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# Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About the Private Property

## **Cover Page Footnote**

Thanks to the editors of the Fordham Urban Law Journal for inviting me to contribute to this issue. Thanks also to Craig Green, Richard Greenstein, and Carol Rose who provided enormously useful comments on earlier drafts. Finally, thanks to Shira Helstrom for excellent research assistance.

## WINDING TOWARD THE HEART OF THE TAKINGS MUDDLE: *KELO*, *LINGLE*, AND PUBLIC DISCOURSE ABOUT PRIVATE PROPERTY

Jane B. Baron\*

People care about property. In 2005, the United States Supreme Court decided two cases with deep connections to that concern, both brought by property owners challenging the government's power under the Takings Clause<sup>1</sup> to take title to, or significantly affect the value of, their property. In both cases, the Court rejected the property owners' claims and upheld the government's action against charges that it had overreached. In both cases, the Court found the issue to be relatively simple, legally speaking. One of these cases, *Kelo v. City of New London*,<sup>2</sup> has been seen as controversial from the moment it was decided,<sup>3</sup> and remains controversial today.<sup>4</sup> The other case, *Lingle v. Chevron U.S.A. Inc.*,<sup>5</sup>

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1. U.S. CONST. amend. V.

2. 545 U.S. 469 (2005).

3. Peter S. Canellos, *High Court Backs Seizure of Land for Development*, BOSTON GLOBE, June 24, 2005, at A1; Linda Greenhouse, *Justices Uphold Taking Property for Development*, N.Y. TIMES, June 24, 2005, at A1; Stephen Henderson, *Property Seizure Widened: The U.S. Supreme Court's Ruling Lets Governments Take Private Property for Private Use, but with a Public Benefit*, PHILA. INQUIRER, June 24, 2005, at A01; David G. Savage, *Justices Back Forced Sale of Property: Cities Have the Authority to Clear Land for Redevelopment Even Where Blight is Not an Issue, the Supreme Court Rules in a 5-4 Vote*, L.A. TIMES, June 24, 2005, at A1.

4. Sometimes, a title says it all. See Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 233 (2006) ("*Kelo* was a case of active judicial expansion of preexisting policy-driven eminent domain decisions that tampered with the meaning of words to reach an unjust result preferred by the Court's majority. In doing so the majority surrendered the vital function of constitutional review to an unaccountable, self-serving business-government alliance."); see also Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006) (describing attacks on *Kelo* by libertarians, liberals, and communitarians).

5. 544 U.S. 528 (2005).

has received far less public attention, despite the fact that its holding, unlike *Kelo*'s,<sup>6</sup> established new law in the takings area.<sup>7</sup>

It might be thought that *Kelo*'s relatively greater impression in the public mind is traceable to its sympathetic facts. The case was, after all, brought by long-term residents who stood to lose their homes if the economic redevelopment project at issue were permitted to go forward.<sup>8</sup> *Lingle*, in contrast, dealt with the constitutionality of a Hawaii ordinance limiting the rents oil companies could charge to lessee-dealers.<sup>9</sup> No sympathetic displaced homeowners here. The technical issues in each case were also different in a way that might account for *Kelo*'s stronger impact on the public consciousness. *Kelo* involved a direct and overt exercise of the state's eminent domain power to take private property, whereas *Lingle* was a "regulatory takings" case, alleging that what appeared to be a garden-variety economic regulation in fact constituted a taking of property.<sup>10</sup> *Kelo*'s outcome can easily be spun as a tale of tragic victimization of innocent homeowners by a voracious government captured by powerful corporate interests. It is hard to find much melodrama in a rent cap.

While these differences are by no means trivial, this Article argues that the significance of *Kelo* and of *Lingle* lies elsewhere—in the extent to which the two cases engage with, or fail to engage with, the cultural debate over the function of property in contemporary society. As is developed in Part I, the facts of *Kelo* did indeed raise emotionally and politically charged issues with which the public was strongly engaged. Notwithstanding its controversial political implications, however, *Kelo* turned out to be a fairly easy legal case from a technical standpoint. As least as the majority saw it, two hundred years of case law,<sup>11</sup> including two particularly note-

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6. For articles explaining the view that *Kelo* broke no new ground with respect to "public use," see *infra* note 88.

7. Specifically, *Lingle* established that takings and due process analyses are distinct and subject to different standards. See *infra* notes 144-52 and accompanying text.

8. See *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) ("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.").

9. See 544 U.S. at 533.

10. *Id.* at 542-45.

11. The Court specifically referred to nineteenth century state court decisions involving Mill Acts and mining, which rejected "use by the public" as a test for "public use." *Kelo*, 545 U.S. at 479 n.8. Justice Thomas, in dissent, reads these cases differently. See *id.* at 512-17 (Thomas, J., dissenting).

worthy decisions from the mid- and late-twentieth century,<sup>12</sup> established law unfavorable to the plaintiffs' claims.<sup>13</sup> In terms of "the ongoing conventions of constitutional adjudication,"<sup>14</sup> in particular fidelity to precedent, *Kelo* was legally uncomplicated.

Because the majority saw the result as virtually dictated by prior precedent, it wrote an opinion that seems insensitive to the issues the public was, and still is, debating.<sup>15</sup> Many people—including prominent academics<sup>16</sup>—understand property "as a bulwark which protects material wealth, liberty, and autonomy; for the government to impair this bulwark—without recognizing that impairment—touches, on the deepest levels, the feelings of security of ordinary citizens."<sup>17</sup> Although *Kelo*'s facts raised precisely this concern over governmental power and individual liberty, the Court's opinion, which focused mainly on precedent, did not seriously address the fear that government might threaten citizens' security or confidence in the protection of their rights.<sup>18</sup> If, as one influential constitutional scholar has asserted, legal authority is not merely a matter of "the logical manipulation of received rules," but instead must be conceived "as a living connection between the Court and the nation, the result of a certain relationship of trust that the Court works to establish with the American public,"<sup>19</sup> then the Court violated the conditions necessary to create that trust. Such trust requires, "at a minimum," that the public be confident "that the Court will justly balance its obligation to maintain fidelity to rule-of-law virtues against its obligation to align its judg-

12. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

13. See *infra* text accompanying notes 52-87.

14. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 108 (2003) (exploring the ways in which constitutional law is and is not independent from the beliefs and values of nonjudicial actors).

15. See Thomas J. Lueck, *Suit Against Atlantic Yards Challenges Eminent Domain*, N.Y. TIMES, Oct. 27, 2006, at B4 (observing that opponents of Brooklyn redevelopment project argue the state is abusing eminent domain by "taking one citizen's property to benefit a powerful and influential private citizen").

16. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (Harv. Univ. Press 1985).

17. LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER 1-2* (Oxford Univ. Press 2003).

18. The Court did note, however, that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Justice Kennedy's concurring opinion focused directly on this theme, carefully scrutinizing the facts to see whether there were signs of "impermissible favoritism." *Id.* at 491 (Kennedy, J., concurring).

19. Post, *supra* note 14, at 109.

ments with constitutional culture.”<sup>20</sup> By attending almost entirely to prior law on the public use question, and failing to address the public’s beliefs and values, including its beliefs and values about the Takings Clause,<sup>21</sup> the Court evaded involvement in what is now an ongoing public dialogue about property and government. For this, it will not be soon forgiven.<sup>22</sup>

Part II argues that the Court was far more effective in *Lingle* than it was in *Kelo* in engaging directly with public unease about the relationship between government and private property. As in *Kelo*, the legal issue in *Lingle* was relatively uncomplicated. In evaluating the validity of the alleged taking, the test from *Agins v. City of Tiburon*<sup>23</sup> dictated that the Court merely had to consider whether the regulation in question did or did not “substantially advance legitimate state interests.”<sup>24</sup> As in *Kelo*, the Court’s view of its precedents was decisive; the *Agins* language, the Court found, “was derived from due process, not takings, precedents.”<sup>25</sup> In the Court’s eyes, it was as easy in *Lingle* to see how the due process cases were distinguishable as it had been in *Kelo* to see how the prior public use cases were determinative.

But the Court in *Lingle* did not confine itself to precedent. It went on to differentiate due process analysis from takings analysis, an approach which provided the Court the opportunity to explain the kind of injury that, in its view, is distinctively cognizable under the Takings Clause—injury involving a burden of a particular “*magnitude or character*” that is not properly “*distributed* among property owners.”<sup>26</sup> In some ways, this holding broke no new ground. In words that have often been repeated, the Court asserted a half-century ago in *Armstrong v. United States* that the Takings Clause “was designed to bar Government from forcing

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20. *Id.*

21. Post refers to the first set of beliefs and values, i.e., those that do not pertain specifically to law, as “culture,” and the second set, i.e., those that “encompass . . . extrajudicial beliefs about the substance of the Constitution” as “constitutional culture.” *Id.* at 8.

22. This is true in a literal as well as figurative sense. In a gesture of anger, the town of Weare, New Hampshire sought to condemn the home of Justice Souter, who joined the majority in *Kelo*. See Kathy McCormack, *Battle Over Ruling Comes Knocking at Justice’s Door*, CHI. TRIB., Jan. 22, 2006, at 19; Elizabeth Mehren, *A Door-to-Door Bid to Single Out Justice*, L.A. TIMES, Jan. 22, 2006, at A15. This effort was successfully rebuffed. See *Justice Prevails in Eviction Bid*, CHI. TRIB., Feb. 5, 2006, at 8.

23. 447 U.S. 255 (1980).

24. *Id.* at 260.

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

26. *Id.* at 542.

some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>27</sup> The growth of “property rights movements”<sup>28</sup> and the passage of ordinances, such as Oregon’s Measure 37,<sup>29</sup> which seek to compel government to compensate owners for the economic losses imposed by regulatory actions, demonstrate that people care deeply about the question of the distribution of regulatory burdens. This concern is well-warranted, for “[u]nderstanding constitutional limitations on the power of the government to regulate private commercial behavior, especially where those regulations frustrate an economic opportunity related to real property, is central to mapping the relationship between the individual, state, and society.”<sup>30</sup> By openly returning takings jurisprudence to its *Armstrong* heart in “fairness and justice,” without attempting to set forth a definitive “test” for determining what is fair and just, the Court left open the possibility of a conversation between it and the public—including “property

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27. 364 U.S. 40, 49 (1960). The *Armstrong* language in turn was derived from *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (“[The Fifth Amendment] prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.”).

28. See William Yardley, *Anger Drives Property Rights Measures*, N.Y. TIMES, Oct. 8, 2006, at A34; see generally Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759 (2006) (describing the successes and failures of the property rights movement within the Supreme Court); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996) (describing and discussing legislation proposed by property rights advocates); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1, 2 (1996) [hereinafter Torres, *Taking and Giving*] (describing the “political technique” of property rights advocates).

29. OR. REV. STAT. § 197.352 (2007). Section 1 of this statute provides:

If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

*Id.* § 197.352(1). With respect to the origins, operation, and policy implications of Measure 37, see Margaret H. Clune, *Government Hardly Could Go On: Oregon’s Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 URB. LAW. 275 (2006); Sara C. Galvan, *Gone Too Far: Oregon’s Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL’Y REV. 587 (2005); Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 URB. LAW. 237 (2006).

30. Torres, *Taking and Giving*, *supra* note 28, at 4 (asserting that the property rights debate is often transformed into a story of patriotic struggle and therefore triggers heightened public interest).

rights” advocates—about what the Takings Clause will mean in the future. Since the public cares about property, this is an important conversation to enable.

Part III describes the implications of *Kelo* and *Lingle* for future redevelopment projects. Here, I acknowledge that my conclusions are quite tentative. We know now a lot more than we did before about what will be regarded as a “public use” as a matter of federal constitutional law. But since *Kelo* can easily be overridden by state or federal legislation—legislation that the majority expressly invited and that states have rushed to pass<sup>31</sup>—it is not clear how much relevance *Kelo* will have in future eminent domain cases. On the regulatory takings side, we know now more than we did before what is *not* part of the analysis; the Court in *Lingle* successfully disentangled due process from takings claims. We also know now, generically as it were, the kinds of concerns the Court thinks *are* properly addressed in regulatory takings claims.<sup>32</sup> How the general concepts articulated in *Lingle* will be implemented in the future—what particulars will truly count—is, alas, another question altogether. From a doctrinal point of view, it is not clear how much guidance the two opinions will provide to municipal planners in assessing whether proposed land use regulations will survive judicial scrutiny under the Fifth Amendment.

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.

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31. For a summary of post-*Kelo* legislation, see The National Conference of State Legislatures Homepage, <http://www.ncsl.org> (search “Post-Kelo”; then follow “Post Kelo v. New London State Eminent Domain Legislation” hyperlink) (last visited Jan. 22, 2007).

32. Specifically, questions of the “magnitude” and the “distribution” of the burdens of regulation. For a discussion of the potential indeterminacy of these terms, see *infra* text accompanying notes 183-84, 207-09. On the importance of burden distribution in the related context of exactions, see Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513 (2006).

### I. *KELO*: POSSIBILITIES UNREALIZED

The facts of *Kelo* are relatively well-known.<sup>33</sup> The case arose out of efforts to revitalize the Fort Trumbull area of the city of New London (the “City”), itself a “distressed municipality.”<sup>34</sup> The City sought to leverage the decision of Pfizer Inc., a pharmaceutical company, to build a research facility nearby;<sup>35</sup> the New London Development Corporation created an ambitious plan for parks, public walkways, office and retail space, and residences.<sup>36</sup> This plan, it was hoped, would create jobs, increase tax revenues, and rejuvenate downtown New London.<sup>37</sup>

Approved in January 2000, the plan authorized the City to purchase property or acquire property by eminent domain.<sup>38</sup> It exercised this power with respect to Susette Kelo and several other long-term Fort Trumbull residents after negotiations to purchase their properties failed.<sup>39</sup> In response, Kelo and the other residents brought suit in state court alleging that the “taking” of their properties, which were not blighted, violated the “public use” restriction in the Fifth Amendment.<sup>40</sup> After the Connecticut courts denied their claim,<sup>41</sup> the United States Supreme Court granted 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.”<sup>42</sup> By a vote of five to four, the Court answered that question in the affirmative.<sup>43</sup>

The *Kelo* case clearly and accessibly raised the question whether citizen owners should regard the state as friend or foe, protector or thief, ally or enemy, with respect to property. Can a government body which exercises its eminent domain power to take homes to which individuals have held title for decades be trusted to further the public good, or is it to be feared for its potential to trample individuals’ rights in pursuit of its own agendas or, worse yet, the agendas of different, favored, citizens? The Court’s holding—that the use of eminent domain to promote economic development sat-

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33. *Kelo v. City of New London*, 545 U.S. 469, 472-76 (2005).

34. *Id.* at 473.

35. *Id.*

36. *Id.* at 474.

37. *Id.* at 472-73.

38. *Id.* at 475.

39. *Id.*

40. *Id.*

41. *See Kelo v. City of New London*, 843 A.2d 500, 508 (Conn. 2004).

42. *Kelo*, 545 U.S. at 477.

43. *Id.* at 490.

ifies the Takings Clause's "public use" requirement, even where the municipal action in question involves the transfer of title from one private owner to another—hardly provides an intuitive answer to these questions; where is the "public" use in a private-entity-to-private-entity transfer? There is, moreover, an enormous gap between, on the one hand, the calm, deliberate tone of the opinion, and, on the other hand, the public's passionate concern for the issues the case seemed to raise.<sup>44</sup> That gap—reflecting the Court's view that existing law more or less dictated a result favoring the government—is, I will argue, extremely problematic insofar as it suggested, even if unintentionally, that the Court did not feel any institutional obligation to address the public's fear that New London's victory renders all property rights vulnerable.

Part A of this section examines *Kelo* doctrinally, focusing on the decision's relation to prior precedents. I neither support nor defend the majority's account of the Court's history of its reading of "public use."<sup>45</sup> My purpose is only to demonstrate how the Court's understanding of prior law rendered *Kelo* relatively easy to decide, from a technical perspective. Part B considers the Court's invitation to states to define for themselves the scope of local eminent domain power. This invitation, I argue, is best understood in terms of the Court's sense of the constraints imposed by the prior case law. It may have been heard, however, in quite a different way than the Court intended—as a message of indifference to public fear. Part C takes up the public outcry that followed *Kelo*, and considers the possibilities left unrealized by the *Kelo* decision.

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44. See Megan Barnett, *A Homeowner's Battle*, U.S. NEWS & WORLD REP., Feb. 28, 2005, at 48; Kirstin Downey, *Fighting the Power to Take Your Home*, WASH. POST, May 7, 2005, at F1; Stephen Henderson, *Private Land vs. Public Control*, PHILA. INQUIRER, Feb. 23, 2005, at A1; Matt Hudgins, *When is Eminent Domain Eminently Unfair?*, NAT'L REAL EST. INVESTOR, May 2005, at 14-15; Charles Lane, *Justices Affirm Property Seizures*, WASH. POST, June 24, 2005, at A1; Elizabeth Mehren, *Dispatch from New London, Conn.*, L.A. TIMES, May 29, 2005, at A20; Iver Peterson, *As Land Goes to Revitalization, There Go the Old Neighbors*, N.Y. TIMES, Jan. 30, 2005, at 29; Timothy Sandefur, *Eminent Domain Abuse*, WASH. TIMES, Feb. 20, 2005, at B4; David G. Savage, *Justices Back Forced Sale of Property*, L.A. TIMES, June 24, 2005, at A1; David G. Savage, *Cases Lift Hopes for Property Rights*, L.A. TIMES, Feb. 22, 2005, at A9; *Your Home is Your Castle—Until the City Says It Isn't*, USA TODAY, Feb. 22, 2005, at 11A.

45. As is developed *infra* in the text accompanying notes 111-16, Justice O'Connor believed that the majority misread the earlier cases, which were, in her view, distinguishable. See 545 U.S. at 497-502 (O'Connor, J., dissenting). Justice Thomas, also dissenting, seemed to agree with the majority about the meaning of the prior case law, but in his view, "[o]ur cases have strayed from the [Takings] Clause's original meaning," and for that reason the Court should have reconsidered them. 545 U.S. at 506 (Thomas, J., dissenting).

Like the public use cases that preceded it, *Kelo* represented an opportunity to consider and discuss the state's role as a guardian of private property rights,<sup>46</sup> and how takings complicate and problematize that role.<sup>47</sup> Because the "fundamental constitutional beliefs of the American people are informed and sustained by the constitutional law announced by courts, just as that law is informed and sustained by the fundamental constitutional beliefs of Americans,"<sup>48</sup> the Court's focus on precedent represented a missed opportunity to address directly citizens' expectations about the extent to which the Constitution should provide special or absolute protection for property rights.

### A. The "Doctrine" of *Kelo*

*Kelo* declined to find that "public use" required "use by the public," and instead found that "public use" was properly interpreted to require only that the property taken be used for a "public purpose."<sup>49</sup> The Court further found that economic development could qualify as "public use," even when the economic development in question might benefit private parties.<sup>50</sup> The Court thus embraced the proposition that a generalized and merely hypothetical benefit to the public, achieved by the forced transfer of ownership from one private party to another, could satisfy the "public use" requirement.<sup>51</sup>

Had the Court been writing on a clean slate, this proposition might indeed seem both outlandish and startling. Prior case law, however, made this result almost inevitable.<sup>52</sup> The Court began by noting that "while many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use,

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46. On this "protective" function of property, see UNDERKUFFLER, *supra* note 17, at 1-3; see also *id.* at 5 (describing the "'common' conception" of property, "in which property functions to protect the individual against collective interests").

47. See *id.* at 37-38 ("[T]he Takings Clause has provided the contemporary stage for real and symbolic struggles among different visions of individual prerogative and state power.").

48. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1038 (2004) (analyzing the potential for a balance between the rule of law and the people's authority to speak on issues of constitutional meaning).

49. *Kelo*, 545 U.S. at 479.

50. *Id.* at 484.

51. *Id.* at 487-88.

52. See *supra* notes 11-13 and accompanying text. Even Justice Thomas, who dissented, believed that the existing cases supported the Court's holding. See *supra* note 45 (describing the difference between the O'Connor and Thomas dissents).

that narrow view steadily eroded over time.”<sup>53</sup> Because the “use by the public” test was both difficult to administer and impractical, “when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’”<sup>54</sup> “Without exception,” the Court added, “our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”<sup>55</sup> Two noteworthy twentieth century decisions, *Berman v. Parker*<sup>56</sup> and *Hawaii Housing Authority v. Midkiff*,<sup>57</sup> reaffirmed the law established in the earlier cases and, more importantly, demonstrated why the eminent domain power could not be cabined within the boundaries petitioners had proposed.<sup>58</sup>

*Berman* was itself an urban redevelopment case, in which Congress authorized the use of eminent domain in connection with a slum clearance project in Washington, D.C.<sup>59</sup> As in *Kelo*, the appellants argued that the taking of their property could not satisfy the “public use” requirement; their property, they claimed, was not blighted and therefore was not contributing to the problem the redevelopment plan sought to solve.<sup>60</sup> Moreover, it was to be “put . . . under the management of a private, not a public, agency and redeveloped for private, not public, use.”<sup>61</sup>

Writing for the Court in *Berman*, Justice Douglas asserted that the judiciary’s role in determining what constitutes a public purpose is “extremely narrow.”<sup>62</sup> In language that has proven to be pivotal, Douglas wrote that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”<sup>63</sup> The legislature’s authority extends, the Court held, not just to the ends to be

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53. *Kelo*, 545 U.S. at 479.

54. *Id.* at 480. For a historical treatment of the development of the concept of “public use,” see Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204-25 (1978).

55. *Kelo*, 545 U.S. at 480.

56. 348 U.S. 26 (1954).

57. 467 U.S. 229 (1984).

58. The Court in *Kelo* also relied in part on *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), which had applied *Berman* and *Midkiff*. See *Kelo*, 545 U.S. at 482.

59. *Berman*, 348 U.S. at 28-31.

60. *Id.* at 31

61. *Id.*

62. *Id.* at 32.

63. *Id.*

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served, but to the means by which those ends are to be accomplished:

Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.<sup>64</sup>

This language raised obvious difficulties for the petitioners in *Kelo*, as it clearly established that exercises of eminent domain that move property from one private owner to another did not, on that ground alone, violate the public use requirement.

This problematic aspect of *Berman*, coupled with its deferential approach to exercises of legislative eminent domain power, was only heightened in *Midkiff*. *Midkiff* challenged a 1967 statute enacted by the Hawaii Legislature designed to redress the State's problem of concentrated land ownership (the "1967 statute").<sup>65</sup> The Legislature had "discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners."<sup>66</sup> The concentration of land ownership "was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."<sup>67</sup> The statute created "a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees."<sup>68</sup> The statutory "mechanism" permitted tenants to request the Hawaii Housing Authority (the "Housing Authority") to condemn the property on which they resided; if the Housing Authority determined that acquisition by the State would further the statute's pub-

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64. *Id.* at 33.

65. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984) ("The Hawaiian Islands were originally settled by Polynesian immigrants from the western Pacific. These settlers developed an economy around a feudal land tenure system in which one island high chief, the ali'i nui, controlled the land and assigned it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. There was no private ownership of land. Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people. These efforts proved largely unsuccessful, however, and the land remained in the hands of a few.")

66. *Id.*

67. *Id.*

68. *Id.* at 233.

lic purpose, it could acquire the land in question and transfer title to the tenants.<sup>69</sup>

The appellees in *Midkiff* were owners who were on the verge of losing title under the Hawaii statute; tenants had invoked the statutory mechanism, and the Housing Authority had made the requisite determination that acquisition of appellees' lands would serve the purposes of the 1967 statute.<sup>70</sup> Appellees filed suit in United States District Court alleging, inter alia, that the statute was unconstitutional.<sup>71</sup> While the district court rejected their claim, the Court of Appeals for the Ninth Circuit held that the 1967 statute violated the "public use" requirement of the Fifth and Fourteenth Amendments.<sup>72</sup> The Supreme Court reversed, holding that the statute did in fact satisfy the "public use" requirement.<sup>73</sup>

Writing for the Court, Justice O'Connor relied heavily on *Berman*, stating, "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" <sup>74</sup> In this instance, the Court found that the end to be achieved—reducing "the perceived social and economic evils of a land oligopoly"<sup>75</sup>—was "a classic exercise of a State's police power," an exercise of which the Court "cannot disapprove."<sup>76</sup> Nor, the Court continued, could it "condemn as irrational the Act's approach to correcting the land oligopoly problem."<sup>77</sup> As in *Berman*, the Court would defer not just to the state legislature's judgment about the ends to be achieved, but also to its choice of means: "When 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."<sup>78</sup>

Again following *Berman*, the Court rejected the claim that "public use" required actual use by the public, stating that the "mere fact that property taken outright by eminent domain is transferred

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69. *Id.* at 233-34.

70. *Id.* at 234.

71. *Midkiff v. Tom*, 483 F. Supp. 62, 64-65 (D. Haw. 1979).

72. *Midkiff v. Tom*, 702 F.2d 788, 789 (9th Cir. 1983).

73. *Midkiff*, 467 U.S. at 231-32.

74. *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

75. *Id.* at 241-42.

76. *Id.* at 242.

77. *Id.*

78. *Id.* at 242-43.

in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.”<sup>79</sup> And again, in language strongly reminiscent of the words that proved critical in *Berman*, the Court defined its role in public use cases in extremely deferential terms, holding that “if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.”<sup>80</sup>

Just as *Midkiff* extensively quoted language from *Berman*, the Court in *Kelo* extensively quoted language from both *Berman* and *Midkiff*, decisions it saw as consistent with the Court’s “earliest” eminent domain cases which, the Court found, “embodied a strong theme of federalism, emphasizing the ‘great respect’ that we owe to state legislatures and state courts in discerning local public needs.”<sup>81</sup> Argument after argument urged by the petitioners was rejected based on the historical pattern of deference made explicit in *Berman* and *Midkiff*. The homeowners in *Kelo* urged that economic development could not qualify as a public use, but the Court found that the cases undermined their claim:

[I]n *Berman*, we endorsed the purpose of transforming a blighted area into a “well-balanced” community through redevelopment . . . in *Midkiff*, we upheld the interest in breaking up a land oligopoly that “created artificial deterrents to the normal functioning of the State’s residential land market” . . . . It would be incongruous to hold that the City’s interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests.<sup>82</sup>

Similarly, petitioners argued that the benefit to private parties meant that the use could not be public, but the Court found that

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79. *Id.* at 243-44.

80. *Id.* at 244.

81. *Kelo v. City of New London*, 545 U.S. 469, 482 (2005). The Court continued: “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.” *Id.* at 483.

82. *Id.* at 484-85. For other situations where the Court also found requisite public purposes in seemingly private takings, see *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (accepting Congress’ view that the elimination of significant barriers to the pesticide market constituted a public purpose); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (finding that public welfare demands aerial lines between mines on the mountain and railways located in the valley below and therefore constituted a necessary public use).

*Berman* and *Midkiff* “foreclose[d] this objection” as well.<sup>83</sup> *Midkiff* had involved precisely the sort of “forced transfer” to which petitioners were objecting in the case at hand, and *Berman* had also permitted a “taking from one businessman for the benefit of another businessman.”<sup>84</sup> Finally, petitioners argued that the Court should require a “reasonable certainty” that the projected public benefits would actually be realized, but again precedent—particularly *Midkiff*’s holding that debates over the wisdom of takings did not belong in federal court—dictated that the claim be rejected.<sup>85</sup> In the end, petitioners’ plea that the Court seriously scrutinize either the development plan as a whole or the decision of what lands were necessary to it was foreclosed by the broad deference mandated by earlier cases: “Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”<sup>86</sup>

As a matter of law, then, *Kelo* was not, as the Court saw it, a complicated case. The petitioners wished to cabin “public use” within narrow bounds—use by the public, use other than economic development—but these bounds had been rejected in prior decisions that, in the Court’s view, were clearly applicable to *Kelo*. As a matter of judicial craft, the Court simply did what courts are supposed to do—since the meaning of the constitutional text, “public use,” was uncertain, the Court moved to judicial precedents.<sup>87</sup> Those precedents settled the question at hand, so there was, as a technical matter, almost nothing more for the Court to say. To the extent that the majority in *Kelo* regarded the issue of public use as one that had already been decided, it could not participate in or contribute to a dialogue concerning what the constraints on state

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83. *Kelo*, 545 U.S. at 485. In this context, the Court again adverted to *Ruckelshaus v. Monsanto*, 467 U.S. at 1014. *See id.*

84. *Kelo*, 545 U.S. at 486 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

85. *See supra* text accompanying note 74.

86. *Kelo*, 545 U.S. at 489 (quoting *Berman*, 348 U.S. at 35-36).

87. *See Post*, *supra* note 14, at 82:

The primary sources of constitutional law are specifically legal. The text of the Constitution is of course paramount . . . . But if the meaning of constitutional text is uncertain, courts must look outside the text in order to make constitutional law. They can look to various legal sources . . . most commonly, judicial precedents.

*See also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-16 (3d ed. 2000) (describing Supreme Court opinions as “in a sense a second set of constitutional texts”).

power ought ideally to be. The Court did not suggest, however, that this question of the scope of state power was unimportant. Rather, the Court's holding reflected the view that the question had been concluded already and could not be reopened for debate without comprehensive overruling of multiple prior decisions; the legislature, not the courts, was the proper forum for such a change.

### **B. *Kelo's* Apparent Indifference to Public Concerns About Property Rights**

Certainly there is reason to believe, based on both the language of the opinion and statements made by Justice Stevens afterwards, that the majority in *Kelo* was truly convinced that *Berman* and *Midkiff* were just extensions of cases decided earlier.<sup>88</sup> To the extent that the question of what constitutes a public use had already been authoritatively determined by prior case law, there was not much the Court could do to advance the discussion of how the term "public use" might be defined if it were free to start from scratch.

Consider, in this light, the Court's statement toward the end of its opinion that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."<sup>89</sup> Doctrinally, this suggestion would seem a simple logical correlate of the Court's position on the respective roles of state legislatures and federal courts in interpreting "public use." As we just saw, the cases establish that the Court must, in general, defer to local determinations of whether a use is "public." If states choose to limit their definitions of what constitutes a public use—either by statute or by interpreting state constitutional provisions<sup>90</sup>—then why

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88. See John Paul Stevens, *Learning on the Job*, 74 *FORDHAM L. REV.* 1561, 1566 (2006) (noting that *Kelo* was "not an example of 'judicial activism'" and that the case "adhered to precedent"). Many legal scholars have asserted that *Kelo* broke no new legal ground. See, e.g., Daniel H. Cole, *Why Kelo Is Not Good News for Local Planners and Developers*, 22 *GA. ST. U. L. REV.* 803, 803 (2006) (arguing that *Kelo* "did not significantly alter eminent domain doctrine; the Court simply followed well-established precedents"); Daniel J. Curtain, Jr., *The Implications of Kelo in Land Use Law*, 46 *SANTA CLARA L. REV.* 787, 787 (2006) ("[T]he Court's decision in *Kelo* was not a departure from precedent, or otherwise surprising."); Thomas W. Merrill, *Six Myths About Kelo*, *PROB. & PROP.*, Jan.-Feb. 2006, at 19-20 (describing as a "myth" the proposition that "Kelo breaks new ground by authorizing the use of eminent domain solely for economic development").

89. *Kelo*, 545 U.S. at 489.

90. *Id.* The majority specifically cited *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), in which the Michigan Supreme Court, overruling *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), held that a County's taking

should the Court not equally defer to those local determinations as well?

There are multiple ways to understand the Court's invitation. One is to see it as reflecting an institutionalist or legal process approach to takings questions, one that abandons the "difficult, if not impossible, task of providing a clear normative justification for the Takings Clause," and instead directs takings jurisprudence toward the more narrow question of "*who* should decide."<sup>91</sup> Another way to understand the invitation in *Kelo* is as a reflection of what has been called the "federalist dimension" of takings law.<sup>92</sup> This view holds that because "[t]he 'property' protected by the Takings Clause is defined not by a single sovereign, but by the legislative enactments and judicial pronouncements of fifty separate states," federalist concerns "make it inappropriate for the Court to use the Takings Clause as a vehicle for articulating a comprehensive theory of the limits of government power to regulate land."<sup>93</sup>

Whether or not these explanations of the Court's invitation are correct, one observation is in order. The Court's eagerness to defer to other decision making bodies, however appropriate from a legal process or a federalist perspective, could equally be understood to carry a secondary message, a message of indifference to the intensity of the problem at hand. The problem of overly broad state power is, the Court suggests, not one that *it* needs to resolve; it is a problem with which other, non-federal, legal bodies should wrestle.

There may be good reasons to believe that state and local governments, closer to the action and to the actors affected by land use planning measures, may indeed do better than the Court at defining the conditions under which eminent domain powers may be exercised.<sup>94</sup> But this allocation of power is not uncontroversial. In

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of land for transfer to private parties who planned to develop it as a business and technology park violated the public use clause of the Michigan Constitution.

91. See Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights 2* (2006) (unpublished manuscript, on file with author), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=888755](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888755) (last visited Feb. 28, 2007).

92. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *YALE L.J.* 203, 205 (2004) (arguing that "federalism concerns . . . do and should play an important role in shaping the Court's takings doctrine").

93. *Id.*

94. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 *CAL. L. REV.* 839, 850 (1983) (describing how local decision making differs structurally from decision making at the state or federal level); Carol M. Rose, *Takings, Federalism, Norms*, 105 *YALE L.J.* 1121, 1132 (1996) (describing how "exit" and "voice" can provide partial safeguards against overreaching at the local level). Of course, there may be reason to believe that local authorities may not

at least one influential strand of thinking, property is prior to politics, and “preservation of the pre-political property of the people is the measure of the goodness or badness of the state.”<sup>95</sup> This strand of thinking regards these principles as part of the Constitution,<sup>96</sup> in which case it is the specific duty of the Court to police and preserve the sphere of private autonomy that property is meant to provide.<sup>97</sup> To those inclined to see the Court as a guardian of private rights against state overreaching,<sup>98</sup> the suggestion that that overreaching was not the Court’s problem could well seem an abdication.<sup>99</sup>

Moreover, legislative action, in general, is slow to come. Even the rash of post-*Kelo* legislative enactments—passed with lightning speed relative to much “ordinary” legislation<sup>100</sup>—could not ar-

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do better than the Court. For criticisms of some of the post-*Kelo* legislation on land use planning grounds, see Cole, *supra* note 88, at 855-56; Julia D. Mahoney, *Kelo’s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 125-29. For criticism of such legislation on “expressive” grounds, see David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. (forthcoming 2007).

95. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 334 (1996) [hereinafter Rose, *Keystone Right*] (exploring seven views on why property is the central constitutional right upon which all other rights rest).

96. See Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1668-69 (1988) (describing how the neoconservative view maintains that the liberal conception of property—encompassing exclusive rights of possession, use, and disposition—is “in” the Constitution).

97. See Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1626-27 (1988) (describing how “property was [the founders’] inspiration for the idea of a private sphere of individual self-determination securely bounded off from politics by law” and how “reviewing courts came to be envisioned as enforcers of legal boundaries demarcating mutually exclusive spheres of authority”); see also Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 146 (1990) (“Contemporary approaches to property . . . proceed from a vision of property as that which protects, and separates, the individual from the collective sphere.”).

98. Many are not so inclined and have challenged the separation of public and private spheres in respect of property. See, e.g., Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1335 (1987) (“[S]o-called private power is power no less constituted by public law than is governmental power itself, specifically, if ironically, the very law that secures private property against encroachment.”); see also JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 68 (2000) (“Property seems to require regulation.”).

99. See Kanner, *supra* note 4, at 216 (“*Kelo* did not involve the construction of federal legislation . . . but instead the interpretation of an explicit provision of the *Federal Constitution*. If the interpretation of the *federal* Bill of Rights is not the proper function of the federal judiciary . . . then what is?”). Cf. Post, *supra* note 14, at 43 (noting that “upsetting the entrenched constitutional beliefs of nonjudicial actors entails costs in terms of both stability and legitimacy”).

100. See Cole, *supra* note 88, at 844 (“[T]he *Kelo* backlash has been remarkably productive in the short period of time since the Supreme Court issued its ruling in June of 2005. In less than a year, four states have enacted laws of various significance

rive in time to save Suzette Kelo.<sup>101</sup> From the perspective of constitutional culture, the possibility of *some* later action, by *some* other legal authority, hardly addressed the immediate fear of government power running amok. In this sense, the Court's opinion seems totally disconnected from the actual problem that gave rise to the litigation.

### C. Unrealized Possibilities

The public's reaction to *Kelo* has been well-documented.<sup>102</sup> The case was widely reported in the press,<sup>103</sup> and it continues to be discussed in numerous public fora.<sup>104</sup> Scores of states have already responded to the Court's invitation by passing legislation imposing

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in response to *Kelo*. Congress has passed legislation in one house that is currently pending in the other. Dozens of other states have drafted legislation that it is currently under consideration; and in a majority of the remaining states, legislation currently is being drafted or planned.”); *see also, e.g.*, S.J. Res. 20, 108th Leg., Reg. Sess. (Fla. 2006) (suggesting a constitutional amendment providing that private economic development “shall not be deemed to constitute public purpose for which private property may be taken by eminent domain”).

101. Kelo's house has, however, been saved. *See* William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1; *see also* Carolyn Battista, *All Quiet on the Eastern Front: Six Months After the Kelo Decision, the City of New London, Conn., Is at a Standstill*, PRESERVATION ONLINE, Jan. 13, 2006, <http://www.nationaltrust.org/Magazine> (follow “Online Archive” hyperlink; then follow “Story of the Week” hyperlink; then scroll down to story) (indicating that six months after *Kelo*, Suzette Kelo's house was still standing).

102. *See, e.g.*, Bell & Parchomovsky, *supra* note 4 (describing libertarian, liberal, and communitarian dissatisfaction with *Kelo*); Cole, *supra* note 88, at 819-44 (describing the political controversy sparked by *Kelo*, as well as state and local legislative efforts to counteract the decision). The “eminent domain abuse” pump was primed by the extremely unpopular decision in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), in which the Michigan Supreme Court upheld Detroit's use of eminent domain to condemn an ethnic neighborhood to provide a site for a General Motors plant. On the reaction to *Poletown*, see JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989). As the Court in *Kelo* noted, *Poletown* was overruled in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). *See supra* note 90.

103. *See supra* note 3.

104. For discussions of *Kelo*, as seen from the perspective of both the property owners and the Government, see The National Constitution Center Homepage, <http://www.constitutioncenter.org> (follow “Podcasts” hyperlink; then follow “Eminent Domain Post-Kelo” hyperlink) (last visited Jan. 22, 2007); “Eminent Domain: Its Uses and Abuses,” <http://www.cato.org/events/020514pf.html> (follow “Listen to the Event” hyperlink) (last visited Jan. 22, 2007). *Kelo* is also a major topic on many web sites. *See, e.g.*, Eminent Domain Watch Homepage, <http://www.emdo.blogspot.com> (last visited Jan. 22, 2007); Reason Foundation: Free Minds and Free Markets Homepage, <http://www.reason.org/eminentdomain> (last visited Jan. 22, 2007).

limitations on the use of eminent domain for purposes of economic redevelopment, and many others seem headed in that direction.<sup>105</sup>

*Kelo*'s galvanizing effects are not hard to understand. The decision implicated important questions about the relation of property ownership and government. Is property a pre-political right that the state must absolutely respect and protect,<sup>106</sup> or can the state adjust property rights to the end, for example, of managing congested resources?<sup>107</sup> In addition, *Kelo* raised highly charged questions about whether all property should be treated alike for eminent domain purposes—for any number of reasons, the type of property at issue in the *Kelo* case, a home, might warrant special treatment by the law.<sup>108</sup> Finally, as Justice Thomas's dissent made clear, *Kelo* raised disturbing issues of race and class, issues of whether some groups are disproportionately targets of "redevelopment" efforts that disrupt their communities or signal a view of

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105. For eminent domain legislation in response to *Kelo*, see The National Conference of State Legislatures Homepage, *supra* note 31 (noting that, in 2005, thirteen states considered legislation in response to *Kelo*, with four states enacting laws and one state passing a constitutional amendment that will go on ballot for voter approval).

106. See Rose, *Keystone Right*, *supra* note 95, at 333 (describing the argument that "[p]roperty is the key to all other rights because it is prior to politics, and hence the basis upon which all other civil rights rest"). But see Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 595 (1984) [hereinafter Rose, Mahon *Reconstructed*] ("The concept of a prepolitical property right is problematic, primarily because it fails to address the question of what it means to 'own' anything in the absence of the community's protection.").

107. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 19-20 (2000) [hereinafter Rose, *Property and Expropriation*].

108. See D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 258 (2006) (arguing that eminent domain law "under-protect[s] the personal interest in the home"); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1542-43 (1991) (suggesting that one strand of a "richer description of takings controversies" might involve "judicial specification of concrete aspects of human existence that the takings clause is designed to protect. Thus . . . courts might note certain objects, such as one's home, that a constitution would sensibly mark out as deserving of special protection."); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991-92 (1982) (describing a home as "a moral nexus between liberty, privacy, and freedom of association," and suggesting that therefore homes need special protection as "property for personhood"); see also Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 908 (2006) ("Given America's obsession with homeownership, it is hardly surprising that an overwhelming majority of the public is concerned that the government may take the homes of fellow citizens.").

those groups as being outside of or “other to” our property system.<sup>109</sup>

These questions are of enormous significance, but once the Court concluded that its precedents disposed of all the issues that were raised by the *Kelo* claimants, there was no reason to discuss them in its opinion. This simple refusal to acknowledge how highly charged the issues were may account for the depth and breadth of dissatisfaction with *Kelo*.<sup>110</sup> In any event, the effect of the Court’s emphasis on prior cases was to eliminate itself as either a leader or a participant in debates over the deeper issues with which the public is concerned. The Court’s holding may be totally justified as a matter of fidelity to precedent, and in this sense, *Kelo* is an “easy” case. By seeing it in these terms, however, the Court deprived itself of a chance to engage in the volatile issues that underlay the dispute.

It would, of course, not have been impossible for the Court to try harder to limit, distinguish, or reinterpret the prior case law. Indeed, in dissent, Justice O’Connor did precisely that, asserting that in fact both *Berman* and *Midkiff* were cases where the eminent domain power had been asserted to eliminate an “affirmative harm” deriving from the targeted property: “blight” in *Berman* and “oligopoly” in *Midkiff*.<sup>111</sup> It is easy to quibble with O’Connor’s interpretation of the prior cases: the particular property at issue in *Berman* was concededly not itself blighted, and no single piece of land, including the parcel at issue in *Midkiff*, can itself cause an oligopoly. But however controversial her conclusions, O’Connor’s willingness to reconsider the meaning of *Berman* and *Midkiff* allowed her to discuss the public use issue in a way that fully engaged cultural understandings of the Takings Clause.<sup>112</sup>

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109. See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (“Urban renewal projects have long been associated with the displacement of blacks . . . . Regrettably, the predictable consequence of the Court’s decision will be to exacerbate these effects.”); Rose, *Property and Expropriation*, *supra* note 107, at 24-38 (describing “revolutionary expropriations” that “were worked on people who were perceived to be nonmembers of the community” and viewing these appropriations as “a part of a radical othering”); see also Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 *YALE J.L. & HUMAN.* 1, 23 (2006) (“What the owner reads into the alleged taking may well be the subtext: You do not matter.”).

110. See Bell & Parchomovsky, *supra* note 4, at 1423-26 (describing dissatisfaction with *Kelo* from “commentators of diverse, and often conflicting, political persuasions,” including libertarians, communitarians, liberals, economists, and politicians).

111. *Kelo*, 545 U.S. at 500-01 (O’Connor, J., dissenting).

112. Ironically, it was Justice O’Connor who wrote the Court’s opinion in *Midkiff*, an opinion that many regard as the source of the problem that ultimately came to

O'Connor begins by describing the Fifth Amendment as a constraint on state power. The Takings Clause's "two limitations"—that the taking be for "public use" and that "just compensation" be paid—"ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."<sup>113</sup> O'Connor acknowledges the need to defer to legislative determinations about public use, but concludes that, if the Takings Clause is to operate as a limit on inappropriate exercises of state power, deference cannot be absolute:

Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.<sup>114</sup>

The notions that there are limits to state power, and that the function of the Constitution is to protect stable expectations against governmental unfairness, are deeply imbued in our constitutional culture, with its dominant "ownership model" of property.<sup>115</sup> So too is the view that judicial deference cannot be appropriate if the Fifth Amendment is to function, as it should, to check illegitimate exercises of legislative power.

This is not to say that O'Connor's attempt to distinguish *Berman* and *Midkiff* is ultimately persuasive.<sup>116</sup> What is important about

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fruition in *Kelo*. See, e.g., EPSTEIN, *supra* note 16, at 110 (asserting that in *Midkiff*, "the Supreme Court . . . obliterated a key structural distinction by holding that the scope of the public use requirement of the Takings Clause is coterminous with the scope of a sovereign's police powers") (internal quotation marks omitted).

113. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting).

114. *Id.* at 497.

115. On the ownership model, see SINGER, *supra* note 98, at 3, 6-9. See also Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 731 (2004) (describing the "Scalian" or "conservative" view of property).

116. See *Kelo*, 545 U.S. at 486 n.16 (majority opinion) ("[O]ur cases [do not] support Justice O'Connor's novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some 'harmful property use.'").

O'Connor's dissent is that it takes up explicitly the themes that characterize the public discourse about eminent domain. How much protection are owners entitled to? Who will restrain governments when they act unfairly? These questions, so simple to state, so difficult to answer, animate our constitutional culture of property. The facts of *Kelo* put these questions squarely on the table. The majority's refusal to acknowledge them—however correct as a matter of judicial craft—is the deepest problem of the *Kelo* opinion.

## II. LINGLE'S PROMISE

*Lingle v. Chevron U.S.A. Inc.* is, as noted earlier, a “regulatory takings” case, not an eminent domain case.<sup>117</sup> “Regulatory takings” involve the losses that can arise from what seem to be perfectly ordinary governmental regulations, such as zoning or wetlands preservation ordinances, that can impose high costs on landowners affected by them. In the Court's famous 1922 decision *Pennsylvania Coal Co. v. Mahon*,<sup>118</sup> the Court held that such losses could be compensable under the Fifth Amendment even in the absence of any physical taking by the government; in the words of Justice Holmes, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>119</sup>

Since *Mahon*, numerous regulations have been challenged as going “too far,” and the Court has struggled to articulate a workable doctrinal standard to implement the “too far” idea.<sup>120</sup> The Court acknowledged its own befuddlement in *Penn Central Transportation Co. v. City of New York*.<sup>121</sup> The Court's analysis began with *Armstrong's* basic formulation that “the Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>122</sup> But it admitted that “this Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated

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117. 544 U.S. 528, 531 (2005).

118. 260 U.S. 393 (1922).

119. *Id.* at 415.

120. See Rose, *Mahon Reconstructed*, *supra* note 106, at 562 n.6 (describing commentators' observations of the incoherence of the Court's takings decisions following *Mahon*).

121. 438 U.S. 104 (1978).

122. *Id.* at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

on a few persons.”<sup>123</sup> The Court described itself as having engaged in previous cases in what it characterized as “essentially ad hoc, factual inquiries,” centering on “several factors that have particular significance,”<sup>124</sup> including the “economic impact of the regulation on the claimant,” the “extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the governmental action.”<sup>125</sup>

*Penn Central*'s ad hoc “test,” with its multiple factors, was never a model of clarity.<sup>126</sup> Since the Court in *Penn Central* explicitly denied that there was a “set formula” for determining regulatory takings questions, it was not surprising that there soon developed variations on the *Penn Central* standard, including *Agins*'s formulation that a regulation could effect a taking “if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.”<sup>127</sup> Regulatory takings doctrine only became more complicated when the Court carved out two regulatory situations that were deemed to constitute takings *per se*, without regard to the public purposes served or to the factors balanced under *Penn Central*'s analysis, the first involving “a permanent physical occupation authorized by government,”<sup>128</sup> and the second involving regulations that deprive owners of “all

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123. *Id.* at 124.

124. *Id.*

125. *Id.*

126. See Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1699-1700 (1988) (arguing that there was no pattern to the decisions in the cases decided after *Penn Central*). Carol Rose has argued, in contrast, that this lack of predictability is a function of the post hoc nature of regulatory takings determinations, and that the ad hoc nature of these decisions should be regarded positively rather than negatively. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 590 (1990) [hereinafter Rose, *Evolutionary Approach*].

Like nuisance adjudications, takings adjudications are post hoc judicial determinations and are based generally on ordinary practice and reasonable expectations about which regulatory efforts are fair and normal, and which are not. As with nuisance law, this post hoc and ad hoc judicial second-guessing makes possible gradual changes in the relationship between the regulated and the regulators, and provides for a change in ordinary regulatory practice—however theoretically unsatisfactory this ad hoc approach may be.

*Id.*

127. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding that the city's open-space land zoning ordinance, which restricted a previously purchased five acre tract of land to single-family residences and open-space use, did not effect a taking).

128. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (discussing whether a statute providing that a landlord must permit a cable television company to install its facilities upon his property constitutes a taking).

economically beneficial or productive use of land.”<sup>129</sup> Finally, the Court added insult to injury by enunciating separate tests for evaluating takings claims arising in the context of exactions.<sup>130</sup>

The proliferation of “tests” for evaluating whether regulatory action would constitute a taking led fairly predictably to a situation where the principal question to be decided in regard to regulatory takings claims appeared to be one of classification—did the case fall into one of the *per se* categories, did it involve an exaction, or was it an “ordinary” case to be governed by *Penn Central* balancing?<sup>131</sup> Formulated this way, the claims involved the Court in a wholesale sorting operation, diverting attention from the basic “fairness and justice” issues that it had said in both *Armstrong* and *Penn Central* were at the heart of regulatory takings problems.

It is in this context that *Lingle* is best understood. *Lingle* involved a Hawaii statute limiting the rent that oil companies could charge to lessee-dealers.<sup>132</sup> The statute was designed to protect the state’s consumers from high gasoline prices arising from the “highly concentrated” market for oil products resulting from “Hawaii’s small size and geographic isolation.”<sup>133</sup> Chevron, Hawaii’s largest gasoline refiner and marketer, claimed that the rent cap effected a taking of its property because the rent cap would not actually reduce prices and therefore did not “substantially advance” a

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129. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (discussing situations where the Supreme Court had found categorical treatment appropriate).

130. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring a showing of “rough proportionality” between the problem government seeks to address and the condition imposed to redress it); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (requiring an “essential nexus” between the condition imposed and the government’s reason for imposing it). Exactions are improvements, dedications, or fees imposed on owners as conditions for subdivision or development. See DANIEL R. MANDELKER, *LAND USE LAW* § 9.11 (5th ed. 2003).

131. In both *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the owners attempted to characterize their cases as *per se* takings by focusing on the part of their property that was rendered valueless under the regulatory regime in question, while the government defendants responded by noting the values remaining to the owners even after the regulatory “loss” was factored in. The Court in *Lucas* had anticipated this problem, noting that its deprivation-of-value rule “does not make clear the ‘property interest’ against which the loss of value is to be measured.” *Lucas*, 505 U.S. at 1016 n.7.

Claims such as those raised by the owners in *Palazzolo* and *Tahoe-Sierra* illustrate a problem Margaret Radin has called “conceptual severance.” Radin, *supra* note 96, at 1676 (explaining that conceptual severance “consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that the particular whole thing has been permanently taken”).

132. *Lingle v. Chevron U.S.A Inc.*, 544 U.S. 528, 533 (2005).

133. *Id.* at 532-33.

legitimate state interest as was required by *Agins*.<sup>134</sup> The lower courts accepted both that the *Agins* test applied and that Chevron's experts had persuasively shown that the rent cap would not achieve its intended purpose.<sup>135</sup>

The Court defined the issue before it narrowly: "This case requires us to decide whether the 'substantially advances' formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking."<sup>136</sup> Concluding that the *Agins* formula "prescribes an inquiry in the nature of a due process, not a takings, test," the Court held that it "has no proper place in our takings jurisprudence."<sup>137</sup> This approach provided the Court an opportunity to explain the factors that, in its view, fundamentally differentiate takings from due process claims and, in the process, to define the issues at the heart of takings analyses. Those issues, as articulated by Justice O'Connor for the Court, concern the "*magnitude or character of the burden* a particular regulation imposes upon private property rights," as well as the question of how the regulatory "burden is *distributed* among property owners."<sup>138</sup>

Part A of this section explores *Lingle* doctrinally, focusing on the opinion's implications for the framing of takings claims. At the very least, the Court in *Lingle* cleared away some of the doctrinal clutter that had accumulated around regulatory takings jurisprudence, establishing the *Penn Central* balancing test<sup>139</sup> as the norm in takings cases and affirming that the *per se* tests applicable in *Loretto*<sup>140</sup> and in *Lucas*<sup>141</sup> are to be considered exceptional. Part B asserts that *Lingle* returned takings law to its central question, the question of the distribution of the burdens of regulatory interventions. The question of what "fairness and justice" *do* require when government regulation affects some individuals or entities more

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134. *Id.* at 533-34.

135. *Id.* at 534-36; see *Chevron U.S.A. Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004); *Chevron U.S.A. Inc. v. Cayetano*, 57 F. Supp. 2d 1003 (D. Haw. 1998).

136. *Lingle*, 544 U.S. at 532.

137. *Id.* at 540.

138. *Id.* at 542.

139. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978) ("In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.").

140. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a permanent physical occupation of private property authorized by the government is a *per se* taking).

141. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (holding that a statute that effectively prevents all economically viable uses of property is a *per se* taking).

than others is at the center of the muddle of regulatory takings law. This return to *Armstrong*'s basic question is not insignificant; the Court in *Lingle* could simply have corrected *Agins*'s doctrinal error and stopped. By openly addressing the purposes of the Takings Clause, the Court connected to the larger cultural debate that it had sidestepped in *Kelo* about the relation between private property and the public good. As we have seen, "the struggle over property rights is really about the contours of our social life and the definitions of community: who counts?"<sup>142</sup> By suggesting that sometimes individual landowners might be disproportionately and unfairly burdened by otherwise lawful regulation, the Court acknowledged that takings cases do send a message about who matters—and about whose property matters—when the government seeks to promote what it regards as the public good. Part C argues that though the Court did not resolve the "fairness and justice" question, it nonetheless moved regulatory takings law in a productive direction. All regulations inevitably burden some citizens more than others. The "magnitude" and "distribution" factors highlighted in *Lingle* suggest how the Court might evaluate that inevitable inequality in the future. More importantly, they set the terms—and thus the frame—for a dialogue between the Court and nonjudicial actors over the connection between regulation and property.

### A. The "Doctrine" of *Lingle*

The essence of Chevron's claim in *Lingle* was that the statute in question would not accomplish its stated objective; the rent cap would not in fact protect consumers from high gasoline prices.<sup>143</sup> Under the *Agins* "substantially advances" test, such a claim, if proven, would render the statute a "taking." The test had the obvious potential to create anomalies between due process and takings challenges. Were Chevron to have asserted its claim under the Due Process Clause, the statute would easily have met the "rational relation" standard that the Court has applied in economic regulation cases since *Lochner*.<sup>144</sup> Thus, if the *Agins* formula had been upheld, statutes that clearly would be found valid as a matter

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142. Gerald Torres, *Visions of Guadalupe: Traces of the Ghost Panel*, 18 YALE J.L. & HUMAN. 161, 167 (2006) [hereinafter Torres, *Visions of Guadalupe*].

143. *Lingle*, 544 U.S. at 532-35.

144. *Lochner v. New York*, 198 U.S. 45 (1905). The Court repudiated *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For a general discussion of *Lochner*, see David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005) (discussing the case and its legacy on current constitu-

of substantive due process (because they might conceivably advance a legitimate state interest) could be found invalid as a matter of takings law (because they might not “substantially advance” that same state interest).

The Court in *Lingle* held that *Agins* had wrongfully conflated what should have been distinguishable and distinct questions. “The ‘substantially advances’ formula,” O’Connor wrote, “suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose.”<sup>145</sup> While such an inquiry “has some logic in the context of a due process challenge,” it “is not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment”<sup>146</sup> because the Takings Clause is concerned with “regulations whose effects are functionally comparable to government appropriation or invasion of private property,” not regulations that fail to carry out their ostensible objectives.<sup>147</sup> Thus, the question of a regulation’s “underlying validity” under the Due Process Clause is “logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”<sup>148</sup>

In addition to noting the distinct purposes of the Due Process and Takings Clauses—the former being directed at effectiveness and the latter at disproportionate burdens—the Court acknowledged what it called the “practical difficulties” presented by the “substantially advances” formula:

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tional debates with respect to the battle between state authority and individual rights).

Academic commentators had, prior to *Lingle*, repeatedly criticized *Agins* on precisely the ground that it would covertly reinstate *Lochner*. See, e.g., Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the Agins’ Tests*, 33 URB. LAW. 343, 361-62 (2001) (describing the academic criticism of *Agins*; see also Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 715 (2002) (arguing that “the Due Process Clauses, rather than the Takings Clause, should serve as the source of a generalized constitutional protection of property rights against arbitrary or fundamentally unfair government actions”).

145. *Lingle*, 544 U.S. at 542.

146. *Id.*

147. *Id.*

148. *Id.* at 543. In contrast to *Kelo*, the Court does not use the words “public purpose” here as a synonym for “public use.” In context, the Court means that, for purposes of Takings Clause analysis, it will be presumed that the government is furthering a legitimate state interest when it effectuates a taking.

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 judgments for those of elected legislatures and expert agencies.<sup>149</sup>

The dueling experts in the *Lingle* case, with their divergent views of the probable effects of the legislation in question, illustrated the problems courts faced under the *Agins* test: “To resolve Chevron’s takings claim, the District Court was required to choose between the views of two opposing economists as to whether [the Hawaii statute] would help to prevent concentration and supracompetitive prices in the State’s retail gasoline market.”<sup>150</sup> The Court characterized the proceedings in the lower courts as “remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.”<sup>151</sup>

Doctrinally, then, *Lingle* drew a clear line between the Due Process Clause and the Takings Clause, finding them to be directed toward distinct questions. It prescribed a sequencing between the analyses under the two clauses, with substantive due process questions to be raised first and, assuming the statute in question withstands due process scrutiny (a safe assumption for economic regulation), takings scrutiny to follow.<sup>152</sup> Finally, the *Lingle* Court rejected the opportunity to use the Takings Clause to reinstate a *Lochner*-like standard for judicial review of economic regulations and affirmed that it would continue to defer to legislative judgments “about the need for, and likely effectiveness of, regulatory actions.”<sup>153</sup>

### B. Defining the Heart of the Takings Clause

Determining what differentiates due process from takings claims provided the Court with an opportunity to define what is distinct about the latter. If takings claims are not about means-ends effectiveness, what *are* they about? The Court sought the answer in

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149. *Id.* at 544.

150. *Id.* at 544-45.

151. *Id.* at 545.

152. *Id.* at 543 (“[I]f a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”).

153. *Id.* at 545.

prior case law. *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>154</sup> established that “where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.”<sup>155</sup> A regulatory action would also be considered a taking *per se* under *Lucas v. South Carolina Coastal Council*,<sup>156</sup> if it “completely deprive[s] an owner of ‘all economically beneficial use’ of her property.”<sup>157</sup> Finally, a taking might be found under *Penn Central* depending on its economic impact, its character, or its interference with investment-backed expectations.<sup>158</sup>

These three inquiries, the Court stated, “share a common touchstone”<sup>159</sup>: “Each aims 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. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.”<sup>160</sup> The Court’s formulation of the “common touchstone” is telling. The direct appropriation or physical invasion of private property stands as paradigmatic—the closer the regulatory action comes to imposing the kind of harm involved in appropriations and invasions, the more likely it is to be deemed a taking.<sup>161</sup> The test for a taking must “help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property.”<sup>162</sup> Only such a test can be tethered to “the basic justification for allowing regulatory actions to be challenged under the [Takings] Clause.”<sup>163</sup>

Here we see the Court seeking the heart or center of the Takings Clause. It defines that heart in terms of the kind of injury suffered when there is a direct appropriation. Such an injury is distinct in “magnitude” and in the way in which it is “distributed among prop-

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154. 458 U.S. 419 (1982).

155. *Lingle*, 544 U.S. at 538 (looking to *Loretto* in holding that permanent physical invasions constitute *per se* takings); *see also Loretto*, 458 U.S. at 434-35.

156. 505 U.S. 1003 (1992).

157. *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019).

158. *Id.* at 538-39.

159. *Id.* at 539.

160. *Id.*

161. Permanent physical invasions, like appropriations, eliminate the right to exclude; elimination of value, like appropriations, deprive owners of beneficial use. *Id.* at 539-40.

162. *Id.* at 542.

163. *Id.*

erty owners.”<sup>164</sup> The Court in *Lingle* thus returned takings analysis to its basic *Armstrong* focus on whether some citizens are being asked to bear alone “public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>165</sup> The Court suggested in *Lingle* that “fairness and justice” require compensation when a regulatory action imposes a particularly strong burden on private property rights or when that burden is distributed narrowly rather than broadly.<sup>166</sup>

The Court in *Lingle* did not purport to set out a new “test” for determining specific takings claims. Rather, it spoke generally to the aim of the Takings Clause for purposes of distinguishing it from the Due Process Clause. Nevertheless, the Court’s abstract statements about the bedrock concerns of the Takings Clause provide a framework for understanding the various tests enunciated in prior cases. The *per se* rules for permanent physical invasions and complete deprivations of economic value, along with the *Penn Central* inquiry for all other cases, are best understood as instantiations of the Takings Clause’s overall concern with the magnitude and distribution of regulatory burdens. The two categories of *per se* takings replicate the kinds of burdens imposed in actual physical takings; other regulations will be found to be takings under *Penn Central* where they can be shown to impose “equivalent” burdens.<sup>167</sup> The rather different tests for exactions enunciated in *Nollan v. California Coastal Commission*<sup>168</sup> and *Dolan v. City of Tigard*<sup>169</sup> fit exactly into this model; in the Court’s view, both cases “involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.”<sup>170</sup>

To summarize, in *Lingle* the Court contextualized existing doctrinal tests for regulatory takings in terms of the larger issues it asserted lie at the heart of the Takings Clause. Those issues have to do with the magnitude and distribution of the burdens inevitably imposed by governmental regulatory activity. To some extent, the Court’s emphasis on the distributional question merely returned it to the basic “fairness and justice” focus of *Armstrong*, which posed

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164. *Id.*

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

166. 544 U.S. at 542-43.

167. *See id.* at 539.

168. 483 U.S. 825 (1987) (requiring an “essential nexus” between the condition imposed and the government’s reason for imposing it).

169. 512 U.S. 374 (1994) (requiring a showing of “rough proportionality” between the problem government seeks to address and the condition imposed to redress it).

170. *Lingle*, 544 U.S. at 547.

the fundamental question of the Takings Clause in precisely those terms.

To understand why this return may be a positive step, consider an alternative way the Court could have decided *Lingle*, a way focusing exclusively on prior case law. The question, recall, was only whether the “substantially advances” formula was a correct takings test. To answer it, the Court looked to the precedents from which that formula was derived—exactly the strategy employed in *Kelo* in evaluating various formulations of the “public use” requirement. The precedents that led to *Agins*, the Court found, relied on due process analysis. The “commingling” of due process and takings inquiries was “understandable,” but “imprecise” and ultimately “not a valid method of discerning whether private property has been ‘taken’ for purposes of the Fifth Amendment.”<sup>171</sup>

As a legal process matter, the Court could have ended its opinion just at this point. It had framed the narrow legal question, identified the legal precedents that underlay the controversial legal formulation at issue, and distinguished them. Technically speaking, there was nothing left to decide.

But an opinion that stopped at this point would have been tremendously unsatisfying in precisely the way that *Kelo* is unsatisfying, because it would not have engaged powerful, deeply felt, and widely shared popular understandings of government’s responsibility with respect to private property. As “property rights” movements attest, regulations that unquestionably serve legitimate state purposes and therefore easily satisfy due process requirements often feel enormously burdensome and arbitrary to citizens affected by them.<sup>172</sup> Those who at some previous point bought land in hopes of later building homes take little solace from subsequently-enacted open space regulations or development moratoria that prevent that construction, even if those measures can be conclusively shown to provide social benefits to others.<sup>173</sup> Notice how

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171. *Id.* at 540-42.

172. Rose, *Property and Expropriation*, *supra* note 107, at 18-20 (describing owners’ expectations that they can continue to use property in the ways to which they have become accustomed, even though such usage has become harmful).

173. *Id.* See also Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 284 (1996). Carol Rose has stated:

[P]ublic authorities may be quite late in determining that particular private land uses cause damage to other persons and to public resources, or they may have suggested that these uses could continue. In the meantime, owners may have innocently sunk capital into their land uses in the expectation of being permitted to continue to consume public resources . . . . Halting

easy it is to see a taking in such regulation. One only has to posit the following:

The Constitution requires that property be understood as a bundle of rights, each one a part of the value of the whole, but valuable in itself. When the value of any one of the rights in the bundle is eliminated the state must compensate the property owner for the loss of the value of the right regardless of the remaining value of the whole parcel.<sup>174</sup>

This view is highly contestable, given its “[e]levation of the extant distribution of entitlements and liabilities to a matter of principle,”<sup>175</sup> yet the cultural notion that at least sometimes the state should pay for the benefits it attains from owners’ sacrifices makes considerable intuitive sense.<sup>176</sup> In acknowledging that the distribution of regulatory burdens is a question of constitutional moment, the Court in *Lingle* showed itself to be connected to the constitutional culture of public beliefs regarding property rights.

### C. *Lingle’s* Potential

I have argued thus far that in *Lingle* the Court returned to older formulations of the regulatory takings problem and in so doing connected to constitutional culture. The importance of this approach can be seen in two ways, one having to do with the pattern of regulatory cases immediately preceding *Lingle*, and the other having to do with the inquiry towards which *Lingle* directs courts in the future.

If the Court had applied *Penn Central* to every subsequent regulatory takings claim, over time the cases might have grown somewhat less “ad hoc” and more “regular,” and the “factors” deemed of “particular significance”—economic impact, interference with economic expectations, and character of governmental activity—might have been systematically elaborated. The muddy standards and unpredictable balancing that the Court in *Penn Central* set out as more or less a second-best solution to the regulatory takings

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such uses may result in the deadweight loss of expenditures that the owner has already made—deadweight in the sense that the expenditures become useless either to the owner or to anyone else.

*Id.*

174. Torres, *Taking and Giving*, *supra* note 28, at 14.

175. *Id.* at 13.

176. See Torres, *Visions of Guadalupe*, *supra* note 142, at 170 (“The property rights movement has its share of cranks, but the reason it has gained such a purchase on policy makers and judges is that it has been able to tell a story with emotional and ideological resonance that connects it to what we think about ourselves.”).

muddle<sup>177</sup> might have evolved into a more crystalline rule for evaluating regulatory takings claims.<sup>178</sup> This arguably-unrealistic possibility was never tested. Soon after *Penn Central*, the Court developed its *per se* rules for permanent physical invasions and for total deprivations of economic value, while enunciating still different standards for takings claims arising in the context of exactions.

The effect of this proliferation of legal tests was predictable. Owners would try to categorize their injury as one falling into one of the *per se* categories, or would argue that their case warranted the more rigorous scrutiny applied to exactions. Thus, in both *Palazzolo v. Rhode Island*<sup>179</sup> and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>180</sup> the owners sought to characterize the impact of the regulations in question as a total deprivation of economic value, in order to take advantage of the *Lucas* categorical taking rule. The issue thus became whether the taking in question either was subject to one of the *per se* rules (i.e., involved a permanent physical occupation or a complete deprivation of economic value), or instead was subject to *Penn Central* balancing. Rather than elaborating on the meaning of the *Penn Central* factors, the Court was forced in many cases to decide if those factors applied at all.<sup>181</sup>

Although the Court has largely seen through claimants' efforts to "conceptually sever" a spatial or temporal portion of their larger ownership interest,<sup>182</sup> *Lingle* has the potential to change the focus

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177. Recall that the Court in *Penn Central* described itself as "unable" to develop a "set formula" for determining takings questions. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

178. On muddy standards and crystalline rules in property generally, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 577 (1988). See also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976) (addressing the problem of the choice between standards and rules as the form for legal directives); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22 (1992) (describing and discussing the standard/rule dichotomy).

179. 533 U.S. 606 (2001).

180. 535 U.S. 302 (2002).

181. This is not to say that the Court *never* confronted a case squarely presenting the issue of whether a taking had been shown under *Penn Central*. It did so in, *inter alia*, *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbitt v. Youpee*, 519 U.S. 234 (1997).

182. See, e.g., *Tahoe-Sierra*, 535 U.S. at 331. The Court stated:

Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular . . . . Petitioners' "conceptual severance" argument is unavailing be-

altogether. Under *Lingle*, the question is not: “what type of *case* is this—a total-deprivation case or some other kind?” Instead, the question is “what quality of *injury* has been shown here?” Owners, in theory, will be pushed to frame their claims in terms of whether the regulation in question burdens them in a particularly heavy way, a way not shared by other citizens. This reframing invites judicial elaboration of the distribution question that the Court has now put at the center of takings inquiries.

Of course, the *Lingle* Court did not provide much guidance on how to resolve the newly-reformulated claims. Indeed, it could be argued that by returning to *Armstrong*’s focus on the distribution of burdens, the Court just restated the takings problem, without even gesturing toward a determinate solution. The Court tells us that in regulatory takings cases it will focus on the “magnitude” of the harm a regulation imposes.<sup>183</sup> But how will it measure “magnitude”? The same questions can be raised with respect to the issue of “distribution.”<sup>184</sup> All regulations will affect some people more than others. How can we determine how much inequality is tolerable? Inquiries into “magnitude” and “distribution” will not answer the question of whether a regulation goes “too far” if they just restate the “too far” concept in different words.

There may, however, be advantages to the Court’s strategy of redirecting the analysis back to distributional questions without providing a fixed method or yet another new “test” for evaluating or resolving those questions. To understand why, it is useful to return to *Mahon*.<sup>185</sup> The “too far” idea set forth in the Court’s opinion was coupled with another, equally powerful, and almost equally famous, observation; in Holmes’s words, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>186</sup> As has long been noted, these two observations—that sometimes government must be allowed to regulate without having to pay compensation, but that sometimes its regulatory actions can impose disproportionate and unreasonable burdens—implicate a

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cause it ignores *Penn Central*’s admonition that in regulatory takings cases we must focus on “the parcel as a whole.”

*Id.*

183. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

184. *Id.*

185. *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

186. *Id.* at 413.

deep tension. The very regulations that produce social goods can impose hugely inefficient demoralization costs on individuals.<sup>187</sup>

These demoralization costs are an important part of what underlies Americans' concerns about the Takings Clause. It is not obvious why the value of property owned by one person or group should be reduced by regulation designed to increase the value of property owned by others; affected property owners legitimately ask, "Why me?" The "Why me?" question takes on particular valence because protection of property is widely understood to be an integral part of constitutional law, and Americans have strong expectations about what the Constitution demands with respect to property rights.<sup>188</sup> Because "Americans form convictions about constitutional meaning that have roots in constitutional history and memory" and "[a]rguments about the nature of the Constitution serve as a medium in which Americans, both in government and in mobilized social movements, debate questions of national identity and purpose,"<sup>189</sup> when the Court interprets the Constitution, it is "in constant dialogue with ambient political culture."<sup>190</sup> It is important, therefore, that its opinions engage public views of property and reflect an openness to change in response to those views.<sup>191</sup> An opinion which, like *Lingle*, points to the difficult sub-

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187. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (defining demoralization costs as "the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion").

188. See Underkuffler, *supra* note 115, at 731 (describing the notion that "property protects the individual's interests from collective powers" as a view "in which all of us, on some level, believe"); see also Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2022 (2003) ("Any historian or political scientist will tell you that the Constitution lives a vibrant and consequential life outside the courts . . . . The 'Constitution' which thrives in American culture, which is a crucible for national values and commitments . . . is assuredly not merely what courts say it is.").

189. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 24 (2003) (exploring and questioning the idea that the Supreme Court has the exclusive authority to interpret the Constitution).

190. *Id.* at 25.

191. See Post, *supra* note 14, at 11 ("The Court must maintain the distinctly legal authority of constitutional law, and yet it must also embed constitutional law within the beliefs and values of nonjudicial actors.").

stantive fairness question at the heart of the Takings Clause, without reducing it to a series of factors or tests, has the potential to further the ongoing dialogue about property that is an important part of our constitutional culture.

The dialogue has many potential dimensions—the tension between social goods and demoralization costs is mirrored by other deep tensions lurking in takings law. American discourse about property is divided on many fronts and in many ways. One tradition in American property theory embraces a “proacquisitive” position, under which stability of expectations is paramount and regulatory redistributions are unacceptable,<sup>192</sup> while another adopts a “civic” position, which has far fewer problems with such redistributions.<sup>193</sup> Models of property that portray ownership in terms of “a lord in a castle” or “an investor in a market economy” compete with a model that “starts from the idea that owners have obligations as well as rights.”<sup>194</sup> The models lead to dramatically different views of when takings should be deemed to have occurred.<sup>195</sup> “Conservative” visions of property, emphasizing individual rights, compete with “progressive” visions, emphasizing social interdependence; under the former, categorical rules for takings seem vastly more appropriate, while under the latter, it seems appropriate to evaluate takings claims by assessing a broad range of factors.<sup>196</sup>

These divisions about property are matched by divisions over the nature of government. If government is dominated by representatives of the many and apt to exploit individuals, then takings law exists to protect “us” from a dangerous “them,” but if we think of

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192. Rose, Mahon *Reconstructed*, *supra* note 106, at 594 (“The proacquisitive position is that individuals should be able to act on numerous fixed property expectations, and thus any involuntary and uncompensated disruption of those expectations is a wrongful taking.”).

193. *Id.* at 592 (“The civic property tradition is significant . . . in that its argument for protection of property focused not on accumulating wealth, but rather on maintaining the liberty of a self-governing nation. The implication of this view is that property is to be protected only up to the bounds of some conception of civil and social responsibility.”).

194. Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 314 (2006) (arguing that *Penn Central*'s return to a fairness and justice focus strikes the best balance between government and individual rights).

195. *Id.* at 325-28.

196. *See generally* Underkuffler, *supra* note 115; *see* Radin, *supra* note 96, at 1668-85 (contrasting a “neoconservative” view of property and its associated “conceptualist” approach to takings questions with alternative views requiring “pragmatism” in evaluating takings claims).

our government as “us,” then “its disappointment of our hopes for profit from time to time” is properly understood “as an acceptable responsibility of citizenship.”<sup>197</sup> If local regulators are seen as “empowered, possessing enormous leverage over private landowners . . . [and] enjoying virtual monopoly power over land use entitlements,” then the Takings Clause will be regarded as a necessary bulwark against irresponsible power, a bulwark best actualized by clear and simple *per se* rules, while “those who hold a more benign view of government land-use regulators find less need for categories of *per se* takings and fixed definitions of property.”<sup>198</sup> Protecting property rights is one of government’s important purposes, but government defines—and thus can define away—the very property rights it is supposed to protect.<sup>199</sup>

It is in the context of these debates—and I have only scratched the surface of takings literature in enumerating them<sup>200</sup>—that the Court’s lack of precision is best understood. We cannot hope and

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197. Radin, *supra* note 96, at 1693. Radin explains:

A “liberal” understanding of politics would lead us to the conclusion that the risks associated with governmental interaction with us and our holdings are different in principle [from other risks that investors face] because they raise the possibility of systematic exploitation of the few by the representatives of the many. A “republican” understanding of politics perhaps does not move so quickly to the fear of systematic exploitation; instead, its central concern is preservation of self-government. Thus, a “liberal” understanding of the taking issue suggests that we evaluate takings claims by asking: Is this action a likely instance of overreaching by Leviathan? Whereas a republican understanding of the taking issue suggests that we evaluate such claims by asking: Is this action such as will undermine our commitment to self-government?

*Id.* at 1692-93.

198. Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1752 (1988). Like Radin, Alexander’s analysis contrasts “republican” and “public choice” theories of government. *Id.* at 1770.

199. Paul, *supra* note 108, at 1411 (“[H]ow can government simultaneously be responsible for establishing the property rights of the citizenry and also be entrusted not to render its constituents helpless when conditions dictate defining property rights so as to benefit public officialdom?”).

200. See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003) (reexamining federal regulatory-takings law in light of a line of eminent-domain cases decided in American state courts during the nineteenth century—cases which made the distinction between regulations and invasions of rights); Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989) (analyzing the development of takings law in an effort to construct a set of principles that would account for the results in the great majority of the Court’s takings decisions); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (asserting that the limited scope of the Takings Clause reflects the fact that members of the framing generation believed that physical possession of property was particularly vulnerable to process

should not wish that the Court in one moment might seek to resolve all the issues concerning property and government that underlie the takings muddle. We can hope and wish that the Court will grapple with the issues with some transparency or clarity. The step away from sorting cases by type, along with a gesture back toward the basic *Armstrong* concept of distributional fairness, could lead the Court in this direction. The competing values and visions will not be made to go away, but they can be discussed.<sup>201</sup>

The openness of the discussion matters. The flap following *Kelo* and the ongoing strength of the various “property rights” movements demonstrate that there is a deep and strong interest in the questions of property and government—an interest shared by the public as well as by academic theorists. In *Kelo*, the Court’s well-warranted sense that it was constrained by prior law effectively precluded it from engaging in the charged but important debates over what constitutes a “public use.” But there is no such impediment in the regulatory takings arena. As has long been lamented, the cases dictate nearly nothing, and *Penn Central* balancing, which the Court has now given primacy of place, is highly indeterminate.<sup>202</sup> The Court has a chance now to lead a visible debate about the role of property in today’s highly regulated world.<sup>203</sup>

Nothing guarantees that it will actually do so, or that it will do so effectively. The reliance on the concentrated and onerous burdens of physical appropriations as a paradigm in *Lingle* suggests that the Court might have already committed itself to what has been called a “physicalist” vision of property.<sup>204</sup> Such a commitment would take off the table many of the more important questions the Takings Clause raises about how property should be defined.<sup>205</sup> The Court could also decide that the larger issues of burden, magnitude, and distribution are subsumed in the *Penn Central* factors; it

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failure and arguing that this should be acknowledged in the analysis of current takings jurisprudence).

201. See Paul, *supra* note 108, at 1545 (suggesting that it would be a mistake for the Court to try to articulate universal principles with respect to takings and that a better approach would be to “directly focus disagreements on the competing values at stake in takings controversies”).

202. See, e.g., Rose-Ackerman, *supra* note 126.

203. See OWEN FISS, *THE LAW AS IT COULD BE* 3 (2003) (“Adjudication is the social process that enables judges to give meaning to public values.”); Post, *supra* note 14, at 11 (describing how particular opinions can serve as “an opening bid in a conversation between the Court and the American public”).

204. See Paul, *supra* note 108, at 1404.

205. See generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000) (describing differing definitions of property in constitutional jurisprudence).

could confine itself to elaborating and refining those factors, again without adverting to the general issue of “fairness and justice.” If it does, *Lingle* will be remembered for its disentanglement of due process from takings issues—and for nothing more.<sup>206</sup>

There is a chance, however, that something different might happen. Courts confronting claims formulated in the “magnitude” and “distribution” terms suggested by *Lingle* may ultimately have to address openly some of the more vexing problems underlying regulatory takings law. In resolving the “magnitude” question, for example, courts will have to confront the issue of the “baseline” against which the extent of the loss is to be evaluated.<sup>207</sup> All regulations will disrupt landowners’ expectations about the use of their property, but is a landowner entitled to expect that her property will be subject only to those regulations that existed when she acquired it?<sup>208</sup> In considering “distributional” concerns, how do we define the relevant community? Do we consider the benefits to the claimant of the regulatory scheme in question—or even of other regulatory schemes—or only the burdens?<sup>209</sup>

Each of these individual questions implicates the larger questions enumerated earlier concerning the connection between property and the state.<sup>210</sup> They provide a way to contextualize, and potentially render less strident, the oversimplified claims of “property rights” adherents who see a taking in every penny lost to regu-

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206. For arguments that this disentangling is itself important, see generally 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); Robert G. Dreher, *Lingle’s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371 (2006).

207. See Torres, *Taking and Giving*, *supra* note 28, at 3. Gerald Torres writes: [T]he misnamed property rights revolution is predicated on an effort to freeze in place the existing distribution of wealth. One way to achieve this goal is to define the existing distribution of rights and liabilities as part of the total wealth held by individuals. Thus, any regulation that rearranges the distribution of rights and liabilities can be understood as a redistribution of wealth.

*Id.*

208. See Rose, *Property and Expropriation*, *supra* note 107, at 19-22 (describing regulatory takings problems in terms of the disruptions of transitions); see also Sterk, *supra* note 92, at 206 (“The Takings Clause protects primarily against change in background state law. As a result, the constitutional protection available to a landowner depends heavily on background principles of state law in effect before the challenged regulation was enacted. A regulation that constitutes an unconstitutional taking in Houston could pass constitutional muster if enacted in New York.”).

209. See Torres, *Taking and Giving*, *supra* note 28, at 18 (asserting that a principal problem in measuring the reduction in value of property concerns whether “we need to account for the value attributable to public action”).

210. See *supra* text accompanying notes 197-99.

latory intervention. But resolving these questions could keep the courts—and, at the end of the line, the Supreme Court—in productive dialogue about our constitutional culture of property. Because people care about property, this is a dialogue to which they are likely to attend. Its possibility is the promise of *Lingle*.

### III. IMPLICATIONS

What will all of this mean for local governments? Both *Kelo* and *Lingle* clarify, to some extent, the rules courts will apply in subsequent takings cases litigated in federal courts. *Kelo* clearly establishes that, for federal constitutional purposes, “public use” will be defined in broadly deferential terms; *Lingle* clearly establishes that regulations will not have to pass *Agins*’s onerous “substantially advances” test.

But these doctrinal clarifications may not take us very far. As we have already seen, *Kelo* spawned dozens of new statutes designed to limit the ends for which governmental entities may take property. This post-*Kelo* legislation, and not federal law, is likely to determine the scope of eminent domain power in the future. The statutes, many of which were written in haste, seek, inter alia, to constrain governments from using eminent domain power for purposes of “economic redevelopment” or in the absence of “blight.” The vagueness of these new statutory terms seems likely to lead to further litigation.<sup>211</sup> On the regulatory takings side, the elimination of *Agins* leaves us with *Penn Central*, never the clearest standard, and with the new criteria of “magnitude” and “distribution,” whose meanings *Lingle* left radically underspecified. In the end, there is much left to litigate in the takings arena.

Outside the sphere of doctrine, some of the more interesting implications of *Kelo* and *Lingle* turn on how those decisions are understood by nonjudicial actors, especially the public at large. As we have seen, *Kelo*’s facts were accessible and sympathetic—even heart-rending, as they were portrayed in the media—and the outcome was widely reported. What people know specifically about *Kelo* is primarily limited to its result,<sup>212</sup> i.e., a holding in favor of

211. See, e.g., Mahoney, *supra* note 94, at 127 (“‘Economic development’ is not a self-executing concept, but one that will require substantial judicial interpretation.”).

212. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2631-32 (2003) (considering the ways in which the public gets information about the Court and asserting that “the public cannot possibly follow the actual content of opinions, and largely knows about opinions simply what the media or opinion leaders tell them”).

the government and against the homeowner plaintiffs. Accordingly, it is not unreasonable to surmise that the case served to heighten public suspicion—and scrutiny—of exercises of eminent domain. The legislative and political backlash against *Kelo* demonstrates how a legal victory can work against the prevailing party. However broad local governments' eminent domain powers may be in theory at this legal juncture, their ability to exercise those powers in the current political climate may be quite limited as a practical matter.

Of course, again speaking theoretically, what local governments cannot do through eminent domain they may be able to accomplish using alternative means, such as regulation or taxation.<sup>213</sup> It is possible that greater public attention to eminent domain will channel local governments towards these alternative legal strategies. This re-channeling, arguably, will result in less protection to ownership rights, if these alternative land use controls are either less visible or more difficult to contest.<sup>214</sup> But given the resurgence of “property rights” movements and the distrust provoked by *Kelo*, it is not clear that the public will actually pay less attention to, or be less apt to challenge, government power asserted as regulation or taxation.

Thus, it is possible that what we may see in the wake of *Kelo* and *Lingle* is yet more litigation testing the scope of local governmental power over property uses. In this litigation, courts will need to confront squarely one influential public understanding of property rights, an understanding that largely underwrites the “property rights” movements and that is an important part of the resistance to *Kelo*.<sup>215</sup> This understanding envisions property as a domain of freedom—freedom to act as owners choose, freedom from regulations limiting owners' liberty to so act.<sup>216</sup> This view regards most

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213. Bell & Parchomovsky, *supra* note 4, at 1416, 1426.

214. Bell & Parchomovsky argue that they are. *See id.* at 1426-33.

215. But this is only one important part of the resistance to *Kelo*. Another important part is the sense that *Kelo* is bad for the poor. *See Kelo v. City of New London*, 545 U.S. 469, 521 (Thomas, J., dissenting) (“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.”); *see generally* Dana, *supra* note 94 (discussing the negative effects that post-*Kelo* legislation has had on the poor).

216. *See, e.g.*, Kanner, *supra* note 4, at 229 (“[I]t is difficult to see why only in the abuse-prone field of eminent domain, unoffending individuals should be subjected to de facto, unreviewable exercise of government power that strikes them where they are most vulnerable: their homes, which are supposed to be, and are, recognized by law, policy, and custom as their places of security and repose.”). Joseph Singer has dubbed this understanding the “ownership model.” *See* SINGER, *supra* note 98, at 2-3.

exercises of eminent domain as fundamentally misguided because, as this view holds, government's role is to protect individuals' property rights, not to interfere with them. Regulations similarly are suspect in this view, since they limit owners' freedoms rather than enhance them. While academics have challenged this vision for some time,<sup>217</sup> there is no doubting its rhetorical power or political popularity.<sup>218</sup> What happens next in the takings arena will depend a great deal on the success with which both courts and local legislative bodies engage this understanding.

From the point of view of constitutional culture, this engagement is part of an ongoing negotiation between citizens and government over what property will mean in our national culture. This negotiation is possible because "the Constitution is a very special kind of law,"<sup>219</sup> one that symbolizes our national commitments.<sup>220</sup> Thus, "[a]rguments about the nature of the Constitution serve as a medium in which Americans, both in government and in mobilized social movements, debate questions of national identity and purpose."<sup>221</sup> Because property is widely understood to be part of our identity as Americans, much is at stake in the litigation that is likely to follow in the wake of *Kelo* and *Lingle*.

While we cannot know whether this litigation will fulfill the promise of *Lingle*, we do know that people care about property, and that is no less true on the local level than on the national level. Indeed, the constitutional culture of property may have its strongest valence at the local level, for it is there—in the homes and neighborhoods where people live and work—that the abstractions of property and government are experienced. Fancy, innovative

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Joan Williams has called it the "intuitive image." See Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 289-95 (1998); see also Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 604 (1998) (describing the "exclusivity axiom").

217. See, e.g., SINGER, *supra* note 98, at 71 ("[P]roperty rights are themselves forms of regulation."); Rose, *Evolutionary Approach*, *supra* note 126, at 593 ("A private property regime, after all, is a form of regulatory regime . . . . We are not choosing property or regulation; we are choosing among regulatory regimes on property, and we are choosing regulatory regimes at least in part to induce people to respond with actions that accomplish the things to which we aspire in our larger common life."). These critiques notwithstanding, this view of property is held by highly influential legal thinkers, most notably Richard Epstein. See EPSTEIN, *supra* note 16, at 3-6.

218. See Underkuffler, *supra* note 115, at 731 (describing near-universal belief in the view that the Takings Clause's "essential function" is to protect individual interests from collective power).

219. Post & Siegel, *supra* note 189, at 24.

220. *Id.* at 25.

221. *Id.* at 24.

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regulatory schemes are scrutinized through a simple but charged grid in which people often regard what they own, at any given moment in time, as an absolute entitlement that government must protect—and cannot alter—without regard to the social benefits that regulation might produce. That grid may be simplistic, naïve, or otherwise misguided, but it is nonetheless powerful. *Kelo* and *Lingle* teach municipalities that they ignore that grid at their peril. Like the Supreme Court, local governments must expressly engage with cultural understandings of property if they are to attain legitimacy in the eyes of their constituents.

