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## HAS THE HIGH COURT TAKEN AWAY PRIVATE PROPERTY RIGHTS?

by

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After a decade of decisions principally favoring property owners,<sup>1</sup> the U.S. Supreme Court's 2005 term appears to have ushered in a new era in Fifth Amendment takings jurisprudence that greatly bolsters states' rights and the government's right to exercise its power of eminent domain while limiting property owners' rights to recover for uncompensated taking. Led by *Kelo v. City of New London* and the lesser heralded *Lingle v. Chevron U.S.A., Inc.*,<sup>2</sup> the Court's recent decisions favor states' rights to take property for economic redevelopment, thereby transferring property not from private to public hands for public "use" but, rather from private hands to other private hands under the guise of and mere hope of public "benefit." As discussed below, the *Kelo* decision leaves many questions unanswered, including the penultimate question: are there any limits on the government's right to exercise its power of eminent domain to take property from one private property owner and give it to another private interest in the name of "economic redevelopment?"

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<sup>1</sup>See, e.g. *Lucas v. Carolina Coastal Council*, 505 U.S. 1003 (1992) (announcing a categorical rule that a taking will be found when a regulation eliminates all economic value of a parcel); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (requiring that governmental action substantially advance legitimate state interest); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (holding that a landowner is not barred from asserting a taking claim by the mere fact that title was acquired after the effective date of a regulation affecting land use).

<sup>2</sup>*Lingle* involved a challenge by Chevron U.S.A. to a Hawaii statute imposing a cap on rent that oil companies could charge dealers leasing company-owned service stations. Chevron alleged that the rent cap significantly limited its profits and thus effected a taking of its property in violation of the Fifth Amendment to the Constitution (which provides ". . . nor shall private property be taken for public use without just compensation"). Both the federal trial court and the U.S. Court of Appeals Ninth Circuit ruled in Chevron's favor, finding that the rent cap constituted an uncompensated taking that did not "substantially advance" the State's interest in controlling and lowering retail gas prices. The "substantially advances" test was first announced in the Supreme Court's decision in *Agins v. City of Tiburon* where the Court held that a government regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests." Reversing the lower court, the Supreme Court upheld the Hawaii statute and clarified that the language in *Agins* was "imprecise." According to the Court, the "substantially advances" test has no validity as a freestanding Fifth Amendment takings test.

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The Fifth Amendment takings clause is no stranger to the high court. In *Kelo*, the Court's thirty-third taking decision since 1979,<sup>3</sup> a five-Justice majority ruled that states may exercise their power of eminent domain and condemn private property to promote a community's general economic benefit. In its much anticipated and sharply divided ruling, the Court stated that while cities may not seize homes and businesses simply to give those properties to other private parties, states may take property from one private landowner and give it to another as part of an overall community development plan, provided that the intent of the development plan is to confer a "public benefit" and not to benefit a particular class of identifiable individuals, even though the property at issue may never be open and available to the general public. *Kelo v. City of New London*, 125 S. Ct. 2655, 2662 (2005). Unlike the Court's earlier decisions in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the city's use of its eminent domain power in *Kelo* was not predicated upon and designed to remedy an antecedent finding of blight, as was the case in *Berman*, or other social harm (oligopoly), as was the case in *Midkiff*.

At issue in *Kelo* was whether the City of New London, Connecticut could take, without the owner's consent, the family homes of several city residents, including Susette Kelo, to pave the way for the private development of a riverfront hotel, health club and offices. *Kelo*, 125 S. Ct. at 2659. Ms. Kelo argued that despite the promise of great public benefit that would result from the planned redevelopment of her neighborhood, the Fifth Amendment to the Constitution, which provides ". . . nor shall private property be taken for *public use* without just compensation" protected her and her neighbors' property from involuntary seizure unless the property is taken for "public use," such as building schools, jails, courts, and roads. *Id.* at 2666.

Rejecting this argument and deferring to the city's plan, the Supreme Court found that the city had carefully formulated a development plan that it believed would provide appreciable benefits to the community, including new jobs and increased tax revenue. *Id.* Looking to the city's efforts to coordinate a variety of commercial, residential, and recreational land uses, "with the hope that they will form a whole greater than the sum of its parts," the Court upheld the Connecticut statute that specifically authorized the use of eminent domain to promote economic development in the City of New London. *Id.* at 2668. "Given the plan's comprehensive character, the thorough deliberation that preceded its adoption, and the limited scope of this Court's review in such cases, it is appropriate here . . . to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the Fifth Amendment," ruled the Court. *Id.* at 2665. Specifically addressing the issue of whether a promised public benefit satisfies the public use requirement of the Fifth Amendment, Justice Stevens, writing for the majority, stated that "promoting economic development is a traditional and long accepted

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<sup>3</sup>See, *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 403 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *United States v. Sperry Corp.*, 493 U.S. 52 (1989); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Concrete Pipe & Prods. of California v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005); *San Remo Hotel v. City and County of San Francisco*, 125 S. Ct. 2491 (2005).

governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.” *Id.*

Explaining the limits of permissible takings, however, Justice Stevens noted:

[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future use by the public is the purpose of the taking . . . .

The City [of New London] would no doubt be forbidden from taking [Ms. Kelo’s] land for the purpose of conferring a private benefit on a particular private party,” which would serve no legitimate governmental purpose. . . . Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.

*Id.* at 2661.

Although Ms. Kelo alleged that a private developer would realize enormous profits from the planned New London development, the majority found dispositive that the takings and proposed redevelopment would benefit the entire community by creating jobs and increasing the tax base pursuant to a carefully considered and comprehensive development plan. *Id.* at 2665. By contrast to the Court’s unanimous decision in *Lingle*, *Kelo* was sharply divided. Writing a scathing dissent, Justice O’Connor (joined by Chief Justice Rehnquist, Justice Scalia and Justice Thomas) stated:

Under the banner of economic redevelopment, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded, i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.

*Id.* at 2671.

Justice O’Connor accused the majority of doing exactly what it says it may not: permitting the taking of the property of party “A” for the sole purpose of transferring it to another private party, “B”. Justice O’Connor distinguished the facts of *Kelo* from those in *Berman* and *Midkiff*, 467 U.S. 229 (1984), which provide the legal and analytic support for governmental seizures of private property for purposes of economic redevelopment. Unlike *Berman*, in which the government’s use of its power of eminent domain was used to combat slum conditions and blight, or in *Midkiff* in which the state’s taking power was upheld to support the transfer of property to reduce the concentration of land ownership, in *Kelo*, there was no claim that the property at issue was “the source of any social harm.” *Kelo*, 125 S. Ct. at 2674-75. Thus, concluded Justice O’Connor, the majority’s opinion permits the taking of property from one private owner in order to give it to another private owner on the mere promise and hope that the new owner will put the property to use to generate some public benefit. Because nearly any use of property can hypothetically generate some incidental public benefit, Justice O’Connor warned that “[t]he specter of condemnation hangs over all property.” *Id.* at 2676.

Finally, in response to Justice Stevens’ suggestion that property owners should turn to their state legislatures for protection from the government’s use of its power of eminent domain, O’Connor wrote, “this is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.” *Id.* at 2677.

What does *Kelo* mean for future takings disputes involving private redevelopment? The majority's decision makes it clear that private redevelopment can in some circumstances be a "public use" for purposes of the Fifth Amendment. What are the parameters of this robust authority that states and the federal government enjoy? In what was perhaps a clarion call to state legislatures, Justice Stevens noted that "we emphasize that nothing in our opinion precludes any state from placing further restrictions on its exercise of the taking power." *Id.* at 2668. Some states have enacted laws that specifically forbid the use of eminent domain solely for economic development.<sup>4</sup> Other states expressly permit the taking of private property for private economic redevelopment.<sup>5</sup> Legislation has been proposed in Congress and in several states to forbid the use of eminent domain to support economic redevelopment. *E.g.* S. 1313 and H.R. 3135. What does the future hold for property owners in those states that have not addressed the issue? The answer may lie in the concurrence written by Justice Kennedy, who provided the fifth and critical vote in the *Kelo* case.

Justice Kennedy agreed generally with the majority that under the rational relationship test, deference to condemning authorities is appropriate. *Kelo*, 125 S. Ct. at 2669. Justice Kennedy focused specifically on the evidentiary record developed in the lower court to support the finding that the taking at issue was designed to benefit the local community and not the proposed private developers. *Id.* at 2669-70. Significant to the inquiry in Justice Kennedy's eyes was the fact that the state reviewed a variety of proposed development plans and chose a developer from a group of applicants rather than pre-selecting the developer in advance of its review of the proposed development plan. Despite his approval of the process in this case, he noted that there may be instances where "the risk of undetected impermissible favoritism of private parties is so acute" that deference is not warranted and a "presumption of invalidity" may be appropriate. *Id.* at 2670. Under such circumstances, Justice Kennedy suggests "a more stringent standard of review than that announced in *Berman* and *Midkiff* may be appropriate for a more narrowly drawn category of takings." *Id.* Justice Kennedy stops short of announcing the parameters of such a "more stringent standard of review" and seemingly invites litigation on the issue, stating "[t]his is not the occasion for conjecture as to what sort of cases might justify a more demanding standard . . ." *Id.*

In a stinging rebuke to Justice Kennedy's concurrence, Justice O'Connor wrote, "whatever the details of Justice Kennedy's as-yet undisclosed test, it is difficult to envision anyone but a 'stupid staffer' failing it." *Id.* at 2675.

In addition to the issue left unresolved by Justice Kennedy, *Kelo* also begs the question of whether traditional measures of just compensation fairly and adequately compensate property owners whose property is taken not for public use but, rather, to support economic redevelopment. In the case of the former, the sovereign exercises its power of eminent domain to benefit the public by, among other things, building roads, courts, jails and schools; the commercial value of the taken property is generally not enhanced. In such cases, just compensation is measured as the value of taken property prior to the taking. In the case of the latter, however, the very purpose of the taking is to enhance the property's commercial value to produce the desired and promised public benefit. The traditional measure of just compensation fails to compensate the former owner or allow the former owner to participate in the increase of the property value while allowing the subsequent owner to realize a windfall. This government-sanctioned transfer of wealth strips from property owners the right to realize the full benefit of their investments. Perhaps future courts will recognize the economic disequilibrium that the *Kelo* decision creates and adopt new rules for determining just compensation in cases where takings are based not on public use but on public benefit arising out of proposed economic redevelopment.

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<sup>4</sup>These states include: Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, South Carolina, Utah and Washington.

<sup>5</sup>These states include: Connecticut, Kansas, Maryland, Minnesota, New York and North Dakota.