Taking the Courts: A Brief History of Takings Jurisprudence and the Relationship Between State, Federal, and the United States Supreme Courts

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Introduction

Regulatory takings law today is criticized as a confused muddle,[1] intractable,[2] as an ambiguous area in which the United States Supreme Court complicates its own jurisprudence with each new decision, and as an area in which the Court fails to "revisit its regulatory takings precedent in order to clarify the current standard."[3] Though this is true to some extent, it is because the often fact-specific nature of takings cases leads to results that are "pragmatic at the expense of internal consistency."[4]

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1. Bradley C. Karkkainen, *Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 827 (2006). See also Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 612 (2004); 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, 343 (2005).

2. William A. Fletcher, Kelo, Lingle, *and* San Remo Hotel, *Takings Law Now Belongs to the States*, 46 SANTA CLARA L. REV. 767, 776 (2006).

3. Keri Ann Kilcommons, Note, *A Survey of Supreme Court Takings Jurisprudence: The Impact of* Del Monte Dunes *on* Nollan, Dolan, Agins, *and* Lucas, 9 N.Y.U. ENVTL. L.J. 532, 533 (2001).

4. David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 NOTRE DAME L. REV. 717, 721

The basic takings framework is as follows. In general, when a government regulation results in the permanent physical occupation of property[5] or when it deprives an owner of all economically viable use of his property,[6] it is a taking, unless it is not.[7] In the case of exactions, which are a special class of regulatory takings wherein the government conditions an owner's ability to use his land is a particular way based on the surrender of a property right, regulations are subject to the "essential nexus" test in *Nollan v. California Coastal Commission*,[8] and the "rough proportionality" test of *Dolan v. City of Tigard*.[9] All other cases are decided under the multi-factor calculus in *Penn Central Transportation Corp. v. New York City*.[10] Until recently, because of the complexity and uncertainty of result under *Penn Central*, courts relied on a "short-form alternative"[11] test set out in *Agins v. City of Tiburon*.[12] The *Agins* two-prong test found a compensable taking when the regulation "[did] not substantially advance legitimate state interests . . . or den[y] an owner economically viable use of his land."[13] The Court overruled the "substantially advances" prong of the *Agins* test in *Lingle v. Chevron U.S.A., Inc.*, finding that the test was "an inquiry in the nature of a due process, not a takings, test," and "has no proper place in our takings jurisprudence."[14] *Lingle* is an important step toward more clarity in judicial takings analysis. It is also a rare admission of mistake and an attempt to correct course on the part of the Court.[15] However, the

(1999). See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (noting that property regulation decisions are "question[s] of degree—and therefore cannot be disposed of by general propositions.").

5. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (finding that a state law requiring landlords to permit cable companies to install cables on apartment buildings constituted a taking).

6. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

7. See Karkkainen, *supra* note 1, at 827. See also *Lucas*, 505 U.S. at 1028-29 (stating that limitations on the use of property "inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," then it is non-compensable).

8. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

9. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

10. Penn Central Transp. Corp. v. New York City, 438 U.S. 104, 124 (1978).

11. Karkkainen, *supra* note 1, at 828.

12. 447 U.S. 255 (1980).

13. *Id.* at 260.

14. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005).

15. *Id.* at 531.

complexity of takings jurisprudence has a long judicial and social history.

This paper traces the role of the federal courts and the U.S. Supreme Court with regard to review of state judicial changes in takings or property law. It examines the position of the federal courts in their review of both physical and regulatory takings cases. Part I addresses the political and social history behind the development of takings jurisprudence, and offers some contextual reasons for the murky law. Part II explains the four primary ways in which a plaintiff can mount a takings challenge, and the related role of the courts with regard to each theory. Part III looks toward future takings challenges and the implications of the U.S. Supreme Court's current trend toward rule-formalist analysis. Rather than conclude that the takings doctrine is "a hopeless mess," the paper finds that there is a light at the end of the dark tunnel.[16] The focus is now squarely on whether the government action took property[17] and on the impact of the government action on the property owner, which reaffirms the fact-specific nature of takings case analysis.

I. Short Political and Social History of Takings Jurisprudence

The principles of federalism underscore our constitutional law of property. Since *Erie v. Tompkins*,[18] the general presumption is that "state law is the primary source and determinant scope of the limits of property."[19] Because property law is the product of judge-made common law, an owner's property rights "extend only as far as state property law says they do," and states have considerable discretion to determine and adjust their property laws.[20] With that in mind, it would seem that federalism concerns would play a greater role in takings jurisprudence than they seem to have done.

One explanation for the complexity of takings jurisprudence and the consistently evolving role of the federal court is political.

16. Barros, *supra* note 1, at 356.

17. *Lingle*, 544 U.S. at 541-43.

18. Erie v. Tompkins, 304 U.S. 64, 78-80 (1938) (finding that a federal court sitting in diversity should apply state law and not federal common law).

19. Karkkainen, *supra* note 1, at 833-34.

20. *Id.* at 834. See also Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 402-04 (2001) (describing property as the product of the dynamic relationship between common law and legislation).

Legislative and social valuations of constitutional rights have changed and developed over the years, and judicial treatment of these rights has varied accordingly.[21] James W. Ely noted that the New Deal era saw a great shift in the constitutional status of property rights.[22] Until the rise of the Progressive movement in the 1930s, the protection of property rights were a central theme in American constitutional jurisprudence.[23] "Legal theorists associated with the Progressives argued that constitutional doctrine overstated the importance of property and contractual rights."[24] Ely argues that the Great Depression and the New Deal "constituted a watershed in constitutional history" because of the New Deal emphasis on broader federal government and away from individual property owners' rights.[25] He points to the famous footnote four of *United States v. Carolene Products*,[26] in which the Court established the rational basis standard of review and "signaled that it would give a higher degree of due process scrutiny to a preferred class of individual rights, such as free speech and religious freedom, than to property rights."[27] Ely argues that this hierarchy of rights affected judicial treatment of property rights and takings claims for the next fifty years.[28]

This hierarchy may also have roots in the language of the Fifth Amendment,[29] which is applicable to the states via the Fourteenth

21. *C.f.* Brown v. Board of Education, 349 U.S. 294 (1955) (racial segregation in public schools); Empl. Div. Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990) (free exercise of religion).

22. James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004-05 CATO SUPR. CT. REV. 39, 45 (2004-05) [hereinafter *Poor Relation*]. Though property rights continue to be a major theme in American constitutional jurisprudence, other issues have also risen to prominence in more recent years.

23. *Id. See also* JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 132-34 (2d ed. 1998) [hereinafter GUARDIAN].

24. *Id.*

25. *Id.*

26. United States v. Carolene Prod., 304 U.S. 144, 152 n.4 (1938) (denying a Fifth Amendment challenge to the Filled Milk Act of 1923, J. Harlan Fisk Stone distinguished the rational relation test as the appropriate standard of judicial review of economic regulations affecting commercial activity and laws that allegedly violate personal constitutional rights).

27. *Poor Relation*, *supra* note 22, at 46.

28. GUARDIAN, *supra* note 23, at 132-34.

29. U.S.CONST. amend. V.

Amendment.[30] The Fifth Amendment regulates the way in which the government can apply its power to the individual. It states

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[31]

Ostensibly, the order of the phrases (according to Ely) set out a general hierarchy of restraints on the exercise of state power, from capital punishment on one end to eminent domain on the other.[32] Perhaps the placement of property rights at the bottom of the amendment (not to mention the associations and implications of property rights in the political sphere) guided federal court treatment of property and takings claims as well.

For many years, the United States Supreme Court was relatively silent on the Takings Clause. The dramatic increase in the rate of residential development and population growth has led to an increase in the number of takings cases that reach the federal courts and the United States Supreme Court. In recent years, the Supreme Court has moved toward a more formal, rule-based takings analysis. Its latest decisions have attempted to clarify and streamline previous takings jurisprudence. Part of this process involves a hard look at the role of the federal courts—and specifically the Supreme Court—with regard to state court and legislative determinations of takings.

II. Takings Challenges Today

The United States Supreme Court recently reaffirmed four theories under which a plaintiff can challenge a government regulation as an uncompensated taking of private property. A plaintiff can allege "a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."[33] The standard of review

30. U.S. Const. amend. XIV.

31. *Id.*

32. See Westbrook, *supra* note 4, at 723.

33. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005).

and the related role of the Supreme Court in evaluating the state court holding and definition of taking and property rights differs under each theory. This section examines these four theories and the cases behind them. It then goes on to examine three of the Supreme Court's most recent takings decisions[34] and the implications that these decisions have for the future of takings jurisprudence.

A. The Role of the Federal Judiciary Before *Kelo*, *Lingle*, and *San Remo*

The most recent Supreme Court takings cases have not only been the most sensational, but have clarified and limited takings jurisprudence. Taken together, these three cases represent a substantial change in the relationship between state courts and the United States Supreme Court. Though they maintain the default multi-factor balancing test described in *Penn Central Transportation Co. v. New York City*,[35] they indicate a significant shift toward "relegating takings issues to the political and legal judgments of the states."[36]

1. Physical Takings

There are two categories of regulatory government action that are generally considered per se takings for the purposes of the Fifth Amendment. The first is a taking in the classic sense: a permanent physical occupation. When the government requires a landowner to suffer a permanent physical occupation (or authorizes a permanent physical invasion) of her property, the government must pay the landowner just compensation.[37] In *Loretto v. Teleprompter Manhattan CATV Corp.*, the appellant purchased apartment buildings on which the previous owner had allowed a cable company to install cables and to provide cable services to the building occupants.[38] The appellant challenged the New York State law that required landlords to allow cable companies to install cable facilities

34. *Id.;* Kelo v. City of New London, 545 U.S. 469 (2005); San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).

35. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (determining that a building regulation aimed at historical preservation was not a regulatory taking, identifying several factors that contribute to this analysis, and finding that regulatory takings cases should be evaluated on a case by case basis).

36. Fletcher, *supra* note 2, at 776.

37. *Lingle*, 544 U.S. at 538; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

38. *Loretto*, 458 U.S. at 421.

on the landlord's property on the grounds that it constituted a compensable taking.[39] The Court agreed that "a minor but permanent physical occupation" of private property constituted a compensable taking under the Fifth and Fourteenth Amendments.[40]

Under the categorical *Loretto* rule, the court must answer two questions to determine whether the case falls under the multi-factor *Penn Central* test or the per se test. First, did the property owner consent to the initial physical occupation, or was the occupation forced upon the owner by the government?[41] Second, is this a permanent physical occupation, for example one in which the property owner could escape the occupation by changing the use of the land to a purpose not covered by the challenged regulation?[42]

The *Loretto* holding is "very narrow," as the Court seemed reluctant to take on a role beyond one of the arbiter of the degree of the degree of a physical occupation.[43] The Court limited its decision to consider only whether there was a permanent physical occupation, not the import of the extent of such occupation or the necessary compensation for it.[44] The character of a permanent physical occupation, even when that occupation is the size of a few television cables on the side of a building, is "qualitatively more intrusive than perhaps any other category of property regulation."[45] However, the Court remained very deferential to a state's power to regulate an owner's use of his property.[46]

2. *Total Regulatory Takings Under* Lucas

The second category of per se takings covers those government regulations that deprive a property owner of "*all* economically beneficial use" of his property.[47] This is also a relatively narrow

39. *Id.*

40. *Id.*

41. *Id.* at 429; *see also* http://web.mac.com/graybe/iWeb/Site%203/Takings%20Seminar. html (follow "Updates" hyperlink; then follow "Summary of the Law.doc" hyperlink) [hereinafter *Summary*].

42. *Id.* at 452 (Blackmun, J., dissenting). *But see* F.C.C. v. Florida Power Group, 480 U.S. 245 (1987) (finding power company's prior consent to the placement of cable television lines and boxes on their utility poles removed the case from the *per se* takings rules of *Loretto*).

43. *Loretto*, 458 U.S. at 441.

44. *Id.* at 437-38.

45. *Id.* at 441.

46. *Id.*

47. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original).

category of takings because most state or local government regulations will not rise to the level of a total regulatory taking.[48] Of those that do, there is a second test: If the regulated use constitutes a noxious use or some form of nuisance already regulated at common law, then the state need not provide compensation to the landowner.[49] The cases subjected to takings scrutiny are often those in which the court finds that the right asserted by the plaintiff was not his in the first place. *Lucas v. South Carolina Coastal Council*[50] is an example of such a case.

In *Lucas*, a beachfront property owner challenged a state regulation as a taking under the Fifth Amendment.[51] Lucas argued that the regulation rendered his property valueless because it effectively barred him from erecting any "permanent habitable structures" on the property, and thus required just compensation.[52] The South Carolina Supreme Court upheld the law, finding that the state was acting within its power to prevent noxious uses of property.[53] The United States Supreme Court granted certiorari. Justice Scalia wrote for the Court, joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas:

> when government restrictions on the use of a tract of land deprive the owner of all "economically beneficial or productive options for its use," the government is constitutionally obligated to compensate the owner, unless the regulation does "no more than duplicate the result that could have been achieved . . . under the State's law of private nuisance" or by the State itself using the doctrine of public nuisance.[54]

In other words, any state law that effectively denies a private property owner all economically beneficial use of his property is a taking per se.[55]

Professor Richard Lazarus argues that *Lucas* is likely "the high-water mark for constitutional protection of private property" because the facts of the case were terrible from the government's perspective

48. *Id.* at 1026.

49. Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1369 (1993).

50. *Lucas*, 505 U.S. at 1003.

51. *Id.* at 1006.

52. *Id.*

53. *Id.* at 1009-10.

54. William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393, 1393 (1993) (quoting *Lucas*, 505 U.S. at 1018, 1029, 1009-10).

55. *Lucas*, 505 U.S. at 1029.

and the Court "was dominated by a conservative supermajority that was predisposed against the government's position."[56] Nevertheless, Justice Scalia was unable to construct a majority decision that South Carolina's regulation constituted a compensable taking.[57] The Court instead remanded the case back to the state court for a determination of whether common-law "background principles" would have prevented any development on the land.[58] The *Lucas* court built in an exception to the per se rule for cases in which the property owner never held the claimed right under the "background principles" of state property or nuisance law.[59] David Sarratt argues that states can use this exception to avoid paying compensation for actions that are effectively takings.[60] He argues that the exception would function properly as such in a perfect world where statutes were enacted to replace or define common law background principles and the courts "decide questions retrospectively, saying what the law is and has been."[61]

Professor Lazarus questions the ultimate impact of *Lucas* with regard to the relationship between the federal and state courts as follows:

> Lucas' bite may ultimately turn on the lower courts' willingness to accept the majority's invitation to scrutinize state court property and tort rulings to determine whether they are supported by "an objectively reasonable application of relevant precedents." Unfortunately, "takings" plaintiffs may not be able to take advantage of that limitation. State court judges are not likely to conclude that their own application of precedent is not "objectively reasonable." And, while federal judges might be more willing to second-guess their state judicial counterparts, they are not likely to have much opportunity to do so. The Supreme Court's ripeness rules effectively require that "as applied" takings challenges be initiated in state administrative and judicial fora. The Supreme Court's new emphasis on the background principles of state property and tort law may also

56. Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1425 (1993).

57. *Lucas*, 505 U.S. at 1031-32; *see also* Lazarus, *supra* note 56, at 1425-26.

58. *Lucas*, 505 U.S. at 1031.

59. W. David Sarratt, Note, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1489 (2004) (quoting *Lucas*, 505 U.S. at 1029).

60. *Id.* at 1490.

61. *Id.* at 1491.

> prompt federal court abstention to provide state courts with the first opportunity to resolve those issues of state law.[62]

In other words, the Supreme Court provides a paradoxical limitation on the state courts. The Court acknowledges that there is "no doubt some leeway in a court's interpretation of what existing state law permits," but not nearly as much leeway as in a legislative determination of the scope of a regulation.[63] In order for a state court to properly address a takings challenge, at least according to the Supreme Court, that state court must make and objectively review its own decision at the same time. While this is reasonable and desirable from a federal court (and constitutional) perspective, it likely will be inconsistent in its application. Though it may reduce the number of takings challenges that reach the Supreme Court, it does not necessarily improve the quality of review of those challenges. It may also keep more takings challenges within states, which limits the federal and Supreme Courts' opportunities to review and define uniform means to adjudicate takings challenges.

3. Nollan, Dolan, *and Land-Use Exactions*

Land-use exactions are a special form of government regulation. They are *quid pro quo* cases in which, for example, the government demands a landowner dedicate a public easement over her property as a condition for obtaining a development permit.[64] Other examples of exactions include "mandatory dedications of land, fees required in lieu of dedication, and impact fees given by property owners in exchange for permits, zoning changes, and other regulatory clearances."[65] While takings law mandates that the "majority of regulatory acts enjoy deferential treatment in an ad hoc balancing test," courts review exactions under a "rule-formalist heightened scrutiny."[66]

The Supreme Court decided in *Nollan v. California Coastal Commission*[67] and in *Dolan v. City of Tigard*[68] that there must be an "essential nexus" between the government conditions placed on the

62. Lazarus, *supra* note 56, at 1430-31 (citations omitted).

63. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032 (1992).

64. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 546 (2005); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

65. Fenster, *supra* note 1, at 613.

66. *Id.* at 611.

67. *Nollan*, 483 U.S. at 837.

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

use of land and the problems created by that use or development.[69] In other words, a condition placed on development must redress the problems caused by the development, and the condition must be "roughly proportionate" to those problems.[70] Under *Nollan*, a regulation that would otherwise be a taking may be imposed without compensation if these criteria are satisfied.[71] If a local government fails to meet either requirement, the regulatory act is a taking and the property owner is entitled to just compensation.

The essential nexus and rough proportionality tests established in *Nollan* and *Dolan* do not apply beyond the limited class of land-use exactions.[72] The rationale for this limitation is based on the "similarity of conditional exactions to prior precedent establishing government's physical occupation of property as warranting higher scrutiny under the Takings Clause."[73] In *Nollan*, the state government conditioned the plaintiff's ability to build a larger home on his beachfront property on the dedication of a public easement that allowed access between the owner's seawall and the mean high-tide line.[74] In *Dolan*, the state government conditioned a permit to expand a store and parking lot on the dedication of a portion of the property for a bicycle and pedestrian pathway.[75] Permanent physical invasions are classic takings, and are the most serious form of invasion of private property rights.

4. Penn Central *Takings*

Outside of the relatively narrow *Loretto* and *Lucas* takings and special land-use exactions, the default standard for regulatory takings challenges is the multi-factor *Penn Central* balancing test.[76] The *Penn Central* decision identified "several factors that have particular significance" in the outcome of a takings challenge.[77] These factors include "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with

69. *Id.*; see also *Nollan*, 483 U.S. at 837; *Summary* at 1.

70. *Dolan*, 512 U.S. at 391.

71. *Nollan*, 483 U.S. at 836.

72. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999).

73. Kilcommons, *supra* note 3, at 559.

74. *Nollan*, 483 U.S. at 827.

75. *Dolan*, 512 U.S. at 380.

76. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

77. *Id.*

distinct investment-backed expectations, . . . [the] character of the governmental action."[78] When a government regulation amounts to a physical invasion rather than affects property rights through a "public program [that adjusts] benefits and burdens of economic life to promote the common good," it is more likely to be a taking.[79] The balance of these factors rests in judicial discretion.

This balancing test is perhaps better described as a "framework for analysis"[80] or a "calculus"[81] rather than a free-standing test that yields predictable and consistent results. Though the Court has enunciated a more rule-based takings doctrine through *Lucas*, *Loretto*, *Nollan*, and *Dolan*, the narrow interpretations of those cases and the narrow circumstances in which they apply ultimately returned *Penn Central* to the forefront of regulatory takings analysis.[82] The *Penn Central* analysis provides for a more nuanced evaluation of the facts of a case, which is likely why "the ideological middle of the Court, represented by Justice Anthony Kennedy and former Justice Sandra Day O'Connor, consistently resisted the effort by the more conservative wing of the Court, led by Justice Antonin Scalia, to develop a more rule-based approach to takings."[83] Some commentators argue that because the Court has not provided strict guidelines as to how to apply the *Penn Central* factors or which factors to weigh above others, that the multi-factor calculus "mask[s] . . . considerable uncertainty about the parameters of takings law."[84] On the other hand, perhaps this is the Court's way of acknowledging that takings cases are necessarily fact specific and that state interests, public interests, and the meaning of "public benefit"[85] and public harm[86] do and should change over time. In order to meet these changing norms, the courts should have a more flexible test at their disposal.

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78. *Id.*

79. *Id.*

80. John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 208 (2005).

81. Brian Gray, *The Modern Takings Clause:* Penn Central Transp. Co. v. New York City, *available at* http://web.mac.com/graybe/iWeb/Site%203/Assignments.html. (follow the "Takings 08 Penn Central.pdf" hyperlink).

82. Echeverria, *supra* note 80, at 173.

83. *Id.* at 174.

84. *Id.*

85. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 144 (1978) (quoting Mugler v. Kansas, 123 U.S. 623, 668-669 (1887)).

86. *Id.* at 130-31. See also Echeverria, *supra* note 80, at 175-77.

The *Penn Central*, *Lucas*, and *Loretto* inquiries seek to "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[87] Because each test focuses on the degree of the burden imposed on private property rights, the Court remains an arbiter of scale.

B. *Kelo* and the Broad Delegation of Land Use Decisions to State and Local Governments

Kelo v. City of New London[88] is probably the most famous recent takings case. After the decision, there was a strong public backlash against the government's use of eminent domain.[89] A number of states passed legislation to restrict the power of state and local governments to condemn private property for redevelopment projects.[90] The issue remains active in state legislatures.

In *Kelo*, the City of New London, Connecticut had experienced years of economic downturn and was designated an "economically distressed city" by the State of Connecticut.[91] The city approved a redevelopment project for its waterfront in an effort to encourage community economic revitalization. The city proposed to build a large complex including shopping areas, a hotel, office space, new residential construction, and a public park.[92] Significant portions of the proposed redevelopment area were to be owned by private landowners. The city believed that this redevelopment project would create significant economic benefit both for the neighborhood and for

87. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).

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

89. See William Yardley, *Anger Drives Property Rights Measures*, N.Y. TIMES, Oct. 8, 2006, at A1. *See also* Judy Coleman, *The Powers of the Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2; Richard A. Epstein, *Supreme Folly*, WALL ST. J., June 27, 2005, at A14.

90. For a discussion of 2006 ballot measures regarding eminent domain, see JOHN D. ECHEVERRIA, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE, ALL OVER THE MAP: THE DIVERSITY OF 2006 STATE BALLOT MEASURES ADDRESSING EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT, (Nov. 27, 2006), http://www.law.georgetown.edu/gelpi/current_research/eminent_domain/eminent_pub.cfm; *see also* Richard M. Frank et al., CAL. CTR. FOR ENVT'L LAW & POLICY, PROPOSITION 90: AN ANALYSIS, (Oct. 2006), http://www.law.berkeley.edu/centers/envirolaw/. Only two of the eleven 2006 state ballot measures on eminent domain failed. See Initiative & Referendum Inst. at U.S.C., *Ballotwatch: Election Results 2006*, (Nov. 2006), http://www.iandrinstitute.org/BW%202006-5%20(Election%20results).pdf

91. *Kelo*, 545 U.S. at 472.

92. *Id.* at 473.

the city at large.[93] In order to complete the project, the city purchased property from willing sellers, and proposed to use its power of eminent domain to acquire the remaining property.[94]

A small group of homeowners refused to sell their properties voluntarily to the city. These properties were not "blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."[95] After the city commenced formal condemnation procedures against them, the homeowners filed a Fifth Amendment takings claim in the New London Superior Court.[96] The United States Supreme Court ultimately granted certiorari to determine whether the city's decision to take property for the purpose of economic development satisfied the "public use" requirement of the Takings Clause.[97] The Supreme Court, in a five to four decision, ruled in favor of the city, finding that the city's action was consistent with the Fifth Amendment.[98] Justice Stevens, writing for the majority, rested the decision largely on two earlier cases, *Berman v. Parker*[99] and *Hawaii Housing Authority v. Midkiff*,[100] which both emphasized a broad understanding of the "public use" requirement of the Fifth Amendment. The majority opinion emphasized that the government does not have the power to condemn one private landowner's property just to confer an economic benefit on another private party.[101] However, in this case the government intended to provide general economic benefits on the community as a whole, which was a legitimate public use.[102]

Justices O'Connor and Thomas filed vigorous dissenting opinions. Justice O'Connor, who wrote the unanimous opinion in *Midkiff*, argued that *Midkiff* and *Berman* were easily distinguishable from *Kelo* in that they both dealt with severe problems posed by existing land use.[103] Furthermore, she argued, the majority's holding that the construction of economic development projects may

93. *Id.* at 474.
94. *Id.* at 472.
95. *Id.* at 475.
96. *Id.*
97. *Id.* at 477.
98. *Id.* at 477-78.
99. Berman v. Parker, 348 U.S. 26, 32-33 (1954).
100. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984).
101. *Kelo*, 545 U.S. at 485-87.
102. *Id.* at 489-90.
103. *Id.* at 498-99.

constitute a public use means that "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process."[104] Even though Justice Stevens stated clearly that the property at issue in *Kelo* was not blighted, he still found that it fell within the rules established by *Berman* and *Midkiff*.[105]

Justice Thomas urged a narrower interpretation of the Takings Clause's public use requirement. He argued for a return to the original understanding of the Public Use Clause: "[T]hat the government may take property only if it actually uses or gives the public a legal right to use the property."[106] Unlike the majority, he did not equate public use with public purpose.[107] He refused to afford deference to "legislative conclusions that a use serves a 'public use,'"[108] and, also contrary to the majority, found that *Berman* and *Midkiff* were wrong.[109]

Unlike *Lingle* and *San Remo* where the Court was more concerned with its role vis-à-vis the state courts, the Court in *Kelo* defined the role of the Court vis-à-vis state legislatures. On one hand, this focus was necessitated by the facts of the case, but is also perhaps part of a larger move toward defining the role of the federal court in Fifth Amendment takings cases. To wit, in the 2004 term in which the Supreme Court decided *Kelo*, *Lingle*, and *San Remo*, the Court continued a trend that favored economic regulation and state and local government use of eminent domain over private property interests. In order to define the proper venue in which to address takings issues, the Court must address both the state government and the state courts. In fact, *Kelo* may be more firmly rooted in political theory or policy than Justice Stevens was willing to admit.[110] "The majority opinion masks a balancing of social and administrative costs behind precedent and leaves state courts and/or legislatures with the burden of crafting a test or legislation, respectively, that balances the

104. *Id.* at 494.

105. *Id.* at 482-84.

106. *Id.* at 507 (Thomas, J., dissenting).

107. *Id.* at 508 (Thomas, J., dissenting).

108. *Id.* at 517 (Thomas, J., dissenting).

109. *Id.* at 520 (Thomas, J., dissenting).

110. See Eric Rutkow, Case Comment, *Kelo v. City of New London*, 30 HARV. ENVT'L. L. REV. 261, 270 (2006).

rights of property owners with the needs of developers."[111] The Court did not replace a legislative test with a judicial one, however.[112]

C. *Lingle* and the Shift Toward Doctrinal Coherence

Lingle stands out in Supreme Court takings jurisprudence not only because it was a unanimous decision, but because of its "its unusual commitment to producing doctrinally coherent takings standards."[113] The Court recognized the multiplicity of tests in its takings jurisprudence[114] and sought to "correct course."[115]

The core question in *Lingle* was whether the "substantially advance" test was a takings test or a substantive due process test.[116] *Lingle* was the first chance the Supreme Court had to address the "substantially advance" test of *Agins* on the merits. The conflicting results in the lower courts took this test to "its logical conclusion, and in so doing, revealed its imprecision."[117] Because the Court made such a clear statement regarding the appropriate takings test, it is worthwhile to quickly trace the procedural history of *Lingle* so as to better understand the Court's doctrinal decision.

In *Lingle*, Chevron challenged a Hawaii law that limited the rent charged by oil companies to the operators of service stations.[118] Chevron contended that the rent-control law constituted a taking under the Fifth and Fourteenth Amendments.[119] Hawaii argued to the district court that the statute was intended to protect consumers from high gasoline prices that would result from "concentration of the retail gasoline market."[120] Chevron based its takings argument on the

111. *Id.*

112. *Id.*

113. Sarah B. Nelson, Case Comment, *Lingle v. Chevron U.S.A., Inc.*, 30 HARV. ENVTL. L. REV. 281, 286 (2006). *See also* Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases,* 38 WM. & MARY L. REV. 1099 (1997); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) (noting that "our regulatory takings jurisprudence cannot be characterized as unified"). *But see* G. Richard Hill, *Partial Takings after* Dolan, *in* TAKINGS: LAND DEVELOPMENT-REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 189, 189 (David L. Callies ed., 1996) (arguing that before *Lingle* "in fact it [was] quite simple for the government to steer clear of [regulatory] takings problems").

114. *Lingle*, 544 U.S. at 539.

115. *Id.* at 548.

116. *Id.* at 532.

117. *Id.* at 548.

118. *Id.* at 533.

119. *Lingle* , 544 U.S. at 533.

120. *Id.* at 533.

point that Hawaii's zoning laws failed to substantially advance a legitimate state interest, and would not work as intended.[121] The district court agreed with Chevron and granted summary judgment on the basis that the statute did not substantially advance a legitimate state interest, and thus constituted a compensable taking.[122] The Court of Appeals for the Ninth Circuit held that the district court "had applied the correct legal standard," but vacated the grant of summary judgment on the grounds that a "genuine issue of material fact remained as to whether the Act would benefit consumers."[123] On remand, the trial was limited to the testimony of competing expert witnesses.[124] The district court again entered judgment for Chevron, and found again that the statute would not work as intended.[125] The Ninth Circuit affirmed again.[126] Hence,

> by the time the case reached the Supreme Court, the Hawaii statute had been held to be an unconstitutional taking because the trial court concluded, based on its finding that one economics expert was more credible than the other, that the Hawaii legislature had done something stupid. The Supreme Court, understandably unimpressed with the proceedings below, concluded that the district court, based on a battle of expert economists, had improperly substituted its judgment for that of the Hawaii legislature.[127]

After "seeing the substantially advance test in action,"[128] the Supreme Court concluded the test was a substantive due process that "ha[d] no proper place in . . . takings jurisprudence."[129]

Professor David Shultz argues that the significance of *Lingle* is that it reaffirms claims in two early takings cases, *Berman v. Parker*[130] and *Hawaii Housing Authority v. Midkiff*,[131] "which gave government

121. *Id.* at 534.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 535-36.

126. *Id.* at 536.

127. Barros, *supra* note 1, at 347.

128. *Id.*

129. *Lingle*, 544 U.S. at 541.

130. Berman v. Parker, 348 U.S. 26 (1954) (finding constitutional the condemnation of private property for transfer to a private real estate developer where the overall purpose of the project served a the public purpose of community redevelopment).

131. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (allowing condemnations of private property for public use when the exercise of eminent domain by state governments is rationally related to a public purpose).

significant discretion to interpret 'public use' broadly, including for economic development cases."[132] Further, he argues that this "reaffirmed broad judicial deference to legislative decisions" on economic regulation.[133] Beyond this, the ultimate impact of *Lingle* is that it refocused the court's analysis away from whether the act advanced a legitimate state interest, which is the inquiry under a substantive due process analysis, and back on the effect of the government's action on the private property at issue.[134]

The Supreme Court's decision in *Lingle* effectively sent the message that the federal courts would take an even more hands-off approach to regulatory takings. The decision broadened the regulatory power of state and local authorities in land use cases.[135] "After *Lingle*, the only regulatory takings test is whether the regulation effectively takes away all economically viable use of the property."[136] The case has great potential to further clarify regulatory takings law in the future, and will certainly have a significant on the ways and means that takings challenges reach and succeed in federal court.

D. *San Remo* and Issue Preclusion: Keeping Takings Claims in the State Courts

A discussion of the role of the Supreme Court and federal courts vis-à-vis state courts necessarily begs the question of the role of the full faith and credit statute and of issue and claim preclusion. *San Remo* grew out of a complicated litigation history, but ultimately presented the procedural question of "whether the federal courts could create an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment."[137]

The San Remo Hotel is a "three-story, 62-unit hotel in the Fisherman's Wharf neighborhood of San Francisco."[138] After the earthquake of 1906 that destroyed most of the city, the hotel, then

132. David Schultz, *The Property Rights Revolution That Failed: Eminent Domain in the 2004 Supreme Court Term*, 21 TOURO L. REV. 929, 977 (2006).

133. *Id.*

134. *See* Barros, *supra* note 1, at 348.

135. Fletcher, *supra* note 2, at 777-78.

136. *Id.*

137. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 326 (2005).

138. *Id.* at 327.

operating under a different name, served as a home for "dislocated individuals, immigrants, artists, and laborers."[139] By the 1970s, it was a bed and breakfast inn.[140] In response to a severe shortage of affordable housing for the elderly, disabled, and low-income, the city issued a moratorium on the conversion of residential units into tourist units.[141] The city enacted a series of ordinances that regulated permits to convert residential units into tourist units, and the city and the hotel engaged in protracted disputes over these permit regulations.[142] In 1990, the hotel applied to the city to convert all of the rooms to tourist use rooms.[143] San Francisco approved the conversion, but required a $567,000 "in lieu" fee.[144] The hotel appealed, arguing that the regulation was "unconstitutional and otherwise improperly applied" to them.[145]

The hotel first tried the issue in state court, but the parties agreed to stay the action while San Remo pursued a takings claim in federal court. San Remo filed for the first time in federal court in 1993, alleging four counts of due process, both substantive and procedural, and takings, both facial and as-applied, under the Fifth and Fourteenth Amendments.[146] There were numerous subsequent administrative, state, and federal court appeals on the regulatory takings claim. A federal district court ultimately granted the city summary judgment on the theory that the plaintiffs' claim was unripe.[147] On appeal, the United States Court of Appeals for the Ninth Circuit found that the facial takings claims were ripe, but agreed with the hotel owners to abstain under *Railroad Commission of Texas v. Pullman Co.*[148] on the basis that "a return to state court could conceivably moot the remaining federal questions."[149] The Ninth Circuit also found that the hotel owners' as-applied claims were unripe for review because the owners had failed to pursue a

139. *Id.*
140. *Id.* at 328.
141. *Id.*
142. *Id.* at 328-29.
143. *Id.* at 329.
144. *Id.*
145. *Id.*
146. *Id.* at 330.
147. *Id.*
148. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).
149. *San Remo*, 545 U.S. at 330-31.

compensation action in state court[150] as contemplated by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[151]

The hotel owners pursued this action when they reactivated the dormant California case, but reserved the federal takings claims for later decision by the federal court.[152] The state court ruled against them on the state law takings claim, and decided both federal and state issues, despite the hotel owners' reservation of the federal claims.[153] The principal constitutional issue in the California Supreme Court was whether heightened scrutiny applied; the court found the proper standard of review was the rational relationship test.[154]

Once the state decision was final, the hotel owners came back to federal court to re-litigate the issues they believed they had reserved.[155] The district court found the hotel's facial challenge was barred by both the statute of limitations and by issue preclusion.[156] The preclusion argument was based on 28 U.S.C. 1738, which requires a federal court to give the same preclusive effect to a state court judgment as the courts of that state would give that judgment. The California court had interpreted the "relevant substantive state takings law coextensively with federal law," so San Remo's federal claims had already been resolved in state court.[157] The United States Supreme Court held, over the hotel's arguments under *England v. Louisiana Board of Medical Examiners*,[158] that federal courts should review reserved federal claims *de novo*, that preclusive effect should be given to the state court determination in accordance with California's laws of issue preclusion.[159] Justice Stevens pointed out that *England* stands for the proposition that "when a federal court abstains from deciding a federal constitutional issue to enable state courts to address an antecedent state-law issue, the plaintiff may reserve his right to return to federal court for the disposition of his

150. *Id.* at 331.

151. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985).

152. *San Remo*, 545 U.S. at 331.

153. *Id.* at 332-33.

154. *Id.* at 333.

155. *Id.* at 334.

156. *Id.*

157. *Id.* at 335.

158. England v. La. Bd. of Med. Exam'r, 375 U.S. 411 (1964).

159. *San Remo*, 545 U.S. at 339-340.

claims" *only* when the state and federal claims are distinct from one another.[160] Justice Stevens found the issues in *San Remo* were so interconnected that *England* did not apply.[161]

The Court then rejected the hotel owners' argument that issue preclusion should not apply when a case is "forced into state court by the ripeness rule of *Williamson County*.[162] In an article on the 2004 Supreme Court term, Judge William A. Fletcher of the United States Court of Appeals for the Ninth Circuit argues that *Williamson County* "means that all state-law aspects of regulatory takings claims must first be litigated in state court . . . [and] when state-court litigation is finished and the state court has ruled against the landowner," then the landowner can bring a takings claim based on federal law to federal court.[163] Judge Fletcher reads *San Remo* to mean that a federal court must apply both issue preclusion and claim preclusion.[164] He finds that

> the practical effect of the Court's decision is that there can be no regulatory takings litigation challenging state and local land use regulation in federal district court. That is, *Williamson County* requires that suits involving potential federal regulatory takings claims first be litigated in state court. Only after the landowner has lost in state court does she have a ripe federal takings claim. But once the landowner has lost in state court, there is a Catch-22. She may have a federal takings claim, but 1738 prevents her from litigating it in federal court.[165]

This reasoning suggests some reluctance on the part of the Supreme Court to address federal takings claims. The majority points out that state courts are "fully competent to adjudicate constitutional challenges to local land-use decisions."[166] Further, state courts "undoubtedly have more experience than federal courts" in resolving such issues.[167] Time will tell whether or not this justification is satisfactory, but it seems to be rather tenuous.

Chief Justice Rehnquist, joined by Justice O'Connor, Justice Kennedy, and Justice Thomas, concurred in the judgment.[168] The four

160. *Id.* at 339.
161. *Id.* at 340.
162. *Id.* at 342.
163. Fletcher, *supra* note 2, at 774.
164. *Id.*
165. *Id.*
166. *San Remo*, 545 U.S. at 347.
167. *Id.*
168. *Id.* at 348.

justices agreed that the majority's analysis led to the proper result under *Williamson County*. However, they argued that it was time to reconsider *Williamson County* because "the justifications for its state-litigation requirements are suspect, while its impact on takings plaintiffs is dramatic."[169] Chief Justice Rehnquist questioned the majority's state court familiarity justification. Though he agreed that state courts were "competent to enforce federal rights and to adjudicate federal claims," he felt that the majority unfairly singled out federal takings claims.[170] Perhaps he was partially motivated to continue the recent trend toward rule-formalist analysis in takings jurisprudence, and so favored federal or Supreme Court adjudication of those cases.

III. Looking Forward: Future Interpretation of Takings Cases

The *Penn Central* multi-factor calculus remains the default standard for takings challenges. Permanent physical occupations and regulations that deprive the landowner of all economically beneficial use of her property are governed by the per se takings tests of *Loretto* and *Lucas*. Though the earlier cases discussed above still stand, the rhetoric under which they are analyzed and political context in which they stand has changed significantly. Today, the property rights movement, partially motivated by the *Kelo* backlash, endeavors to keep eminent domain issues in the public eye.

Though *Kelo* caused more of a public sensation, *Lingle* may ultimately have a greater effect on the future of takings jurisprudence. The doctrinal separation of substantive due process and regulatory takings leaves a major impact on takings jurisprudence. *Lingle* refocused the courts' attention on the impact of the government regulation on the landowner rather than on the reasons behind the government action. As Judge Fletcher points out, taken together, *Kelo*, *Lingle*, and *San Remo* represent a major shift in takings jurisprudence—a shift "entirely in the direction of relegating takings issues to the political and legal judgments of the states."[171] *Kelo* basically allows all state and local redevelopment projects, as long as the redevelopment authority can show the project has a public use.[172] *Lingle* stripped down the regulatory takings test to only

169. *Id.* at 352 (Rehnquist, C.J., concurring).

170. *Id.* at 351 (Rehnquist, C.J., concurring).

171. Fletcher, *supra* note 2, at 776.

172. *Id.* at 777.

whether the regulation takes away all economically viable use of the property, which broadened the state and local regulatory authority.[173] *San Remo* "effectively requires that all takings claims against state and local authorities be presented to state courts."[174] This keeps most takings claims out of the federal courts, and gives state courts the almost exclusive control over takings protection. Fletcher argues that the Supreme Court essentially stripped the federal district courts of jurisdiction over land-use regulatory takings via the *San Remo* decision.[175] Indeed, this action may be the Supreme Court's message on the proper role of the federal courts vis-à-vis state courts in the takings context.

Conclusion

The federal district courts and the United States Supreme are certainly comfortable reversing lower court decisions on takings challenges. This, however, is not unique to takings cases, and tells us little about the proper relationship between the state and federal courts. Though the cases discussed in this note provide a multitude of interrelated tests that state courts can use to determine whether or not a government action constitutes a compensable taking, the federal courts rarely define their role vis-à-vis the state courts.

Some cases provide more guidance on the issue. In *Lucas*, the Supreme Court offered some direction to the state courts. The majority opinion acknowledged that the Court's reliance on the limitations in land ownership that inhere in the "background principles" of a state's property and nuisance law provide leeway to state courts in their determination of the scope of a state law.[176] The extent of this leeway depends on the willingness of the state courts to evaluate whether their own application of precedent is "objectively reasonable."[177] This structure is circular, and ultimately keeps the majority of takings decisions out of the federal courts. *San Remo* effectively fills out the Supreme Court's very deferential approach to state determinations of takings challenges. Whereas the Court has traditionally given great deference to local and state political bodies,

173. *Id.*

174. *Id.*

175. *Id.* at 778-79.

176. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032 (1992).

177. *Id.*

San Remo makes those determinations only enforceable in the state courts.

Ultimately, and no matter which test applies to a case, the courts must ask whether or not a taking of property has occurred. First, the court must determine the extent and nature of the plaintiff's property rights. Second, it must examine any limitations on those rights that inhere in state property law, and determine whether the governmental action goes so far that it takes the individual's property right, or whether it is within the purview of the state's regulatory or police power to create such a regulation.[178] Political and historical concerns also weigh in the balance. However, despite the current trend toward clarity and a better-defined role of the federal courts, takings jurisprudence is notoriously unsettled. The current focus on the impact of the regulation or government action on the individual will provide more guidance for future cases, and may lead the way out of the takings muddle.

178. Of course permanent physical occupations are treated differently and tend to present simpler cases.