutiny should not exist for all legislative determinations and that *Agins* did not compel a higher standard of review for legislative determinations, notwithstanding the landowner's burden in establishing a facial taking.[250] *Agins* has little application outside the context of a facial challenge. Within the context of a facial challenge, however, *Agins* imposed a heavy burden on landowners who seek to declare a statute an unconstitutional takings before the landowner knew the effects of the statute's application. Moreover, the Ninth Circuit's argument that referred *Nollan* and *Dolan* to support heightened scrutiny is illogical to create intermediate scrutiny because the Ninth Circuit offers no constitutional doctrine to connect rent control protection and the need for greater protection of the right to just compensation.

In fact, the Rehnquist Court had refused to establish a bright line test or heightened scrutiny by explicitly limiting *Dolan* to adjudicative

243. *Id.* (citing *Chevron II*, 198 F. Supp. 2d at 1190).
244. *Id.* at 536 (citing *Chevron II*, 198 F.Supp. 2d at 1191).
245. *Id.* (citing *Chevron II*, 198 F.Supp. at 1191-92).
246. *Chevron*, 544 U.S. at 536 (citing *id.* at 1193).
247. *Id.* (citing 363 F.3d 846, 849-855 (2004)).
248. *Chevron*, 543 U.S. at 924.
249. *Chevron*, 544 U.S. at 536.
250. *See Agins*, 447 U.S. at 260-61. When a landowner tries to establish a taking on the face of the regulation under a facial challenge, the Court has referred to this challenge as "an uphill battle." Keystone Bituminous Coal Assn v. Debendictis, 480 U.S. 470, 495 (1987). Justice Stevens, writing for majority, states that "Petitioners thus face an uphill battle in making a facial attack on the Act as a taking. The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests in western Pennsylvania. . . ." *Id.* at 495-96.

determinations in *Del Monte Dunes,*[251] and *Lucas* to denial of economically viable use claims only involving land with little or no economic value in *Palazzolo.*[252] Although the Ninth Circuit had most diligently tried to apply *Agins'* dicta as heightened scrutiny in *Chevron,*[253] the gradual erosion of the *Lucas per se* test should have alerted the Ninth Circuit to the difficulty of using *Agins* once again to provide scrutiny of takings claims involving property rights in the post *Lochner* era. The Ninth Circuit's doctrinal underpinning for *Agins'* substantially advances test as heightened scrutiny is missing both *Lucas'* common law doctrine and *Dolan's* constitutional doctrine.[254] Nevertheless, all legislative determinations should not be subject to a reasonably related test or a *per se* test in light of *Armstrong's* requirements of fairness and justice, thus requiring the design of means-ends tests to strike a proportional balance between restricting property rights and furthering public interests under the Takings Clause.[255]

C. Establishing Heightened Scrutiny on More Than Agins' Dicta

Using bare "substantially advances" language of *Agins* to impose heightened scrutiny lacks a doctrinal foundation in constitutional and takings jurisprudence, and shows no justification for giving greater protection to the right to receive just compensation against rent control ordinances.[256] Arguably, commercial rent control places no greater burden on the right to receive just compensation than does residential rent control. The constitutional justification for heightened or

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251. *See Del Monte Dunes*, 526 U.S. at 702-03.

252. *See Palazzolo*, 533 U.S. at 626.

253. *See Chevron*, 544 U.S. at 536 (quoting *Chevron II*, 363 F.3d at 849-55.) In *Chevron*, the Court notes the fact that "[t]he Ninth Circuit affirmed, holding that its decision in the prior appeal barred Hawaii from challenging the application of the "substantially advances" test to Chevron's takings claim or from arguing for a more deferential standard of review."

254. *See Chevron II*, 363 F.3d at 857. Notwithstanding its reliance on *Yee*, the Ninth Circuit does not show how the right to receive just compensation would be so greatly undermined or eviscerated by the possible loss of a premium and its eventual transfer and puts forth no common law or constitutional doctrine to establish need to give greater protection to the right to receive just compensation under a rent control ordinance. *Id.* at 857-58; *see also infra* Part IV.C and accompanying notes (discussing the use of constitutional doctrine and common law principles in *Dolan* and *Lucas*, respectively, to support heightened scrutiny).

255. Holloway & Guy—Tahoe-Sierra, *supra* note 3, at 277-78 (discussing justification for heightened scrutiny of some regulatory takings claims).

256. *See Dolan*, 512 U.S. at 385 (relying on the unconstitutional conditions doctrine as federal Constitutional doctrine to underpin the rough proportionality test); *see also* Holloway & Guy—Tahoe Sierra, *supra* note 3, at 288-92 (arguing that *Armstrong's* use by the Court passes dicta and may rise to the level of constitutional doctrine to underpin new takings principles).

intermediate scrutiny would not be supported by a slight connection between commercial rent control and the right to receive just compensation.[257] The landlord may lose a premium on the sale of land, but this impact on the right to transfer land or property interest is not an overwhelming threat to a most fundamental interest in property under these circumstances.

This loss of revenues on the transfer or sale of land in *Chevron* is not as intrusive as an interference with the right to exclude others in *Dolan* or to a denial of all economically viable use in *Lucas*. *Dolan* and *Lucas* involve landowners that must either gratuitously transfer an interest or totally forego using an interest. In both *Dolan* and *Lucas*, this obligation to surrender a property interest is tantamount to giving the State a property interest, but the State did not offer just compensation for these transfers (takings) of property and its development by regulation.[258] The right to transfer is important.[259] However, one must ask whether a rent control ordinance that creates the possibility of a loss of a premium or part of the price must always be equivalent to having to completely forego the right to develop. The later would result in a total loss of investment-backed expectations or cause the landowner to sustain a substantial market or economic loss through diminution of a value. Therefore, the germaneness or connection between rent control and the right to just compensation necessary to justify heightened scrutiny of a commercial rent control statute has not been fully explored by the Ninth Circuit. This leaves doubt as to whether the level of germaneness between the rent control statute and a loss of right to just compensation relied on in *Dolan* and *Lucas* could ever exist on the facts of *Chevron* that include the loss of a premium.[260]

In *Chevron II*, the Ninth Circuit creates a "substantially advances" test from the dicta of *Agins* and threatens to dislodge regulatory takings jurisprudence from an already tenuous doctrinal mooring. *Dolan* shows how the Court uses constitutional doctrine, actually the unconstitutional

257. *See* Holloway & Guy - Tahoe-Sierra, *supra* note 3, at 277-78.

258. *See Dolan*, 512 U.S. at 385 (concluding that land dedication conditions actually gave a landowner a choice to transfer an easement or forego development that did not include an uncompensated public use); *Lucas*, 505 U.S. at 1030-31 (concluding that coastal zone management regulation prohibits development of beachfront property and thus establishes an uncompensated public use).

259. *See* Holloway & Guy—Tahoe-Sierra, *supra* note 3, at 286-87 (we agree that the right to transfer is some circumstances is most fundamental, when a land use control limits its effect to a purchase or transfer of the land to government, which completely removed or totally diminished its usefulness in private land markets).

260. *See* Karl Manheim, *Rent Control In The New Lochner Era*, 23 UCLA J. ENVTL. L. & POL'Y 211, 270-71 (2005) (finding that the Court must not return to *Lochner* era doctrine to determine the constitutional validity of rent control under the Takings Clause).

conditions doctrine, as a mooring to secure protection for the right to receive just compensation and its quintessential role to protect property rights.[261] No one property right may be more important than any other in the bundle,[262] but taking only one should not destroy the other or leave the bundle worthless other than for the owner's interests that can be shared by or beneficial to the community, such as aesthetics.[263] Taking the right to develop should not come at the cost of destroying or greatly diminishing the right to exclude others by the city's recreational and other needs, such as a walk along the creek or on the beach in someone's backyard.[264]

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261. *See Dolan*, 512 U.S. at 385. Unconstitutional conditions doctrine was used in *Dolan* to justify the need for heightened scrutiny of a particular land use control. *See id.* In *Dolan*, the Court states that:

> [T]he [land dedication] conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. *See* Perry v. Sinderman, 408 U.S. 593, 33 L.Ed. 2d 570, 92 S.Ct. 2694 (1972); Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968).

Id. Prior to the use of the unconstitutional conditions doctrine in *Nollan*, the Court had been used unconstitutional conditions doctrine to protect personal liberties. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1416, 1417 (1989); *see also* Holloway & Guy—Social Welfare, *supra* note 22, at 62-71 (discussing the Court's application and takings implications of the unconstitutional conditions doctrine to in *Dolan* and *Nollan*).

262. *See Tahoe-Sierra Preservation Council*, 535 U.S. at 327. In *Tahoe-Sierra Preservation Council*, the Court states that:

> This requirement that "the aggregate must be viewed in its entirety" explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. Andrus v. Allard, 444 U.S. 51, 66, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as set-back ordinances, Gorieb v. Fox, 274 U.S. 603, 71 L. Ed. 1228, 47 S. Ct. 675 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 498, 107 S.Ct. 1232, were not considered regulatory takings. In each of these cases, we affirmed that where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus*, 444 U.S. at 65-66.

Id.

263. *See Dolan*, 512 U.S. at 393.

264. *See id.* (recognizing the need to control the entry by local citizens who may wan to walk along creek in a public flood control easement); *see Nollan*, 483 U.S. at 836 (recognizing the need to control the entry of beachgoers who may want to walk along beach above the high tide mark).

At best, the Ninth Circuit's noble cause protects property rights, namely the right to transfer an interest in land, but just about every other Amendment of the Bill of Rights and other provisions of the Federal Constitution *protect* an interest, *cover* a relation or *underpin* a theory of property rights. These include the Due Process Clauses,[265] Freedom from Unreasonable Searches and Seizures,[266] and the Contract Clause.[267] This massive protection of property rights that had included ownership of human beings, did not justify a Property Rights Clause, saying that "no state shall abridge property rights." Consequently, arguments and opinions creating a property rights clause that justifies *per se*, heightened scrutiny or intermediate scrutiny actually undermine or weaken takings jurisprudence when they put forth no more than wishful or exuberant thinking to protect property rights. Just saying a regulation infringes on a property right that is of importance in our economic, social or political system is not germane enough to justify the application of heightened scrutiny.[268]

The Rehnquist Court put forth constitutional doctrine to support the development of takings jurisprudence by trying to find settled doctrine, even if it was takings doctrine, to justify the establishment of takings principles to balance exercises of property rights with the police power of state governments. More recently, in *Tahoe-Sierra Preservation Council*, Chief Justice Rehnquist, in a dissenting opinion, proffers the use of physical takings doctrine to determine whether a moratorium for a number of years was tantamount to leasehold and thus should be a temporary taking of private property for public use.[269] Not too long ago, in *Nollan* and *Dolan*, the Rehnquist Court relied on the unconstitutional conditions doctrine to justify heightened scrutiny of conditional demands in protecting the landowner's right to receive just compensation.[270] Earlier, in *Lucas*, the Rehnquist Court used the common law to create a doctrine preserving the landowner's use of property at common law in giving greater protection to the landowner's right to just compensation.[271]

In *Chevron*, the Ninth Circuit put forth no tested doctrine to support

265. *See* U.S. CONST., Amend. XIV; *see also* U.S. CONST. Amend. V.

266. *See* U.S. CONST., Amend. IV.

267. *See* U.S. CONST., art. I, § 10, cl. 6.

268. *See* Sullivan, *supra* note 261, at 1417.

269. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 349-50 (Rehnquist, C.J., dissenting).

270. *See Dolan*, 512 U.S. at 385.

271. *Lucas*, 505 U.S. at 1030-31. One student commentator points out the use common law theory to create historical norm in interpreting the Takings Clause could be problematic in that our past history is used to fix today's constitutional norms. *See* Jonathan Lahn, Note, *The Uses of History in the Supreme Court's Takings Clause Jurisprudence*, 81 CHI.-KENT. L. REV. 1233, 1234-35 (2006).

heightened scrutiny as a means of protecting property rights and limiting abuse of the right to just compensation.[272] However, the Ninth Circuit opened a needed jurisprudential path that was close on the facts of *Chevron* in that it brings to the constitutional forefront the need to consider or weigh government means and ends under something other than a dysfunctional *per se* test or unworkable deferential inquiry that often yields the same results—a *taking without compensation*.

Even more unsettling is the fact that property rights are so pervasive or ubiquitous in our political and economic systems that if private property rights impose, rather than receive, greater constitutional protection from government regulation, the absence of takings and other doctrinal support, similar to *Dolan* and *Lucas*, to justify heightened scrutiny of rent control and other regulation would permit these rights to overwhelm the Federal Constitution and seriously blur the distinction between democracy and capitalism.

Recognizing the Ninth Circuit's courageous yet inadequate decision, *Chevron* exemplifies the Court's refusal to further clarify the standard of intermediate scrutiny to promote public compromises in policy-making for taxation, economic development, growth management and land use.[273] *Kelo* is another example. The Court in *Kelo* fell victim

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272. *See* Chevron U.S.A Inc. v. Cayetano, 224 F.3d 1030, 1036-37 (9th Cir. 2000) [hereinafter *Chevron I*]. In *Chevron I*, the Ninth Circuit found support in the Court, other circuit and its precedents that had either implicated or applied heightened scrutiny to rent control ordinances to justify their public needs. The Ninth Circuit states that:

> Finally, we note that other federal cases have applied the "substantially advances" test in considering a regulatory takings challenge to a rent control ordinance. See Federal Home Loan Mortgage Corp. v. N.Y. State Div. of Hous. and Cmty. Renewal, 83 F.3d 45, 48 (2d Cir. 1996) (concluding that rent stabilization law does not constitute either physical or regulatory taking); Greystone Hotel Co. v. City of New York, 13 F. Supp. 2d 524, 527-29 (S.D.N.Y.) (concluding that rent stabilization provision substantially advanced a legitimate state interest and thus did not effect a regulatory taking); Adamson Cos. v. City of Malibu, 854 F. Supp. 1476, 1501-02 (C.D. Cal. 1994) (concluding that city's mobile home rent control ordinance was substantially related to a legitimate interest).
>
> In sum, we disagree with the concurrence's position that we should apply the "reasonableness" test to evaluate Chevron's regulatory takings claim. The correct test is "whether the legislation substantially advances a legitimate state interest," as discussed above, as suggested by the Supreme Court in *Yee*, as used by the district court in this case, and as established by this court in Richardson [v. City and County of Honolulu,] 124 F.3d 1150, 1158 (9th Cir. 1997), *cert. denied*, 525 U.S. 871, 119 S. Ct. 168, 142 L. Ed. 2d 137 (1998)].

Chevron I, 224 F.3d at 1036-37.

273. Some commentators have found a couple of purposes or uses for Chevron in takings jurisprudence. One set finds that Chevron may have differentiate between substantive due process and takings claims in regulatory issues. *See* D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact Of Lingle v. Chevron And The Separation Of Takings And Substantive Due Process*, 69 ALB. L. REV. 343 (2005)

to the same (or lack of) constitutional logic. In *Kelo* and *Chevron*, the majority and dissenting opinions read as though the Court was stuck in "doctrineless" time or merely a pragmatic time warp going forward on deference and backward on strict scrutiny. This logic promotes no compromises, and soon after *Kelo*, thousands of Americans in several Gulf Coast towns and cities were left in neighborhoods blighted by hurricanes.

The Court should provide us with law that gives us doctrinal grounds for fashioning constitutional law promoting growth and compromises on policy choices. We do not need another *Kelo* that would reiterate the Court's uncompromising or unbalanced takings jurisprudence, i.e., a *per se* test or deferential test.[274] On the one hand, the United States Court of Appeals for the Ninth Circuit rightfully seeks middle ground in *Chevron* but unconstitutionally fails to underpin its heightened scrutiny with constitutional doctrine. On the other hand, the Court notoriously seeks to avoid the middle ground, leaving policy choices totally in the hands of community policy-makers. In *Kelo,* the Court puts forth extremes; first, in giving the government the power to condemn on almost any circumstances and second, intimating a return to a time before *Berman,* that was decided in 1954, to wait on market reactions. We cannot accept that nine bright individuals are unable to fashion law to promote compromises among policy choices.

We now have a global marketplace where government and business

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(concluding that Chevron has the potential help draw a line between substantive due process and takings law); Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process From Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371 (2006) (explaining the importance of *Chevron*, though others find it to be merely another technical correction of language that had put forth by the Court). The other commentator finds that *Chevron* raises concern regarding the Nollan and Dolan in takings jurisprudence. *See* Daniel Pollak, *Regulatory Takings: The Supreme Court Tries To Prune Agins Without Stepping On Nollan And Dolan*, 33 Ecology L.Q. 925 (2006)(discussing the impact *Chevron* might have on *Nollan* and *Dolan* and their bifurcated standard of review for takings claims involving land dedication conditions); Bradley C. Davis, Student Note, *Substantially Advancing Penn Central: Sharpening The Remaining Arrow In The Property Advocate's Quiver For The New Age Of Regulatory Takings*, 30 NOVA L. REV. 445 (2006).

274. Students, professors and commentators have explored the intersection, relationship or connectivity of *Kelo* and *Chevron* and its implication for takings and constitutional jurisprudence. *See, e.g.*, Jane B. Baron, *Winding Toward The Heart Of The Takings Muddle: Kelo, Lingle, And Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613 (2007) (suggesting that the Court failed to engage in a real debate about the function of property in our society); L. Kinvin Wroth, *Lingle & Kelo: The Accidental Tourist In Canada And NAFTA-Land*, 7 VT. J. ENVTL. L. 62 (2006) (suggesting that Court's interpretations removes confusion and uncertainty); David L. Breau, Student Note, *A New Take On Public Use: Were Kelo And Lingle Nonjusticiable?*, 55 DUKE L.J. 835 (2006) (suggesting that the Court's are permitting legal action under the Takings Clause where plaintiffs may lack standing).

need to find policy compromises to local political, economic and social problems that may have been created by global business conditions and events. These are policy problems that cannot always be solved by market solutions or legislative intervention on either *per se* tests or deferential tests when economic, social and political needs and differences among the global market responses, government policies and business decisions require fundamentally new policy approaches and compromises.

V. Analysis of *San Remo Hotel* and Just Compensation Clause

The Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco*[275] supports the point that the climax of Rehnquist Court in takings jurisprudence began with *Lucas* and ended with *Dolan*. *San Remo Hotel* offered the Court an opportunity to revisit *Dolan* on the question of whether a few legislative exactions or conditional demands would treat the Just Compensation Clause as lesser Fifth Amendment protection of private property rights under particular circumstances.[276] In *San Remo Hotel*, the right to receive just compensation would elicit no special or specific constitutional concern. Moreover, the Court chose to narrow the judicial path to the federal court once takings plaintiffs have had their day in the state trial and appellate courts on the right to receive just compensation underlying the pursuit of regulatory taking claims. *San Remo Hotel* implicates the right to receive just compensation that is an essential part of takings jurisprudence but explicitly addressed federal-state relations, namely full faith and credit, and left great uncertainty regarding the viability of a seminal ripeness precedent of the Federal Judiciary.

Part V analyzes *San Remo Hotel* to examine the Rehnquist Court's refusal to revisit *Dolan* and its analytical framework and doctrinal underpinning for reasons of comity and prudence. Part V also points out that the Rehnquist Court's refusal fits tidily within an overarching constitutional perspective of an underdeveloped takings jurisprudence unable to weigh the nature of the means and ends or consider their relative importance in municipal policy-making. *San Remo Hotel* stands as a prime example of the Rehnquist Court's reluctant involvement and preference for a deferential standard of review for exercises of police power that treat the Takings Clause as if any protection provided by the right to receive just compensation is lesser protection under the Fifth Amendment.

275. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).
276. *See Dolan*, 512 U.S. at 392.

A. Government Policy in the Dispute under Takings and Just Compensation

Many cities and counties have realized, and still do, that various forms of residential, commercial, industrial and institutional development can impose unwanted burdens on financial coffers, public infrastructure, community services and public facilities.[277] Specifically, these unwanted burdens attributable to development include the provision of secondary education, public safety, emergency services, public services and recreational facilities.[278] Consequently, municipalities and county governments impose conditional demands or impact exactions, such as land dedication conditions and impact fees, on the granting of building and occupancy permits.[279]

Municipalities imposed conditional demands to address public needs that were allegedly attributable to or caused by the impact of development on public facilities, infrastructure and services.[280] Specifically, a municipality imposes an impact fee on a residential development for single-family homes if this development increased public school enrollments, which, in turn, increases the operating costs of the public school system and requires the municipality to allocate more tax revenues to the school system.[281] Thus, land dedication conditions, impact fees and other exactions shift the burden for increases in public facilities, services and infrastructure to real estate developers.[282]

State and federal courts had generally concluded that land dedication conditions and other exactions are not a regulatory taking under the Takings Clause of the Fifth Amendment.[283] However, these courts limit how municipalities could justify conditional demands or exactions under state and federal takings provisions.[284] These courts have generally given deference to municipal exactions and their justifications when these exactions have been reasonably or rationally attributable to or caused by the impact of development on community

277. *See* Holloway and Guy—Social Welfare, *supra* note 22, at 31 n. 94 (citing ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE REGULATION FOR REVENUE: THE POLITICAL ECONOMCY OF LAND USE EXACTIONS, 32-33 &77 (1993)).

278. *See* Holloway and Guy—Social Welfare, *supra* note 22, at 31-35.

279. *Id.* at 31.

280. *Id.* at 31-32.

281. *Id.* at 11 & n.14.

282. *Id.* at 35-36.

283. *See Dolan*, 512 U.S. at 388-91; *see* Holloway & Guy—Social Welfare, *supra* note 22, at 38-40.

284. *See id.* at 389, 390-91 (finding that state courts impose a deferential standard of review to scrutinize the need for and use of impact exactions).

infrastructure, facilities and services.[285] In *Dolan*, the Rehnquist Court concluded that the imposition of land dedication conditions must be justified by the impact of development on the community.[286] Shortly thereafter, in *Del Monte Dunes*, the Rehnquist Court concluded that *Dolan* did not extend to impact exactions that were similar to land use controls but were legislative determinations.[287]

Dolan was not the Rehnquist Court's first effort to limit judicial deference bestowed upon those municipalities which imposed conditional demands on requests by landowners to use their land for residential or other development.[288] In *Nollan*, the Rehnquist Court had concluded that the standard of review for the relationship between the land dedication condition and its ability to further its declared purpose must be more than a loose fit and required an essential nexus to review this relationship,[289] which is the first prong of *Dolan's* two prong test.[290]

In *Dolan*, the Rehnquist Court added a second prong, and sought a closer fit between the land dedication condition and the declared need for or purpose of a land dedication condition.[291] The Rehnquist Court's second prong was the "rough proportionality" that was selected from among the "reasonably related," "reasonable relationship" and "strict scrutiny" standards of review.[292] The Rehnquist Court concluded that the reasonably related test and strict scrutiny standards are too deferential and too restrictive, respectively, for reviewing the means, namely land dedication conditions, imposed by municipalities in providing public needs justified by the impact of development on public facilities, services and infrastructure.[293] Not within, but essential to each prong is the municipality's unassailable ends, actually objectives and purposes, to impose regulation, such as land dedication conditions and other impact exactions, on the residential and other development to provide a particular need.

Totally avoiding ends analysis in the post *West Coast Hotel* era,[294] the Rehnquist Court generally deferred to municipalities on the legality

285. *Id.* at 389-90.
286. *Id.* at 391-92 (concluding that rough proportionality must exist between the land dedication condition and the impact of development on the community).
287. *Del Monte Dunes*, 526 U.S. at 702-03.
288. Nollan v. California Coastal Commission, 483 U.S. 825, 827 (1987).
289. *Nollan*, 483 U.S. at 838-39.
290. *Dolan*, 512 U.S. at 386.
291. *Id.* at 383.
292. *Id.* at 391-92.
293. *Id.* at 389-91.
294. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (signaling an end to the *Lochner* era that had permitted courts to apply closer scrutiny of government regulation, Lochner v. New York, 198 U.S. 45 (1905); Nebbia v. New York 291 U.S. 502 (1934)).

of objectives and permitted municipalities to make regulation, such as impact exactions, to provide recreational facilities, flood control measures, beach access and other public needs under the state's police power.[295] In *Nollan* and *Dolan*, one would easily conclude that California's standards of review for both first and second prong tests were among the most deferential because they relied generally on a loose fit between the means and ends.[296] In *San Remo Hotel*, the Rehnquist Court would assume away property rights by accepting the Supreme Court of California's standard of review for development impact exactions as consistent with a federal norm that has always been not loose enough for the California courts.

Jurisprudentially, *San Remo Hotel's* glancing look at the standard of review for development impact exactions is one of either complete deference or of total avoidance of a regulation which permits municipalities to impose regulatory fees rather than levy property or other taxes, a less favorable communitywide means.[297] In *San Remo Hotel*, the San Remo Hotel is a three-story structure with 62 units or rooms and is located in the Fisherman's Wharf neighborhood in San Francisco.[298] In 1979, San Francisco's Board of Supervisors enacted a moratorium on the conversion of residential hotel units to tourist units.[299] It was responding to "a severe shortage" of affordable rental housing for elderly, disabled, and low-income persons by instituting a moratorium on the conversion of residential hotel units into tourist units.[300] In 1981 or thereabouts, the City of San Francisco (City) enacted the first version of the San Francisco Residential Hotel Unit Conversion and Demolition Ordinance[301] (Hotel Conversion Ordinance). The Hotel Conversion Ordinance permitted a hotel owner to convert residential units into tourist units only by obtaining a conversion permit.[302] But a condition imposed

295. *See Del Monte Dunes*, 526 U.S. at 702-03.

296. *See Dolan*, 512 U.S. at 391 (finding only general support for the application of the reasonable relationship test or intermediate standard of review in the first prong in a California case decided by the Ninth Circuit. Parks v. Watson, 716 F.2d. 646, 651-53 (9th Cir. 1983); *see Nollan*, 483 U.S. at 840 (finding that California's standard of review for the first prong did not conform to the most untailored standards, including the standards of other states and *Parks*, 716 F.2d at 646).

297. *See* Holloway & Guy—Social Welfare, *supra* note 22, at 23 (recognizing that the impact of heightened scrutiny could be a limit on the use of business or economic regulation to raise revenue for communities policy objectives).

298. *San Remo Hotel*, 545 U.S. at 327.

299. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 328 (2005) (citing the San Francisco Residential Hotel Unit Conversion and Demolition Ordinance [hereinafter Hotel Conversion Ordinance or HCO], §§ 41.3(a)-(g), Pet. for Cert. 195a-197a.).

300. *San Remo Hotel*, 545 U.S. at 328.

301. *Id.* (citing § 41.1 *et seq.*).

302. *Id.*

on those acquiring these permits required the hotel owners comply with one of the following: (1) construct new residential units, (2) rehabilitating old residential unit or (3) pay a fee in lieu of this construction or rehabilitation into the City's Residential Hotel Preservation Fund Account.[303] In 1990, the City eliminated several exceptions that had existed in the 1981 version and increased the amount of the fee in lieu of construction or rehabilitation.[304]

The dispute arose under the Hotel Conversion Ordinance's requirement that each hotel "file an initial unit usage report containing" the "number of residential and tourist units in the hotels as of September 23, 1979."[305] In filing the initial usage report, the operator mistakenly reported that all of the rooms in the San Remo Hotel were residential units, and thus the City classified the Sam Remo Hotel as residential despite that fact that San Remo Hotel had operated as a tourist hotel.[306] As a consequence of the hotel's mistake and the city's subsequent refusal to correct it, the operators of San Remo Hotel had to apply for a conditional use permit to operate the hotel as a tourist hotel.[307] In 1990, the Hotel Conversion Ordinance was revised, and at that time, petitioners applied to covert the residential units to tourist units.[308] But the City Planning Commission imposed several exactions, one of which imposed a fee in lieu of construction or rehabilitation in the amount of $567,000.00,[309] and the City Board of Supervisors rejected petitioners' appeal.[310] Whether *Dolan* applies to development impact exactions is an obvious question,[311] though other federal questions, namely issue preclusion, carried the day before the Court.

B. The Economic but Overriding Constitutional Nature of the Issues under Review

Deja vu! Dolan is center stage again, and landowners can now learn whether any legislative determinations, namely money exactions or fees in lieu of dedication, are within the grasp of *Dolan's* rough proportionality under any social welfare circumstances. The Court sees otherwise. However, our analysis shows that the Rehnquist Court may

303. *See id.* (citing §§ 41.12-41.13).
304. *See id.* at 329 (citing San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095, 1099 (9th Cir. 1998)).
305. *Id.* at 328 (citing § 41.6(b)(1)).
306. *Id.* at 329 (citing *San Remo Hotel*, 145 F.3d at 1100).
307. *Id.* (citing San Remo Hotel v. County and City of San Francisco, 27 Cal. 4th 643, 654, (2002)).
308. *Id.* (citing *San Remo Hotel*, 27 Cal. 4th at 656).
309. *See id.* (citing *San Remo Hotel*, 27 Cal. 4th at 656).
310. *Id.*
311. *See supra* Part II.B and accompanying notes.

have simultaneously taken one step forward and one step back by Federal Constitutional jurisprudence in choosing to protect the Full Faith and Credit Clause[312] and leaving more uncertainty surrounding the protection provided by the Takings Clause.[313] In *San Remo Hotel*, Petitioners sued the City in the California Superior Court in March 1993, but the parties agreed to stay the action and pursue it in the federal district court.[314] In May 4, 1993, Petitioners filed an amended complaint alleging, among others, facial and as-applied takings[315] under the Fifth and Fourteenth Amendments.[316] The district court granted respondents summary judgment and concluded that the facial takings claims had been tolled by the applicable statute of limitations[317] and that the as-applied takings claim was not ripe[318] under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City.*[319]

In *San Remo Hotel*, the United States Court of Appeals for the Ninth Circuit abstained on the federal takings claims under the *Pullman* abstention doctrine.[320] The court reasoned that "a return to state court could conceivably moot the remaining federal questions."[321] The Ninth Circuit found that the facial takings claim was ripe when the Hotel Conversion Ordinance was enacted, and was appropriate for *Pullman* abstention because it was the subject of stayed trial court action for a writ of mandamus.[322] The Ninth Circuit affirmed the district court's holding that the as-applied takings claim was not ripe for review "because petitioners had failed to pursue an inverse condemnation action in state court, they had not yet been denied just compensation as contemplated by *Williamson County*."[323] The Ninth Circuit included a footnote in its

312. U.S. CONST., art. IV, § 1.
313. U.S. CONST., amend V.
314. *San Remo Hotel*, 545 U.S. at 330.
315. *See id.* The Ninth Circuit noted that:

> Specifically, count 3 alleged that the HCO was facially unconstitutional under the Takings Clause because it "fails to substantially advance legitimate government interests, deprives plaintiffs of the opportunity to earn a fair return on its investment, denies plaintiffs economically viable use of their property, and forces plaintiffs to bear the public burden of housing the poor, all without just compensation. . . . Count 4, which advanced petitioners' as-applied Takings Clause violation, was predicated on the same rationale.

Id. (citing First Amended and Supplemental Complaint at 20-21, San Remo Hotel, L.P. v. City and County of San Francisco, 145 F.3d 1095 (9th Cir. 1998) (No. C-93-1644-DLJ)).
316. *Id.* at 330.
317. *Id.*
318. *Id.*
319. *See* 473 U.S. 172 (1985).
320. *San Remo Hotel*, 545 U.S. at 330 (citing Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, (1941)).
321. *Id.* at 330-31 (citing *San Remo Hotel,* 145 F.3d at 1101).
322. *Id.* at 331 (citing *San Remo Hotel,* 145 F.3d at 1105).
323. *Id.* (citing *San Remo Hotel,* 145 F.3d at 1105).

opinion that permitted the petitioner to raise federal takings claims in the California trial court, but if petitioners wanted to retain their right to return to the federal court, they must reserve it.[324]

Petitioners attempted to do so but advanced *Agins* and *Dolan* claims that had not been among the original claims.[325] The state trial court dismissed the action, and the court of appeal reversed concluding that the fee in lieu of construction and rehabilitation was subject to heightened scrutiny under *Nollan* and *Dolan* if it was applied to the designation of the hotel as residential use.[326] The Supreme Court of California reversed but concluded that federal taking claims were not before it.[327] Nevertheless, the Supreme Court of California still construed the state and federal Takings Clauses congruently[328] and thus analyzed the taking claims under both federal and state takings law.[329] The Supreme Court of California relied on *Nollan* and *Dolan* in deciding that heightened scrutiny was not justified by the in lieu fee of the Hotel Conversion Ordinance that was a legislative determination and not an adjudicative decision,[330] and thus a reasonable relationship test should apply.[331] The Supreme Court of California applied a reasonableness test and concluded that the Hotel Conversion Ordinance did not violate the Takings Clause on its face because it bears a reasonable relationship to the loss of housing[332] and was not an as-applied taking because it is "reasonably based on number of units designated for conversion. . . ."[333] The Supreme Court of California reversed, but the petitioners did not seek a writ of certiorari from the United States Supreme Court for the decision of the Supreme Court of California.[334]

Instead, petitioners returned to the federal district court and filed their federal claims that had been based on the complaint it filed before invoking the *Pullman* abstention doctrine.[335] The district court concluded that facial taking claim was barred by the statute of limitation

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324. *Id.* (citing *San Remo Hotel,* 145 F.3d at 1106).

325. *San Remo Hotel,* 545 U.S. at 331 (citing San Remo Hotel L.P. v. City and County of San Francisco, 27 Cal. 4th 643, 656 (2002)).

326. *Id.* at 332 (citing *San Remo Hotel,* 27 Cal. 4th at 657-58 (summarizing appellate court opinion)).

327. *Id.* (citing *San Remo Hotel,* 27 Cal. 4th at 649).

328. *Id.* (citing *San Remo Hotel,* 27 Cal. 4th at 664).

329. *Id.* at 332-33 (citing *San Remo Hotel,* 27 Cal. 4th at 664).

330. *San Remo Hotel,* 545 U.S. at 333 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)).

331. *Id.* (citing *San Remo Hotel,* 27 Cal. 4th, at 671, 41 P. 3d, at 105).

332. *Id. at 334* (citing *San Remo Hotel,* 27 Cal. 4th, at 673, 41 P. 3d, at 107).

333. *Id.* (citing *San Remo Hotel,* 27 Cal. 4th, at 678, and n. 17, 41 P. 3d, at 110-111, and n. 17.).

334. *Id.*

335. *San Remo Hotel,* 545 U.S. at 334-35.

and reasoned that 28 U.S.C. § 1738[336] precluded federal courts from hearing an issue already decided in state courts under federal law.[337] This statute requires federal courts to give preclusive effect to any state court judgment that would have preclusive effect under the laws of the State in which the judgment was rendered. Because California courts had interpreted the relevant substantive state takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in the state court. The United States Court of Appeals for the Ninth Circuit affirmed and concluded that petitioners must litigate their taking claims pursuant to *Pullman* or *Williamson County* or both and therefore applied the general issue preclusion doctrine.[338] The Ninth Circuit rejected the argument that "California takings law is not coextensive with federal takings law,"[339] and held that the state court's application of the "reasonable relationship" test was an "'equivalent determination' of such claims under the Federal Takings Clause. . . ."[340]

The Court granted a writ of certiorari to United States Court of Appeals for the Ninth Circuit[341] because the Ninth Circuit's rejection of petitioners' argument conflicted with a decision of the United States Court of Appeals for the Second Circuit.[342] In fact, the narrow issue before the Court was not a takings issue but was a full faith and credit issue: "whether an exception to the full faith and credit statute, and the ancient rule on which it is based, [should be created] 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 compensation."[343] The Court affirmed the Ninth Circuit by responding

336. Act of June 25, 1948, Chap. 646, § 1, 62 Stat. 947.

337. *San Remo Hotel*, 545 U.S. at 335.

338. *San Remo Hotel v. City* & County of San Francisco, 364 F.3d 1088, 1096 (9th Cir. 2004).

339. *San Remo Hotel*, 545 U.S. at 335 (citing *San Remo Hotel*, 145 F.3d at 1096).

340. *Id.* at 335 (citing *San Remo Hotel*, 145 F.3d at 1098).

341. *San Remo Hotel v. City* & County of San Francisco, 543 U.S. 1032 (2004).

342. *See* Santini v. Conn. Hazardous Waste Management Service, 342 F.3d 118 (2d Cir. 2003).

343. *See Williamson County,* 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). In *San Remo Hotel*, the Court chose not to review a number of other issues and stated that:

> We did not grant certiorari on many of the issues discussed by the parties and *amici*. We therefore assume for purposes of our decision that all other issues in this protracted controversy have been correctly decided. We assume, for instance, that the Ninth Circuit properly interpreted California preclusion law; that the California Supreme Court was correct in its determination that California takings law is coextensive with federal law; that, as a matter of California law, the HCO was lawfully applied to petitioners' hotel; and that under California law, the "in lieu" fee was imposed evenhandedly and

in the negative and thus found no exception that would justify a federal forum for takings claim that had been litigated in the state court system.[344] The Court stated that the Full Faith and Credit Clause[345] required "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."[346] The Court found that Congress enacted the full faith and credit statute[347] to implement the Full Faith and Credit Clause.[348] The full faith and credit statute provided that:

> [J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . . This statute has long been understood to encompass the doctrines of res judicata, or "claim preclusion," and collateral estoppel, or "issue preclusion."[349]

The full faith and credit statute prohibited parties from relitigating issues that had been resolved by courts of competent jurisdiction.[350] The Court explained the importance and impact of the full faith and credit statute and its principle on our republic by stating that:

> [T]he rule "is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."[351]

The Court concluded that petitioners' takings claims are subject to *Pullman* abstention and that an exception is not justified under the full faith and credit statute.[352] Petitioners argued that *Williamson County*

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substantially advanced legitimate state interests.

San Remo Hotel, 545 U.S. at 335 (citing *San Remo Hotel*, 145 F.3d] at 1098).

344. *Id.* at 348.

345. U.S. CONST., art. IV, § 1.

346. *San Remo Hotel*, 545 U.S. at 336 (citing U. S. CONST., ART. IV, § 1).

347. *See* 28 U.S.C. § 1738. The earlier full faith and credit statute was the Act of May 26, 1790, ch. 11, 1 Stat. 122.

348. *San Remo Hotel*, 545 U.S. at 336.

349. *Id.* (quoting Allen v. McCurry, 449 U.S. 90, 94-96, 66 L. Ed. 2d 308, 101 S.Ct. 411 (1980)).

350. *Id.* at 337.

351. *Id.* (quoting Southern Pacific R. Co. v. United States, 168 U.S. 1, 49, 42 L. Ed. 355, 18 S.Ct. 18 (1897)).

352. *Id.*

Regional Planning Comm'n v. *Hamilton Bank of Johnson City*,[353] is undermined by the Court's conclusion of law.[354] *Williamson County* "held that takings claims are not ripe until a State fails 'to provide adequate compensation for the taking.'"[355] Thus petitioners argued that plaintiffs would be forced to bring their claims in state courts without any access to federal trial and intermediate appellate courts if they did not agree with decisions of the state trial and appellate courts.[356]

The Court was not persuaded by petitioner's argument that takings plaintiff would no longer have access to the federal courts. Explicitly, the Court states that:

> The essence of petitioners' argument is as follows: because no claim that a state agency has violated the federal Takings Clause can be heard in federal court until the property owner has "been denied just compensation" through an available state compensation procedure, [*Williamson County*] at 195, 87 L. Ed. 2d 126, 105 S. Ct. 3108, "federal courts [should be] required to disregard the decision of the state court" in order to ensure that federal takings claims can be "considered on the merits in . . . federal court." See Brief for Petitioners 8, 14. Therefore, the argument goes, whenever plaintiffs reserve their claims under *England* v. *Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964), federal courts should review the reserved federal claims *de novo*, regardless of what issues the state court may have decided or how it may have decided them.[357]

The Court did not agree with petitioners' arguments on issue preclusion and the impact of its conclusion in *San Remo Hotel* on the ripeness doctrine of *Williamson County*.[358] In *San Remo Hotel*, the United States Supreme Court assumes away the regulatory takings issues to decide the issue preclusion question but raises and leaves uncertainty regarding both the weight and role of *Williamson County* as a ripeness precedent. In its broadest sense, the Court's avoidance of the regulatory takings issue regarding conditional demands leaves the right to receive just compensation in a lesser state and raises a deep concern regarding the Court's earlier protection of the right to receive just compensation.

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353. *Williamson County*, 473 U.S. 172, 105 S.Ct. 3108 (1985).
354. *San Remo Hotel*, 545 U.S. at 338.
355. *Id.* at 337 (citing *Williamson County*, 473 U.S. at 195, 87 L.Ed. 2d 126, 105 S.Ct. 3108).
356. *Id.* at 338.
357. *Id.*
358. *Id.*

C. *Choosing Comity and Retrenching from Ripeness and Federal Takings Claims*

San Remo Hotel involved impact exactions or conditional demands for the construction of new residential units, rehabilitation of old units or a fee in lieu of this construction and rehabilitation to provide affordable low-income residential housing.[359] *San Remo Hotel* was an excellent opportunity for the Rehnquist Court to address whether the nature of regulation, either legislative or adjudicative, would absolutely control the application of *Dolan,* thus denying greater weight to the right to receive just compensation. The Court chose to forego this opportunity in *San Remo Hotel.*

In *Dolan*, the Court examined state standards of review and barely implicated or mentioned that California's standard of review for land dedications and other impact exactions was heightened or intermediate scrutiny.[360] In the aftermath of *City of Monterey v. Del Monte Dunes*, Ltd.,[361] *Dolan's* application turns on the specific nature of the regulation, and if the impact exaction is a legislative determination, *Dolan* does not apply to the regulatory takings dispute challenging the constitutional validity of the regulation.[362] Consequently, municipalities can pummel landowners with impact fees and other exactions that are subject to the most deferential review as mere land use controls if the governing board sought to use a legislative determination, other than taxation, to burden landowners' with public needs, such as affordable housing.[363]

In *San Remo Hotel*, the Supreme Court of California acknowledged that the fee in lieu of construction or rehabilitation was a legislative determination, and thus the standard of review for this impact exaction was a "reasonably related" test that is consistent with the federal norm or standard of review for zoning and other land use controls.[364] The Rehnquist Court in its last days courageously assumed that the Supreme Court of California appropriately interpreted *Dolan* in establishing consistency with the federal norm or standard of review. Consequently, *San Remo Hotel* avoids one takings issue establishing the climax of the

359. *See San Remo Hotel*, 545 U.S. at 329. In *San Remo Hotel*, the City and County of San Francisco imposed a fee in lieu: "In 1993, the City Planning Commission granted petitioners' requested conversion and conditional use permit, but only after imposing several conditions, one of which included the requirement that petitioners pay a $567,000 'in lieu' fee." *Id.*

360. *See Dolan*, 512 U.S. at 388-91 (finding the most general support for application of an intermediate standard); *see Nollan*, 483 U.S. at 838-39 (finding the first prong loosely tailored, if not untailored).

361. *Del Monte Dunes,* 526 U.S. 687 (1999).

362. *See Del Monte Dunes*, 526 U.S. at 702-03.

363. *See id.*; *see San Remo Hotel*, 545 U.S. at 333.

364. *See San Remo Hotel*, 545 U.S. at 333-34.

Rehnquist Court but renders another takings issue less effective to save the venerable old doctrine of full faith and credit, but still casts a shadow of uncertainty over the Rehnquist Court and its ripeness doctrine.

The appropriateness of the standard of review was only one part of *San Remo Hotel*'s less questionable contribution to takings jurisprudence, actually more like a travesty to *Armstrong* fairness and justice. The Rehnquist Court assumes away much protection of property rights by not scrutinizing the standard of review applied to a legislative determination that may not be entirely consistent with *Dolan*'s notion of justice and fairness in reviewing conditional demands when the municipality merely changes only the specific nature of the exaction, actually regulation, to take personal property or money rather than an interest in real property, namely the right to exclude others. Assuming that matters could not get any worse is not safe. In its final days while coming to rest after a long ago climax, the Rehnquist Court obfuscates the ripeness doctrine and its protection of property rights that would have been protected under the Takings Clause.

Here the Court chose to deny access to federal courts when landowners had chosen first to initiate their regulatory takings claims in the state court system.[365] In *San Remo Hotel*, the Rehnquist Court found *Pullman's* preclusion doctrine entangled with *Williamson County*'s ripeness doctrine and gave favor or greater weight to the issue preclusion doctrine and its constitutional role in the Federal Judiciary.[366] The Court decided that the prudence of the Takings Clause's ripeness doctrine is outweighed by the needs of the issue preclusion doctrine to protect state court judgments under full faith and credit.[367] The Court concluded that when the state's final decision on granting just compensation occurs at the same time as the state court's final judgment on the regulatory takings claim, then plaintiff's takings issue is precluded from adjudication in the federal court system when the state supreme court's interpretation of state takings law is consistent with the federal court's interpretation of federal law on the same issue.[368]

Returning to *Dolan* reveals that such reliance by the Court appears at best rational, but its rationality may be entirely misplaced in giving the final decision on federal takings law to state courts until the Court intervenes on a writ of certiorari. *Dolan* illustrates the precarious position in which the Court leaves landowners. In *Dolan,* the Court found that three levels of scrutiny existed for review of municipal and

365. *Id.* at 347-48.
366. *Id.*
367. *Id.*
368. *Id.*

state means and their justifications for the need of land dedication conditions under the Federal Takings Clause.[369] Only a few state courts had established before *Dolan* a norm or standard of review that had given the same level of protection to the federal right to receive just compensation as *Dolan* would eventually impose on land dedication conditions.[370] *Del Monte Dunes* concluded that *Dolan* does not apply to traditional legislative determinations. It limits this federal precedent, thus permitting state legislatures and courts to avoid federal takings law by redefining the specific nature of the regulation that was one element of the takings claims, where other elements are the taking of an interest in land and deprivation of the right to just compensation by a conditional demand.[371] Allowing state courts to avoid other elements of *Dolan's* takings issue through redefining the least offensive element, here the nature of regulation, permits municipalities to still further the questionable objectives of a regulation by using a legislative regulatory scheme. Yet these municipalities are still not compensating or paying for the benefits of development impact exactions.

Supposedly, when federal and state courts share the same meaning of takings principles, *San Remo Hotel* permits state trial courts to make the final decision by adopting the federal takings norm or standard. Another point that helps drive this conclusion home is when the Court permits state courts to decide takings issues without recourse to the federal trial and intermediate appellate courts, the Court does not establish the most logical choice. Little or no recourse means that the right of just compensation gives limited protection to property rights, except when the Court grants a writ of certiorari to address a takings issue that had been left to a diverse group of state courts. Reflecting on California's untailored or extremely deferential standard in *Nollan*[372] and

369. Dolan v. City of Tigard, 512 U.S. 374, 388-91 (1994).

370. *Id.* at 389.

371. 526 U.S. 687 (1999); *see San Remo Hotel*, 545 U.S. at 333; *see* Mark Fenster, *Regulating Land Use In A Constitutional Shadow: The Institutional Contexts Of Exactions*, 58 HASTINGS L.J. 729 (2007) (for more recent analysis of the development impact exactions and their constitutional validity and use under *Nollan* and *Dolan*); David L. Callies & Glenn H. Sonoda, *Providing Infrastructure For Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351 (2007); Carlos A. Ball & Laurie Reynolds, *Exactions And Burden Distribution In Takings Law*, 47 WM. AND MARY L. REV. 1513 (2006); D. S. Pensley, Note, *Real Cities, Ideal Cities: Proposing A Test Of Intrinsic Fairness For Contested Development Exactions*, 91 CORNELL L. REV. 699 (2006); Ronald H. Rosenberg, *The Changing Culture Of American Land Use Regulation: Paying For Growth With Impact Fees*, 59 SMU L. REV. 177 (2006); Jack Estill, Benjamin Powell & Edward Stringham, *Taxing Development: The Law And Economics Of Traffic Impact Fees*, 16 B.U. PUB. INT. L.J. 1 (2006); Jane C. Needleman, Note, *Exactions: Exploring Exactly When Nollan And Dolan Should Be Triggered*, 28 CARDOZO L. REV. 1563 (2006).

372. *See Nollan*, 483 U.S. at 838-39.

Oregon's highly deferential standard in *Dolan*,[373] one must at least think that California, Oregon and other state legislatures and supreme courts may frequently make and find, respectively, impact exactions or conditional demands that could be a legislative determination[374] or justified by a public need.[375]

San Remo Hotel permits state trial courts to avoid *Williamson County*'s ripeness doctrine by merging the final decision and final judgment when the state courts adopt a consistent interpretation of the Federal Takings Clause, thus removing federal courts from reviewing this interpretation and its validity under *Armstrong's* fairness and justice. Chief Justice Rehnquist was correct in recognizing that the Court must return to address the issue caused by curtailing the ripeness doctrine in that landowners would not be permitted to bring takings claims in the federal trial court if these claims or issues therein had been decided in the state courts.[376]

In *San Remo Hotel*, the municipality furthers public objectives by imposing legislative conditional demands on a hotel unit conversion permit and takes money, actually private property, by legislated impact exactions and fees in lieu of exactions. *San Remo Hotel* leaves unresolved two issues that the Rehnquist Court seemingly showed little need to resolve at its closing. Earlier the Court had approached both ripeness and standard of review issues with utmost jurisprudential

373. *See Dolan*, 512 U.S. at 390-91.

374. *See San Remo Hotel*, 545 U.S. at 333.

375. *See* Ehrlich .v City of Culver City, 911 P.2d 429, 450 (Cal. 1996). Shortly after deciding *Dolan*, the Court granted certiorari and vacated and remanded *Ehrlich* to Court of Appeal of California to apply *Dolan* to a conditional demand (impact or mitigation fee) imposed on a request for rezoning by the city. 512 U.S. 1231 (1994).

For an analysis of *Ehrlich* that discusses the nature and validity of the impact fees under *Dolan's* rough proportionality and real estate and economic thinking, *see* James E. Holloway & Donald C. Guy, *The Recapture of Public Value on the Termination of the Use of Commercial Land under Takings Jurisprudence and Economic Analysis*, 15 B.Y.U. J. PUB. L. 183, 183-219 (2001).

376. *San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring) ("Here, no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." (quoting *San Remo Hotel*, 545 U.S. at 352)); *see* Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading As Ripeness: Eliminating The Williamson County State Litigation Requirement For Regulatory Takings Claims*, 85 TEX. L. REV. 199 (2006) (for commentary and analysis on the impact of *San Remo Hotel* on the ripeness doctrine and regulatory takings jurisprudence); J. David Breemer, *You Can Check Out But You Can Never Leave: The Story Of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims To State Courts Under A Rule Intended To Ripen The Claims For Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247 (2006).

diligence shortly before its beginning and near its climax.[377] Both issues must be resolved by the Roberts Court to validate any substantial change in takings jurisprudence beyond that of the Rehnquist Court. Foremost, *San Remo Hotel* leaves *Dolan* at the mercy of state courts and legislatures that may use legislative determinations to exact an interest in land or fee to further public objectives that may not demonstrate a sufficient relationship or connection with real estate, commercial or industrial development.[378] These legislative determinations are merely form over substance, and they use this shallow tactic to avoid any deterrent effect of the right to just compensation that appears to be of limited utility if it can be so easily avoided by policy-makers. Next, *San Remo Hotel* leaves *Williamson County* with much less force on state courts and renders the ripeness doctrine inchoate by forcing plaintiffs to choose federal court first or foreclose the right to sue later when they do not agree with state courts' decisions.[379] Of course, these plaintiffs can always request a writ of certiorari to have their day in the United States Supreme Court.

VI. Rehnquist Court and Takings Clause Jurisprudence

The Rehnquist Court's climax had been reached on the standard of review for claims arising under the Fifth Amendment's protection against government takings immediately after *Lucas* and *Dolan* on heightened scrutiny and a *per se* test, respectively. By the natural end of the Rehnquist Court, both *Dolan* and *Lucas* are limited precedents of little or uncertain value in a constitutional perspective of takings jurisprudence under the Fifth Amendment. *Penn Central Transp. Co.* was a constitutional thorn in the side of the Rehnquist Court's effort to give broader protection to private property rights. Justice Stevens has effectively persuaded either Justice O'Connor or Justice Kennedy to join the Stevens Coalition to form a majority on almost every other occasion, and thus made *Penn Central Transp. Co.* a viable precedent throughout the Rehnquist Court era and unlike any precedent of takings jurisprudence the Rehnquist Court could fashion. *Nollan, Lucas* and *Dolan* established narrow standards of review that give more protection to private property rights but are not viable precedents. The Court's decisions in *Kelo*, *Chevron* and *San Remo Hotel* are firm evidence that the climax of Rehnquist Court in takings jurisprudence of the Fifth Amendment was *Dolan* or shortly thereafter, circa 1994. At that point in

377. *See* Part I.A and accompanying notes (discussing the seminal takings cases that both Chief Justice and Associate Justice Rehnquist took part in deciding).

378. *See supra* Part V.B and accompanying notes.

379. *See supra* Part V.C and accompanying notes.

the Rehnquist Court's history, it was evident that Justices Kennedy and O'Connor were playing musical chairs with Justice Stevens as they sought to preserve or reshape *Penn Central Transp. Co.* while recognizing the omnipotence of circumstances in making regulatory taking determinations and a fundamental fairness protecting property interests that usually exist in deference to public interests.[380]

A. The Rehnquist Court and Reluctance to Provide Heightened Scrutiny

The Takings Clause prevents some citizens from having to shoulder a public burden that should be borne by the public or community as a whole.[381] However, the Rehnquist Court settles for a pragmatic or ad hoc approach that includes little justification for heightened scrutiny or *per se* test. Although the Rehnquist Court stood fast on the use of *per se* test to judge physical occupation by regulation and other government actions, it had the opportunity to decide a regulatory takings claim that would have made a rent control ordinance a physical occupation. In *Yee v. City of Escondido*,[382] the Court rejected a physical occupation argument regarding a land use control ordinance that had been imposed on lease of rental spaces in a mobile home park.[383] A physical taking by regulation takes a property interest or gives authority to another person to take a property interests, such as possession or use.[384] However, the Rehnquist Court creates a *per se* test in *Lucas v. South Carolina Coastal Council*[385] that prohibits the use of government regulation to take or deny all economically viable use of the land, namely the development of beachfront property.[386]

The Rehnquist Court had little success with *per se* test that retained any value as a precedent, except for *Lucas'* unique set of facts. The bright line or *per se* test of *Lucas* was greatly curtailed in *Suitum v. Tahoe Regional Planning Agency*[387] and *Palazzolo v. Rhode Island*[388]

380. *See generally* v. City of New London, Conn., 545 U.S. 469, 490-83 (2005) (Kennedy, J., concurring) (finding that rationale basis test would suffice to a standard of review for public use); *cf. id.* at 494-505 (O'Connor, J., dissenting) (not agreeing with Justice Kennedy's rational basis test, but clearly showing a preference for circumstances that give great deference in *Palazzolo*).

381. Armstrong v. United States, 364 U.S. 40, 49 (1960).

382. *Yee,* 503 U.S. 519 (1992).

383. *Id.* at 528.

384. *See* U.S. CONST. amend. V; *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

385. *Lucas,* 505 U.S. 1003 (1992).

386. *Id.* at 1027.

387. 520 U.S. 725 (1997).

388. *Palazzolo,* 533 U.S. 606 (2001).

that impose severe limits on *Lucas* when a portion or interest in the tract or parcel of land retains any economic value, such as an upland tract in wetlands[389] or transferable development rights in nondevelopable land.[390] The Rehnquist Court could not overcome the prudence, deference or reluctance of the Court's shifting center, namely Justices O'Connor and Kennedy, to create a *per se* analytical framework that would permit timely but limited involvement in a few land use controls and other matters.[391]

In *Kelo,* both dissents seem to share in our conclusion that the Rehnquist Court's takings decisions are emblematic of a judiciary's refusal to impose heightened scrutiny on land use and economic policies that do not implicate fundamental rights or suspect traits.[392] But this refusal is no longer subject to a sudden shift either in favor of business or government. A judiciary imposing only a *per se* test in the mix of standards of review available to limit government actions that offend Fifth Amendment protection of private property granted by the Takings Clause is ignoring our global society and markets where American cities and entrepreneurs are now forced to compete with cities and businesses in Asia and Europe if they plan to maintain viable private economic enterprises and sufficient public revenue stream and services.

The Rehnquist Court established a stringent standard of review for land dedication conditions, but that was the limit of its success to create heightened scrutiny as seen in *Chevron* and its avoidance of *Dolan* in *San Remo Hotel.* In *Nollan* and *Dolan,* the Court fashioned a two-prong standard to review for regulatory taking claims involving land dedication conditions that had been imposed as adjudicative decisions by local boards and commissions.[393] The Rehnquist Court limited *Dolan* to conditional demands in the *City of Monterey v. Del Monte Dunes, Ltd.*,[394]

389. *See Suitum*, 520 U.S. at 740-41 (recognizing that transferable development rights have value and but not deciding were they fit in the takings equation).

390. *See Palazzolo*, 533 U.S. at 630-32 (finding that an upland portion in the middle of the wetlands had economic value).

391. *See* Tahoe-Sierra Pres. Council v. Tahoe-Sierra Reg'l Planning Agency, 535 U.S. 302, 321 (2002) (rejecting a *per se* test for moratoria or interim development controls on developments); Palazzolo v. R.I., 533 U.S. 606, 630 (2001) (rejecting a bright line test for future regulatory takings claims that have yet to ripen during previous ownership).

392. *See* Kelo v. City of New London, 545 U.S. 469, 494-505 (2005) (O'Connor,J., dissenting) (arguing for heightened or rigorous scrutiny that would eliminate some projects corporate-sponsered and land-transfer projects that are sponsored by economic development regulation); *Id.* at 505-23 (Thomas, J., dissenting) (arguing for a broadly designed *per se* test that would virtually eliminate economic development regulation as a public use).

393. *See* Dolan v. City of Tigard, 512 U.S. 374, 386 (1994).

394. *Del Monte Dunes,* 526 U.S. 687 (1999).

and removed most of the doubt about using *Dolan* as the standard of review for exercises of police power to enact land use, growth management and environmental regulations.[395] At its end and long after its decade-earlier climax before *San Remo Hotel*, *Chevron* and *Kelo*, the Rehnquist Court rested on a reasonably related test as the standard of review for legislative decisions, namely economic development regulation, conditional demands and rent control ordinances.

The Rehnquist Court had shown great reluctance to give federal and state courts constitutional authority to use heightened scrutiny of legislative decisions.[396] In *Chevron*, the Rehnquist Court could not find an intermediate standard in the substantially advancing language of *Agins*,[397] though the denial of all economically viable use[398] language of *Agins* was used in *Lucas* to fashion a *per se* or bright line test.[399] Yet, a few state courts have chosen heightened scrutiny on a few regulatory takings claims.[400] Similarly, *Kelo* shows a reluctant approach to impose heightened scrutiny under the Public Use Clause.[401] Only a few state courts have chosen heightened scrutiny of public use claims under their state constitutions and given a limited opportunity for judicial involvement in state and local objectives for economic development projects involving a transfer of land to private developers.[402] Finally, *San Remo Hotel* saw the Rehnquist Court refuse an opportunity to return to *Dolan* and *Nollan* to decide whether heightened scrutiny could apply

395. *Id.* at 702-03.

396. *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 939-41 (2003) (discussing the use of a *Nollan-Dolan* standard in disputes under the Public Use Clause).

397. *See* Lingle v. Chevron, U.S. Inc., 544 U.S. 528, 544-45 (2005). In *Chevron*, Justice O'Connor, writing for the majority, which included Chief Justice Rehnquist, points out the danger of applying an intermediate standard of review to government actions. *Id.* at 544. Justice O'Connor stated that:

> Finally, the "substantially advances" formula is not only *doctrinally* untenable as a takings test—its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive.

Id.

398. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 n.6 (1980).

399. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

400. *See Kelo*, 545 U.S at 489-90 (finding that some state courts apply heightened scrutiny to public use claims); *see* Dolan City of Tigard, 512 U.S. 374, 390-91 (1994) (finding that some state courts apply heightened scrutiny to some regulatory takings claims involving conditional demands or exactions).

401. *See Kelo*, 545 U.S. at 490-91.

402. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 783-85 (Mich. 2004).

to any legislated conditional demands imposing almost community-wide obligations on selected landowners. The Rehnquist Court seems to retreat from its position in *Dolan* and now finds the Just Compensation Clause offers or provides lesser protection of private property under the Fifth Amendment.[403] Therefore, *Kelo, San Remo Hotel* and *Chevron* illustrate the Court's reluctance to impose heightened scrutiny on land use controls and other legislative decisions that will eventually erode most, if not all, of the Fifth Amendment's protection for private property under Takings, Just Compensation and Public Use Clauses.

B. The Rehnquist Court and Its Reliance on Deferential Standards and Precedents

Eminent domain power is a means to an end[404] and coterminous with the police powers.[405] The Court does not normally permit the judiciary to determine whether an exercise of eminent domain power is the appropriate means, and thus courts review only the public purposes for challenges to exercises of eminent domain power.[406] In *Berman* and *Midkiff,* the Court applied a highly deferential standard of review to the exercises of eminent domain power and scantly scrutinized public needs and purposes to protect the right to just compensation in legislative decisions requiring exercises of the eminent domain power.[407] *Kelo* extends *Berman* and *Midkiff* to the outer limits, thus making public use synonymous with public purpose, welfare and other needs.[408] Clinging closely to reluctance and deference, the Rehnquist Court shows little willingness to involve federal courts in community policy-making and sorting out policy choices that local policy-makers should weigh and then choose to further community objectives.[409] The Rehnquist Court

403. *See Dolan*, 512 U.S. at 385-86 (Chief Justice Rehnquist, writing for the majority, found that the right to receive just compensation was not a lesser right of Fifth Amendment protection for private property).

404. *See* Berman v. Parker, 348 U.S. 26, 33 (1954) (citing Luxton v. N. River Bridge Co., 153 U.S. 525, 529-30 (1894); U.S. v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 679 (1986)).

405. *See Berman*, 348 U.S. at 33.

406. *See* Midkiff v. Haw. Hous. Auth., 467 U.S. 229, 244 (1984).

407. *See id.* at 239; *see also Berman*, 348 U.S. at 32.

408. *See* Kelo v. City of New London, 545 U.S. 469, 483 (2005) ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

409. *See* Jane B. Baron, *Winding Toward The Heart Of The Takings Muddle: Kelo, Lingle, And Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 618 (2007). Professor Baron notes that the Court heightened deference and reluctance can have unintended and deleterious policy consequences for local and state policy-makers. *See id.* Professor Baron conclude that:

leaves judicial involvement to state supreme courts and legislatures, thus permitting communities and states to choose their particular public policy. So *Kelo* is not a surprise,[410] except that the Rehnquist Court could not create a limited exception to *Berman* and *Midkiff*.

The Rehnquist Court did not permit any homesteader who had been on the land for an extremely long duration to challenge successfully an exercise of eminent domain power for economic revitalization that resulted from a town's economic decline during their tenure on the land and that did not result in a public real estate development project. If a city can exempt social clubs and other compatible uses, then the Court should fashion heightened scrutiny, permitting long-standing homesteaders to challenge the appropriateness of creating in the design of the economic development project a *homestead exception or variance*. By refusing to permit a narrow challenge under a heightened standard of review, *Kelo* imposes the most deferential review, and if the Rehnquist Court had given anymore deference to communities and states, it would have nullified the Takings, Public Use and Just Compensation Clauses and made the right to just compensation a symbol of the government's execution of its next economic development transaction.

C. *A Novel Argument Relying on the Fifth Amendment Protection and Scrutiny of Full Coffers*

We stand firmly behind the Rehnquist Court's finding that the right to just compensation is not a lesser right of Fifth Amendment[411] of the Federal Constitution.[412] The right to just compensation protects property rights by requiring government to acknowledge and accept particular public costs and burdens associated with or caused by the use of government power to maintain and preserve political, economic and

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> The real significance of the opinions may relate to the issue of public trust and the constitutional culture of property rights. In upholding broad exercises of the eminent domain power, *Kelo* may have rather paradoxically made it more difficult for state and local governments to exercise that power, because it only heightened distrust of municipal actions affecting property. This heightened distrust may well extend beyond eminent domain to less obvious exercises of municipal power—such as new regulatory regimes or innovative taxing schemes. Thus, despite the Court's endorsement of broad exercises of municipal power, *Kelo* may have rendered it harder, rather than easier, for local governments to exercise control over local land development.

Id.

410. *See* Holloway & Guy, *supra* note 83, at 297-98 (pointing out that *Dolan* and *Lucas* were new standards of review resting on constitutional and common law doctrine, respectively, and that *Kelo* showed no such doctrinal underpinning).

411. U.S. CONST. amend. V.

412. *See* Dolan v. City of Tigard, 512 U.S. 374, 385-86 (1994).

social order in society and life.[413] One must ask whether government could violate the right to just compensation when the requisite financial burden is so easily met that for all practical purposes government takes private property for a legitimate purpose that is not an unconstitutional public use but greatly disrupts a landowner's life. The aftermath of *Kelo* had led to pundits and commentators going willy-nilly about property rights when the City of New London may have abused the right to just compensation, and the Court stood idly by gazing entirely at public use. It seems unlikely that the Framers intended that just compensation be a means for government to pay a citizen just because its coffer permits it to take with the slightest financial burden. A wealthier city should have no greater power to take for public use than the poorer city. Takings is public need-based and not wealth-based. Although "public use" is so expansive that it could cover any need, we must ask whether the government's purchase of a wealth maximizing investment to transfer to a private land developer abuses the right to just compensation and leaves private property with little or no protection.[414] Government transfers property rights that were protected by the right to receive just compensation. Government is using its coffers to force the public to bear a burden that provides public benefits only if the public can afford to purchase them from a private party. We are to assume that the only element of just compensation is money or a quantitative issue: how much should government pay the landowners?[415]

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413. *See generally* Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 278-82 (2006).

414. *See id.* at 282-83. Professor Lopez recognizes that the Just Compensation Clause is ineffective under the Court's takings jurisprudence where great deference is given to city and state governments under an extremely liberal interpretation of the Public Use Clause. *See id.*; *see also* J. Peter Bryne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131, 132 (2005) (finding the need for a deferential review to support low-income residents in urban neighborhoods by advocating a broader interpretation of just compensation).

415. *See* Lopez, *supra* note 413, at 289-90. *Kelo* leaves no balance between the Public Use and Just Compensation Clauses according to Professor Lopez and thus a reweighing of Public Use and Just Compensation Clause is necessary. *See id.* at 282-83. He states that:

> Myopic emphasis on legal mechanisms to constrain the republicanism of the public use clause, however, blurs the link between the public use and just compensation clauses as it relates to the exercise of eminent domain. Removing weight from one side of a balance is only one way to correct an imbalance. If the Takings Clause balance is to move toward equipoise, one way to do so without disruption to public use doctrine is to alter the interpretation of the just compensation clause. Moreover, an adjusted eminent domain scale may slow governmental acquisition of homes for private redevelopment and ameliorate, to the extent such is possible, the undeniable hardship that accompanies the confiscation of the home. By shifting the balance-seeking focus, the

Suppose the term "just" implies both qualitative and quantitative elements. We must ask whether fairness and justice permit government to take and compensate simply because it has eminent domain power to take and a constitutional obligation to pay a fair price, respectively, for the property. If that is the case, then *Kelo* permits most takings. Public use is a limitation on the power of eminent domain. But it appears that the correlative of the state's public obligation to compensate is property rights of state law. That reasoning seems faulty in that these rights of state law are not constitutional claims but are the cause for bringing the federal taking or public use claim.

In the public use claim, these rights would exist in state law and be protected by federal rights of the United States Constitution. Obviously, this federal claim is not a state property rights claim for trespass. This claim is a rights-based claim, seeking limits on government power. Perhaps, the correlative right could arguably be "the right to just compensation" and would introduce or add a qualitative element to the just compensation analysis. Compensating an individual for a loss in tort law, appraising the value of land or assessing the value of the goodwill of a business has never been an absolutely quantitative methodology. Relying primarily on value makes the right to just compensation appear to be a lesser part of law, analysis and reasoning of the Takings Clause and Federal Constitution. Of course, it has been thought that the right to just compensation is only a takings element, once the property has been taken for public use. Figuratively, the right to just compensation becomes no more than a quantitative methodology in doling out government funds that may have been acquired by debt, thus financing a taking and paying later. Therefore, the right to just compensation means that compensating with money is always just, and this right to just compensation sees little difference between capitalism and constitutionalism.

Such reasoning subjects the right to just compensation to some unanswered abuses that are not checked and that may be unleashed by extreme judicial deference to public use. *Kelo* is a good example that goes something like this: Since government has the cash or debt[416] to buy the land, it can take and transfer it to a land developer. One could easily say that the definitive right here is not property rights. The

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> question changes from what can be used to reduce the republicanism in the public use clause to what can be added to the liberalism represented by the just compensation clause.

Id.

416. *See* Kelo v. City of New London, 545 U.S. 469, 473 (2005) (noting that states and municipalities take land and pay for it with debt financing or bonds. This debt is paid from future tax revenues or funds collected by the municipality).

constitutional protector of property rights is the right to just compensation that comes into play too late to save anything other than a dollar which is not constitutionalism but mostly capitalism. The use of the right to just compensation as a claim-based right seems more economic than political but "just" seems totally out of place in economics when the willing seller is coerced or strong-armed, that is compelled to transfer so that government can meet revenue-producing or other objectives.[417] Abuses of the right to just compensation include more than paying landowners too few dollars when full government coffers or schemes demand takings for purely economic purposes on the part of government. But the claim here is public use. Remember *Kelo*! The Court should protect the right to just compensation from abusive takings so as to secure property rights of state common law under the Federal Constitution.

VII. Fifth Amendment Protection and Takings Jurisprudence in the New World

We want neither tyranny of the majority nor a public policy catering solely to landowners,[418] and thus we expect the Constitution to be a shining symbol of both justice and fairness. *Kelo* does little to further either. At some time in the history of American cities, it made sense to place compelling weight on the supremacy of land rights and their power, wealth, art and culture. This compelling weight is symbolized by our greatest inhumanity and our worse conflict on American soil, namely slavery and the Civil War, respectively.

Presently, we are not in that America, and the City of New London shall not be a tyrant, and a few landowners shall not make the public policy for a community seeking a future rather than a rapidly deteriorating place on the Thames River.[419] Government shall take only what it needs to advance *clearly* justifiable public policy, and landowners will not hold government hostage to seek what they want for mere wealth or pleasure that may prove detrimental to *justifiable* public policy. Creating a unique class of wealth-maximizing or pleasure-seeking property rights that are beyond the powers of government, but defined and vested by state common law defies the logic of the Bill of Rights. Such rights would give a few landowners preemptive power over the community's policies for economic development, recreation, affordable

417. *See id.*

418. *See* Ilana Waxman, Note, *Hale's Legacy: Why Private Property Is Not A Synonym For Liberty*, 57 HASTINGS L.J. 1009, 1013 (2006) (discussing the use of property rights to advance a public policy that they may not be majoritarian or in the public's best interest).

419. *See Kelo*, 545 U.S. at 473.

housing and other concerns and would leave community policy-making open to manipulation solely for personal wealth or pleasure, namely maximizing wealth by speculating or holding land.

Our Federal Constitution contains no Property Rights Clause,[420] and thus the Court should not create a *de facto* Property Rights Clause regardless of how long Americans pine for it. Instead the Court should focus on the injury to property and economic rights when such rights are clearly defined by State law but fully protected by the Federal Constitution's limitations on both means and ends.[421] In *Kelo*, the Court's means-ends test began with a deferential test[422] and ended with a means-ends test so deferential that it leaves little constitutional protection for the private property rights of landowners.[423] Consequently, the Court leaves community policy-makers with almost unlimited eminent domain power under the Takings Clause and leaves landowners with a lesser right to just compensation that is now essentially executable by the state, not landowners.[424]

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420. *See* U.S. CONST. amend. V (Takings and Due Process Clauses); U.S. CONST. amend. XIV (Due Process Clause). Professors, students and commentators have sought to define the utility, status and role of property rights in American constitutional law. *See, e.g.*, Waxman, *supra* note 418, at 1029 (finding that property rights are not the same as other liberties under the Constitution); Justin Morgan Crane, Note, *The Privatization Of Public Use: Why Rational Basis Review Of A Private Property Condemnation Is A Violation Of A Fundamental Civil Right*, 28 WHITTIER L. REV. 511, 527-28 (2006) (finding that private property rights should be a fundamental rights under the Federal Constitution in the same manner as speech and religion); O. Lee Reed, *What Is "Property"?*, 41 AM. BUS. L.J. 459, 472 (2004) (recognizing property rights could be defined as a negative right in the same manner as freedom of speech); *see generally* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (Kermit L. Hall ed., Oxford University Press 1992) (recognizing the ubiquitous nature of private property in the American legal system).

421. *See generally* Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. Pa. J. Const. L. 667 (2007) (suggesting that courts are using a legal process approach to address the impact of takings law on the utility and use of property rights); James W. Ely Jr., *Property Rights and the Takings Clause: "Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004-05 CATO SUP. CT. REV. 39 (criticizing the Rehnquist Court's approach to protecting property rights under the Takings Clause).

422. *Kelo*, 545 U.S. at 481; *see supra* Part III.C and accompanying notes (discussing the standard of review for reviewing exercises of eminent domain power challenged as lacking a public use).

423. *Kelo*, 545 U.S. at 483 (where Justice Stevens expressly notes that *Kelo* does not disturb the deference that had been given to community policy-makers).

424. *See supra* Part III.B and accompanying notes (recognizing the Court moves *Kelo* to the left of both *Berman* and *Midkiff*, making *Kelo* most deferential and perhaps even too deferential for many landowners).

A. The Nature of the Public Benefit of an Exercise of Eminent Domain Power

Economic development policies and regulation further economic and revenue objectives for municipalities, create business and economic opportunities for businesses and provide social welfare benefits for the public. These private business opportunities and public benefits must be weighed against the nature of private economic development and business investments that include economic uncertainty, market risks and financial liabilities for investors and government. A truly functional standard of review must weigh this uncertainty, risk and liability of making the presence of the development project part of the policy outcome. Exercising eminent domain power to condemn or take land for an extremely risky or infeasible project undermines the purpose of the Takings Clause by using the right of just compensation to engage in a merely speculative real estate development project. This condemnation collides with fairness and justice that taken together underpin the purpose of the Takings Clause,[425] and thus permit a government-sponsored land developer or government itself to undertake risk or accept a financial burden that would normally not be undertaken under these market circumstances.

Often enough however, the nature of the land project is not subject to enough scrutiny under a deferential review to question sufficiently government's risk, liability and benefit. Government-sponsored projects with enormous financial and other risks and with little or no immediate (or a highly speculative) benefit to the community should be subject to heightened scrutiny. These projects would include substantial government financial and other public support of a private developer that may or may not earn substantial market returns, and definitely would not have made substantial returns if it had to acquire the land at rising market prices. A limited contribution or benefit would include a business or not-for-profit organization that would not be capable of earning a reasonable market return.[426] Here, government-sponsored support would include providing an economic or financial subsidy to a particular competitor, group of competitors, or an industry.

Although we may not want to admit it, the public benefits of an exercise of eminent domain may not have particularly broad public use, though it offers broader economic and other public benefits. Say for example that County A condemns land to build from its main county

425. U.S. CONST. Amend V.

426. *See* Holloway & Guy—Development Value, *supra* note 40, at 307-09 (explaining that financial expectations and benefits are incentives or motives for real estate development).

highway a secondary road or highway to a tract of beachfront development property. County A builds this two-mile secondary road to the beachfront development but permits no development on the road to preserve its scenic view. Shortly thereafter, extremely expensive homes are built on the beachfront development property. Of course, the road is well traveled by housekeepers, gardeners and others who will make minimum wages and use these wages to feed their families, perhaps in less prosperous areas that are not yet, though not far from becoming, blighted areas of County A. Moreover, retail merchants, storekeepers, banks, doctors, lawyers and other business organizations earn wealth from more fortunate beachfront owners and their less fortunate low-income workers. County A also increases its tax base and receives additional revenues by the addition of new residential and commercial properties that include both beachfront and commercial development.

Most definitely, County A's secondary road has an economic impact that benefits the community. This road provides business and personal benefits to the beachfront developers and landowners, respectively, but County A receives economic development benefits. Although County A receives additional tax revenues, social welfare and economic benefits, the road gives personal and business benefits to landowners and developers, respectively.[427] This situation would be looked upon differently than *Kelo* because the exercise of eminent domain power was to acquire land to build a public road to a gated community. This community contains houses too expensive for 95% of the community, but still justifies the need for a road as public use.[428]

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427. *See generally Kelo*, 545 U.S. at 476 n.4 (transfer of land to the developer for a nominal sum of money, one dollar, creates business or personal advantages for this developer and eventually establishes public benefits for the community).

428. *See id.* at 478-79. Actually, public use does not require that public generally receive any widespread public enjoyment or use. *See id.* In *Kelo*, the Court states that:

> On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public.

Kelo, 545 U.S at 478-79 (citing *Midkiff*, 467 U.S. at 244). Some citizens have not responded positively to the use of eminent domain to create a public road when there are limitations on use, access and other benefits of traditionally public roads. *See* Gary Hoitsma, *Texas Toll Road Plan Stirs Grassroots Protest,* HUMAN EVENTS, Mar. 19, 2007, at 11, 22. Mr. Hoitsma states that one concern is: "The necessary abrupt taking of private property through "eminent domain" and the lack of adequate interchanges and on-off ramps on the proposed new toll roads will wreak havoc on property owners, countryside landscapes and local communities, unnecessarily disrupting traditional in-state travel patterns and forms of commerce." *Id.*

Therefore, each exercise of eminent domain may not necessarily have a direct, broad public benefit to government takers, but may still be a tremendous market solution with important secondary benefits, such as jobs, business opportunities or the impetus for change or means to attract new residents and business. The Court in *Kelo* leaves municipal and county governments to ponder whether tax revenues, business expansion, slow neighborhood deterioration and other motivating indirect or secondary benefits could ever outweigh the direct or primary public need that was put forth to justify public use as a highway, bridge, toll road or other government project.[429] Making economic development a *per se* taking goes too far in answering that question, but some restriction is necessary to prevent the abuse of eminent domain power and its use to take, transfer and fund some economic development projects.[430]

B. Modern Market Solutions of Property Rights in Global Community

Kelo illustrates a market solution, but this solution is repugnant to Justices O'Connor and Thomas' notions of fair and just economic development policy-making under the Takings Clause.[431] Like many American and foreign corporations have done in the 20th Century, Pfizer buys and develops a tract of industrial land.[432] But New London officials, both policy-makers and planners, saw Pfizer's private research or industrial development as a catalyst or springboard for greater economic development.[433] In other words, New London used Pfizer's research facility to revitalize social growth and spur business expansion beyond Pfizer's most immediate business investment in the community.[434] Perhaps, no such unintended mobilizing market solution

429. *See Kelo*, 545 U.S. at 494-505 (O'Connor, J., dissenting) (arguing that economic development should be not be public use); *Id.* at 505-23 (Thomas, J., dissenting) (arguing that economic development is *per se* unconstitutional).

430. *See id.* at 494-505 (O'Connor, J., dissenting). The authors do not argue that the majority's opinion in *Kelo* offers a better economic solution to business expansion and other community needs. They are simply saying that a broad *per se* test would focus too much attention on the validity of secondary benefits as a motivating force for exercises of eminent domain power.

431. *See id.* at 502 (O'Connor, J., dissenting) ("The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs."); *Id.* at 506 (Thomas, J., dissenting) ("This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a 'public use.'").

432. *See Kelo*, 545 U.S. at 473.

433. *See id.*

434. *See id.*

for economic development would have been immediately forthcoming if Pfizer had not developed its tract of land.[435] Obviously, communities suffering a loss of a commercial, institutional or industrial facility or large military training complex are not economic development centers that sustain a high community or regional standard of living. However, Justices O'Connor and Thomas seem mystified by community policy-making and its use of corporate facilities for business expansion and other community or public ends[436] that avoid letting the community's blue collar or low income neighborhoods deteriorate into ghettos and slums. In the 21st Century's global economy, New London and other American communities need a Court that understands their economies and their impact on social, economic and political conditions, and that fashions constitutional remedies to scrutinize community policy-making that recognizes legitimate American ingenuity.[437] Of course, too much policy ingenuity could be harmful so constitutional review is necessary to prevent the abuse of public use.

Another reason for heightened scrutiny is that a city outside of the United States could have been in competition for Pfizer's research facility,[438] and to meet foreign competition, community and state policy-makers might have abused the right to just compensation by taking land purely for the sake of meeting the competition. *Kelo* is a good example of economic revitalization in the global marketplace. Still the potential for using eminent domain power to abuse the right to just

435. *See also id. at* 478. The Court noted that the City of New London did not intend to benefit any particular group of individuals. *Id.* at 478 & n.6, citing *Kelo*, 268 Conn., at 159, 843 A. 2d, at 595 (Zarella, J., concurring in part and dissenting in part) ("'The record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity. . . .'").

436. *See Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting); *see id.* at 505 (Thomas, J., dissenting).

437. For a discussion of the impact of interpretations of the Takings Clause on state and federal relations under federalism, *see generally* Aviam Soifer, *Federalism Issues Following Kelo v. City Of New London: Text-Mess: There Is No Textual Basis For Application Of The Takings Clause To The States*, 28 HAWAII L. REV. 373 (2006) (concluding that the Fourteenth Amendment does apply the Takings Clause to the States); David Alan Ezra, *Symposium: Federalism Issues Following Kelo v. City Of New London: The Overreaching Use Of Eminent Domain And The Police Power After Kelo*, 28 HAWAII L. REV. 349 (2006); David Callies, *Federalism Issues Following Kelo v. City Of New London: Kelo v. City Of New London: Of Planning, Federalism, And A Switch In Time*, 28 HAWAII L. REV. 327 (2006); Joseph L. Sax, *Federalism Issues Following Kelo v. City Of New London: Kelo: A Case Rightly Decided*, 28 HAWAII L. REV. 365 (2006); Bernard W. Bell, *Legislatively Revising Kelo v. City Of New London: Eminent Domain, Federalism, And Congressional Powers*, 32 J. LEGIS. 165 (2006).

438. *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY, 114-27, 1st ed. (Farrar, Straus, and Girou 2005) (finding that American companies are moving to other countries that provide less expensive, professional and skilled talent).

compensation,[439] or the demand for imposing a limitation to curtail its use, is so great in a competitive world that intermediate scrutiny is justified to protect justice and fairness, notwithstanding *Kelo's* virtue.[440]

The Court must not become an unwilling ally of our global competitors, and thus undermine property rights by leaving American business and community policy-makers less able to compete. In the new technology and knowledge global economy, the world is competing with or coming to meet the United States, if not overtaking us.[441] American community and state policy-makers do not need substantive constitutional doctrine or interpretative theory that unknowingly divorces the Court's decisions and rationales from the reality of the world we live and do business in today. In *Kelo*, the majority and dissenting justices settled on a less substantial federal question that supposedly resolved the takings dispute by giving themselves a take-it or leave-it issue.[442]

The Court's better choice should have been finding and framing a more substantial federal question[443] that goes further to resolve community policy-making disputes regarding exercises of eminent domain power to revitalize communities in a more competitive global society where the competition for research facilities recruited by these communities can easily be in India and China.[444] These countries are discovering a need for property rights that we seem to have misplaced. Creating only a *per se* rule or highly deferential test is not a global

439. *See supra* Part VII.A and accompanying notes.

440. *See supra* Parts V.A-B and accompanying notes (discussing the majority and dissenting opinions in *Kelo*).

441. *See* Friedman, *supra* note 438, at 1-21 (naming Chapter 1, *While I Was Sleeping* aptly fits the American dilemma in a flat or wired world that requires business, educational and social responses for a knowledge- and technology-based global economy).

442. *See Kelo*, 545 U.S. at 477. In granting a writ of certiorari to the Supreme Court of Connecticut for Kelo v. City of New London, 542 U.S. 965 (2004), the Court states that the issue is "whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment." Kelo v. City of New London, 545 U.S. 469, 477 (2005). Yet, in takings jurisprudence, *Kelo* is merely a weak substantial federal question regarding another judicial choice between great deference or little deference (*per se* test) for local and state policy-makers. The Federal Constitution permits policy choices by local and state policy-makers, but when the Constitution is interpreted in such a way that the fewest, if any, policy choices are available to government policy-makers, then the Court has clearly made thinly disguised political choices regarding what policy-makers should or should not do in the interest of fundamental fairness. But when the Court makes political choices and divides into liberal and conversative factions that are unable to compromise to eliminate abuse takings of private property, they create a deep policy divide that is full of great uncertainty and discontinuity.

443. *See supra* Part IV.C and accompanying notes (discussing the need for heightened scrutiny of particular disputes involving an exercise of eminent domain power).

444. *See* Friedman, *supra* note 438, at 103-17 (explaining that the American economy is under attack by outsourcing jobs and offshoring industries).

approach.

C. *Corporate Property Rights of Competitors in the Global Marketplace*

Even if Pfizer had demanded an economic revitalization of Fort Trumbull that was consistent with the business needs of its research facility, its demands would have been a business market-government policy-making transaction at arm's length, so long as New London could have exited the transaction. If such a transaction took place, Pfizer would have been using its corporate property (land and wealth) rights[445] to demand a government concession that often includes tax, financing and other incentives.[446] Pfizer might even want the use of adjacent properties to be suitable for compatible or similar commercial and industrial development. We must come to grips with a reality: corporate property rights or wealth-maximizing interests affect federal, state and local policy-making, though some less policy-sensitive corporations may not be completely aware of the magnitude and nature of their impact on communities and their public policy-making influence.[447]

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445. *See generally* Asmara Tekle Johnson, *Correcting For Kelo: Social Capital Impact Assessments And The Re-Balancing Of Power Between "Desperate" Cities, Corporate Interests, And The Average Joe*, 16 CORNELL J. L. & PUB. POL'Y 187, 204 (2006). Professor Johnson states that "[t]he most desperate cities, with the fewest alternative options available, must pay the most in subsidies to attract large corporate interests, and the wealthiest corporations end up receiving the largest concessions. *Id.*, citing John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 70 (1984) (*see* BRYAN D. JONES & LYNN W. BACHELOR, THE SUSTAINING HAND 48 (1986).) (". . . those cities most in need of increased revenues are likely to make the greatest overpayments, and those corporations with the greatest profit margins are likely to receive the largest surpluses from them.").

446. James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 425-26 (2001). In the wake of *Kelo*, professors, students and commentators have examined the role and responsibilities of state, county and municipal governments in financing and establishing economic development. *See, e.g.*, Thaddeus Pitney, Student Note, *Loans, And Takings, And Buildings—Oh My!: A Necessary Difference Between Public Purpose And Public Use In Economic Development*, 56 SYR. L. REV. 321 (2006); Christopher Serkin, *Big Differences For Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U.L. REV. 1624 (2006); Michael Allan Wolf, *Supreme Guidance For Wet Growth: Lessons From The High Court On The Powers And Responsibilities Of Local Governments*, 9 CHAP. L. REV. 233 (2006); Alyson Tomme, Student Note, *Tax Increment Financing: Public Use Or Private Abuse?*, 90 MINN. L. REV. 213 (2005); David L. Callies & Adrienne I. Suarez, *Privatization And The Providing Of Public Facilities Through Private Means*, 21 J. L. & POLITICS 477 (2005) (symposium); Laurie Reynolds & Carlos A. Ball, *Exactions And The Privatization Of The Public Sphere*, 21 J. L. & POLITICS 451 (2005) (symposium).

447. *See generally* James E. Holloway, *A Primer on the Theory, Practice, Pedagogy Underpinning a School of Thought on Law and Business*, 38 U. MICH. J. L. REFORM 587,

Strangely, many judges, commentators and pundits seem to argue that corporate land and wealth are private property rights that cannot be used to shape community policy-making so long as property of less value and social utility would be subject to eminent domain.[448] Yet, Pfizer's demand, even if it made one,[449] would definitely have great utility or impact on the community and its policies.[450] Again, some judges, commentators and pundits are blinded to market solutions that do not include real estate developers taking great risk in development projects to revitalize a new community.[451] Pfizer's implied demand or business needs, if one was present, did not distort real estate markets because the holdout landowners would have received fair market value, what a willing buyer would have actually paid a willing seller.[452]

But there seems to be a constitutional wrong if less sophisticated recent purchasers or long standing residents fall prey to market-enhanced community solutions (namely Pfizer's investment) that can cause the need for land and other legitimate government demands and consequently force involuntary market transactions involving the transfer of land by unwilling sellers.[453] These sellers who just happen to be speculators and holdouts are seeking to preserve pleasure- or comfort-maximizing utility, namely homes and clubs,[454] or engaging in wealth-

587-647 (2005) (discussing the impact and use and law and public policy on business and business decision-making).

448. *See Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting); *see id.* at 505 (Thomas, J., dissenting).

449. *See id.* at 478 & n.6 (Both United States Supreme Court and Supreme Court of Connecticut do not find the Pfizer was the motivating force for the exercise of eminent domain power to take land. *Id.*).

450. *See id.* at 473 (recognizing that the community sees and uses corporate investments as a catalyst for economic development rather than an end only unto themselves). Professors, students and commentators have recognized the role played by corporate interests or property rights in urban revitalization and rural development. *See, e.g.*, Johnson, *supra* note 442, at 187; Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1 (2007); Lynn E. Blais, *Urban Revitalization In The Post-Kelo Era*, 34 FORDHAM URB. L.J. 657 (2007); Steven Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345 (2006); Wendell E. Prichett, *Beyond Kelo: Thinking About Urban Development In The 21st Century*, 22 GA. ST. U.L. REV. 895 (2006); Joseph Blocher, *Private Business As Public Good: Hotel Development And Kelo*, 24 YALE L. & POL'Y REV. 363 (2006); Daniel J. Curtin, Jr., *The Implications Of Kelo In Land Use Law*, 46 SANTA CLARA L. REV. 787 (2006) (symposium).

451. *See Kelo*, 545 U.S. at 505-523 (Thomas, J., dissenting).

452. *See Kelo*, 545 U.S. at 475 ("[The New London Development Corporation] . . . successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case." *Id.*).

453. *See id.* at 494-505 (O'Connor, J., dissenting); *see id.* at 505-523 (Thomas, J., dissenting).

454. *See id.* at 475 (finding that some of the properties were occupied by families).

maximizing transactions, such as land investments.[455] Such utility and transactions are not without risks that may include inherent market, political or personal risks when corporations use their property rights implicitly or explicitly to acquire tax incentives, low interest financing and other business demands from state and community policy-makers.[456]

The Takings Clause itself implies a sort of market risk that all landowners bear, notwithstanding an inherent constitutional limitation or condition on the exercise of eminent domain power. If the Framers had adopted a narrow Public Use Clause to limit exercises of eminent domain power and government takings were always mirror images of traditional public uses, the Framers would have created a constitutional fallacy in establishing the right of just compensation to secure monetary damages for the loss of private property. Why? The narrow public use is a guarantee of payment with little need for any right-based claims, namely the right to just compensation, and thus creating only ends- or purpose-based claims to challenge condemnations not within these narrow limits. The Framers could have enumerated past and future government takings: wooden bridges, dirt roads, red brick schools, cobblestone streets, frontier forts, colonial government facilities and classic Greek buildings. They chose otherwise. The Takings Clause is a limitation that is stated as a condition and relies on the right to compensation to protect property rights.[457]

One could unwisely believe in the wake of *Kelo* that property rights were given by the Framers to protect the government or public from exercises of eminent domain power.[458] The right to just compensation appears to be only a consequence of government action that includes only a remedy, and public use becomes the only real limitation when full public coffers, or the hope thereof, drive government action. The right to just compensation seems to have become a vehicle for community policy-makers to leverage private property rights when public needs seem too great for community policy-makers to overcome with uniquely

455. *See id.* (finding that some of the properties in Fort Trumbull were owned by land investors).

456. *See* Holloway & Guy—Smart Growth, *supra* note 446, at 425-26 (recognizing that government provides incentives with certain economic development expectations, such as more jobs, taxes and growth).

457. *See Dolan*, 512 U.S. at 385-86.

458. *See Kelo*, 545 U.S. at 494-505 (O'Connor, J., dissenting) (arguing for heightened scrutiny of economic development regulation requiring an exercise of eminent domain power); *see id.* at 505-523 (Thomas, J., dissenting) (arguing for strict scrutiny or a *per se* test of economic development regulation requiring an exercise of eminent domain power). In fact, *Dolan* and *Lucas* give more protection to property rights under extremely minute circumstances, but they do so under theory and doctrine grounded in the Federal Constitution or state common law. *See supra* Part IV.C and accompanying notes.

planned, equitable economic development. The Court does little to help matters by furthering public- or- group-based claims.

Justices O'Connor and Thomas place great limits on corporate property rights that are inseparable from the aggregate of individual property rights within the majority of society. They buy into the other half of some black or white, yes or no and heads or tails notion of only two standards of review; deferential and *per se*. Obviously, constitutional choices are not always unmatched pairs or polar opposite or philosophic standoffs, i.e, conservative or liberal.[459] Constitutional logic is often neither a *per se* nor deferential test.[460] Intermediate or heightened scrutiny do not leave American cities and landowners to rely entirely on the Court's *per se* or deferential test when these tests appear seriously out of touch with the realities of the 21st Century and its global business thoughts and decisions.[461] The Court gives little constitutional guidance on scrutinizing community policy-making and its willingness to compromise under the leverage of corporate property rights and their interests in effecting community policies and regulation.[462]

Moreover, it primes and then moves away from the business and social impacts of corporate property rights on individual property rights and their interests under an exercise of eminent domain power.[463] Justices O'Connor and Thomas, writing separate dissenting opinions, give the exercise of private property rights in land considerable control over the social and economic fate of modern communities in a global

459. *Compare Kelo*, 545 U.S. at 488 (Justice Stevens's deferential test can be best represented by the statement that "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." Midkiff, 467 U.S., at 242, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (footnote omitted)), *with*, *Kelo*, 545 U.S. 505 (O'Connor, J., dissenting) (Justice O'Connor's heightened scrutiny is represented by the statement that "[a]ny property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. . . . ." *Id.*).

460. *See Dolan*, 512 U.S. at 391-92 (finding that some exercises of police power are subject to heighten scrutiny under the Takings Clause when they impose unconstitutional conditions on the exercise of importance constitutional rights and could destroy an essential private property right, namely the right to exclude others).

461. *See supra* Part VII.B and accompanying notes (discussing the global economy and its impact on American workers, organizations and communities and the need for community policy-makers to address the competition of foreign cities).

462. *See Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (recognizing the merit of Justice Kennedy's rational basis, actually referring to it as the stupid staffer's test).

463. *See id.* (O'Connor, J., dissenting).

economy.[464] In fact, the most evident property rights are primarily dominant service industries, such as banking, telecommunication and others,[465] that literally may move property, namely information, at the speed of light. Consequently, corporate property rights that are wealth and its power cannot be summarily dismissed with preference given to land that cannot move from one continent to the other. But research has moved, and may continue to move, to foreign laboratories and centers, thus making America appear to be on life support.[466] Instead, both dissenting and majority opinions seem not to understand the impact of corporate property rights on community policy-making and planning and thus dealt only with fallacy of an all or nothing issue, as if Pfizer was operating in our agrarian economy at the beginning 20th Century.

What a waste! In *Kelo*, both dissenting and majority justices reviewed an all-or-nothing issue fixed against the backdrop of an American business and industrial landscape that is shrinking under a relentless attack by global competitors and forces of a global economy that is unprecedented in American history.[467] The Court's all-or-nothing approach gives little guidance to examine and weigh subtle underlying competition between landowners and corporate property rights of the conflict between the use of private property and an exercise of eminent domain power in economic development policy-making to revitalize an

464. *See id.* at 502 (O'Connor, J., dissenting); *see id.* at 505-06 (Thomas, J., dissenting) (both recognizing the influence of corporate wealth on local policy-making).

465. *See id.* at 502 (O'Connor, J., dissenting); *see id.* at 505-06 (Thomas, J., dissenting).

466. *See* Freidman, *supra* note 418, at 208-12 (finding that research and engineering operations are moing to Asian countries).

467. *See id.* at 276-84 (recognizing that America is unprepared to respond and needs a push to meet the competition of the global marketplace). Professors, students and commentators note that although America may be unprepared, many state legislatures that maintain underfunded educational, social, infrastructural and other systems responded to *Kelo* as if their cities and counties were the center of the global economy and can stand toe-to-toe with India and China and command multinational or global technology and knowledge corporations to locate within dust and rust belts—homes to southern textile and northern steel industries, respectively. *See, e.g.*, Amanda W. Goodin, Student Note, *Rejecting The Return To Blight In Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177 (2007); Hannah Jacobs, Student Note, *Searching For Balance In The Aftermath Of The 2006 Takings Initiatives*, 116 YALE L.J. 1518 (2007); Kimberly M. Watt, Student Note, *Eminent Domain, Regulatory Takings, And Legislative Responses In The Post- Kelo Northwest*, 43 IDAHO L. REV. 539 (2007); Bernard W. Bell, *Legislatively Revising Kelo v. City Of New London: Eminent Domain, Federalism, And Congressional Powers*, 32 J. LEGIS. 165 (2006); Patricia J. Askew, Student Note, *Take It Or Leave It: Eminent Domain For Economic Development - Statutes, Ordinances, & Politics, Oh My!*, 12 TEX. WESLEYAN L. REV. 523 (2006); Adrianne Archer, Comment, *Restricting Kelo: Will Redefining "Blight" in Senate Bill 7 Be the Light at the End of the Tunnel?*, 37 ST. MARY'S L. J. 795 (2006); Anatasia C. Sheffler-Wood, Comment, *Where Do We Go From Here? States Revise Eminent Domain Legislation In Response To Kelo*, 79 Temp. L. Rev. 617 (2006).

American city in the 21st Century's global economy of competitive national economies. Perhaps, the Court has a 20th Century solution in mind.

VIII. Conclusion

The *pre* Rehnquist Court era began with *New York City v. Penn Central Transp. Co.*,[468] and continued through *Agins* and *Williamson County*. The Rehnquist Court emerges from a fierce attack on the deference, reluctance and prudence of the Burger and Warren Courts to a lesser Fifth Amendment protection of private property.[469] In 1987, the Rehnquist Court decided *Nollan* and signaled a shift in fashioning standards of review of takings jurisprudence under the Fifth Amendment. In the first half of the 1990s, *Lucas* and *Dolan* led many commentators and scholars to believe that a shift to greater Fifth Amendment protection for private property was taking place and that a new takings jurisprudence was emerging under the Fifth Amendment. Both *Lucas* and *Dolan* included more stringent standards of review that would permit federal and state courts to scrutinize both means and ends of particular land use controls most burdensome on landowners.[470] But hope faded relatively fast when the Rehnquist Court later concluded that *Dolan* and *Lucas* were narrow precedents and failed to establish a *per se* test in *Tahoe-Sierra Preservation Council*[471] and more stringent review in *Palazzolo*. In the 2004-2005 term at the close of the Rehnquist Court era, the Rehnquist Court decided *Kelo*, *Chevron* and *San Remo Hotel* and firmly established that the climax of the Rehnquist Court in takings jurisprudence began after *Dolan* and *Del Monte Dunes*, and experienced a downward turn shortly thereafter.

Ironically, the Rehnquist Court reached a climax in takings jurisprudence long before its natural end, but the Rehnquist Court era ended with a fierce attack being mounted by the American public on *Kelo* and its denial of a limited role for federal courts in the exercise of eminent domain power. At its end, the American public was clamoring for more Fifth Amendment protection of private property rights and strangely raising a public policy concern supporting the property rights

468. *Penn Central Transp. Co.*, 438 U.S. 104 (1978).

469. *Id.* at 138-52 (Rehnquist and Stevens, JJ., dissenting) (finding that the Court should find that New York City's historical preservation regulation are a regulatory takings of private property for public use).

470. *See* Dolan, 512 U.S. at 391 (establishing rough proportionality test to review land dedication conditions); Lucas, 505 U.S., at 1027-28 (establishing the *per se* test for the denial of economical viable use to review regulation prohibiting all development).

471. *See* Tahoe-Sierra Preservation Council, 535 U.S. at 335.

movement agenda.[472] As the Rehnquist Court came to a close, we faced the fact that the United State Supreme Court would be reconstituted and so it was.

We now have the Roberts Court. We could begin a replay of the last 20 years, but we must wait for the outcome. Justice Kennedy may not be any more willing to follow a younger Chief Justice Roberts than he was in not following the older Chief Justice Rehnquist or even Justice Stevens. Moreover, Justice Stevens does not seem any less tenacious in finding just one more Justice to counter the insistence, imprudent run of all or nothing takings issues that are either highly deferential or *per se* standards of review.[473] Come! Come! We thought it was clear that the world was neither completely deferential nor absolutely *per se*, but included an intermediate standard of review as a middle ground permitting compromise in changing and uncertain policy environments of a plethora of American communities. The Roberts Court will confront Fifth Amendment issues best served by intermediate scrutiny or standard of review in a policy environment under siege by changing demographics, scarce resources and global competitors who are as American as apple pie but as foreign as a French wine.

The legacy of the Rehnquist Court has had limited success in protecting property rights where it fashioned new doctrine or relied on old doctrine to underpin new standards of review for takings claims.[474] The Rehnquist Block saw and knew the time for constitutional change, but also accepted that a pragmatic approach without a doctrinal underpinning was too hazardous. In the absence of common law or other doctrine, the circumstances could justify judicial reliance on a rationale or purpose supported by closely related and well-established takings (constitutional) principles.[475]

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472. *See, e.g.,* Dolesh & Vaira, *supra* note 14, at 59-63 (discussing that a public debate exist regarding the use of eminent domain and regulation to create and protect parkland); Lameiras, *supra* note 14, at 8-9 (discussing that States are considering imposing limits the use of eminent domain to further development); United States House of Representatives, *supra* note 15 (discussing how municipalities, counties and states exercise eminent domain power to take land).

473. *See* Tahoe-Sierra Preservation Council, 535 U.S. at 306. In *Tahoe-Sierra Preservation Council*, the Court's polarizing issue shows only a choice between two constitutional alternatives to guide the development of land use and environmental policies. *Id.* This issue is "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution. . . ." *Id.* During the last decade of the Rehnquist Court, many takings issues were merely a polarizing choice between *Lucas* and *Penn Central Transp. Co.*

474. *See Dolan*, 512 U.S. at 391 (establishing rough proportionality test to review land dedication conditions); *Lucas*, 505 U.S. at 1027-28 (establishing the *per se* test for the denial of economical viable use to review regulation prohibiting all development).

475. *See Tahoe-Sierra Preservation Council*, 535 U.S. at 349-52 (Rehnquist, C.J.,

At the climax, *Nollan* and *Dolan* established the essential nexus and rough proportionality, respectively, under the unconstitutional conditions doctrine.[476] Earlier, *Lucas* had established a *per se* test for the denial of all economically viable use under common law doctrine that did not prohibit many present uses of beachfront properties.[477] Finally, *Tahoe-Sierra Preservation Council* rejected an argument to apply common law and physical takings principles to interim development controls or moratoria that had the same impact as a government's taking of a leasehold estate.[478] However, the Rehnquist Court chose to underpin heightened scrutiny with doctrine, but it could not give much sustainability to *Dolan* and *Lucas* as precedents simply because the Rehnquist Court used this doctrine to justify and underpin standards of review that were not intermediate or broad enough to address the broad *circumstances* of a complex, interconnected policy environment. Thus, some municipal land use and economic development planning may involve more than a few local landowners and public policy-makers when this planning impacts the business development and capital investments in a global environment.

The Roberts Court can succeed where the Rehnquist Court did not go far enough. But the Roberts Court must continue to rely on the Rehnquist Court's legacy of defensible constitutional or common law doctrine to justify and underpin takings, just compensation and public use standards of review. The Roberts Court must fashion standards that can address more than the narrowest of socioeconomic circumstances or complex public policy environments of a plethora of American communities now linked to global markets and reliance on global corporations.[479] From a constitutional perspective of takings jurisprudence, this remains the calculus for overcoming deference, reluctance and precedents waylaying the fashioning of heightened scrutiny, namely an intermediate standard of review, for the review of claims arising under Just Compensation, Takings and Public Use Clauses.

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dissenting) (relying on both common law principles and physical taking doctrine to establish that the moratoria was a taking of private property for public use).

476. *See* Dolan, 512 U.S. at 385-86, 391-92.

477. *See* Lucas, 505 U.S. at 1027-28.

478. *Tahoe-Sierra Preservation Council*, 535 U.S at 349-52.

479. *See* Holloway & Guy—Tahoe-Sierra, *supra* note 3, at 275-92.