

Introduction

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Environmental lawyers expected the Supreme Court's 2004 Term to be a quiet one for environmental issues, especially following the 2003 Term, in which the Court decided eight significant environmental cases. So it was something of a surprise when the Court heard three "takings" cases: *Kelo v. City of New London*,¹ *Lingle v. Chevron U.S.A., Inc.*,² and *San Remo Hotel, L.P. v. City & County of San Francisco*.³ These cases represent notable developments in the Court's jurisprudence on the Takings Clause of the Fifth Amendment of the Constitution.

The *Kelo* case was the most controversial. The Supreme Court, through Justice Stevens, upheld the use of eminent domain by the City of New London to further the City's economic development plan. The Court ruled that the City's taking of property met the constitutional requirement of a "public use," even though the condemned land was not a blighted urban area, but a neighborhood of well-kept middle class homes, and the taking was intended to facilitate the City's plan for private commercial activities, rather than public services.

The Court rejected the requirement that condemned property be put to use for the public in favor of an interpretation of public use as "public purpose." The Court determined that the City's plan met the public purpose requirement because it was the product of a careful, integrated planning process and would not benefit a particular class of individuals. The Court also emphasized its deference to the state statute authorizing the City's use of eminent domain power for economic development. Justice O'Connor penned a strong dissent, joined by Justices Rehnquist and Scalia, contending that condemnation for purposes of economic development is unconstitutional. Justice Thomas filed a dissent on similar grounds.

The public reaction to the *Kelo* decision was immediate and pronounced. Newspapers and conservative weblogs reported on the effort of one outraged individual who applied the *Kelo* principles to allow the government to take Justice Souter's modest New Hampshire farmhouse for a hotel and other economically profitable private development.⁴ Privately, however, most lawyers concluded that the *Kelo* case did not make a major change in takings law, but clarified the scope of

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¹ 125 S. Ct. 2655 (2005).

² 125 S. Ct. 2074 (2005).

³ 125 S. Ct. 2491 (2005).

⁴ See, e.g., Eric Rasmusen's Weblog, Taking Souter's House Under Kelo; Judicial Usurpation <http://www.rasmusen.org/x/archives/714> (last visited Nov. 4, 2005).

the Fifth Amendment's public use requirement. State legislatures and Congress are moving forward with various proposed limitations on the use of condemnation in the redevelopment context.

The *Lingle* case caused less of a stir, but may have greater legal significance. The Hawaii legislature, concerned about the impact of market concentration on the escalating price of gasoline within the state, instituted a limit on the rent that oil companies could charge dealers leasing company-owned service stations. Chevron U.S.A., one of the largest oil companies in Hawaii, challenged the rent cap as an unconstitutional taking of its property.

The district court applied the Supreme Court's ruling in *Agins v. Tiburon*⁵ that government regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests."⁶ The court held that the Hawaii statute authorizing the rent cap was an unconstitutional taking because it failed to substantially advance the State's interest in controlling gasoline prices. The Ninth Circuit Court of Appeals affirmed.

In an opinion by Justice O'Connor, the Supreme Court repudiated the "substantially advance legitimate state interests" test for determining whether a regulation effects a taking. (The Court was careful, however, not to invalidate *Agins* and a number of other cases in which it had previously applied the "substantially advance" test.) The Court explained that it was looking for a test to identify regulatory actions that are "functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain."⁷ The Court ruled that the "substantially advance" test fails because it calls for a due process inquiry, rather than measuring the burdensomeness of government action on private property rights. The Court also found the "substantially advance" test inconsistent with the premise in takings cases that government action must serve a legitimate public use.

Finally, in *San Remo*, Justice Stevens writing for the majority refused to permit property owners to make duplicative takings claims in state and federal courts. The *San Remo* petitioners, owners of a hotel in San Francisco, objected to a city ordinance requiring the payment of fees for converting residential hotel rooms into rooms for tourists. The residential hotel rooms provided an important source of low-income housing in the community. After losing in state court, the hotel owners raised the same claims under federal law in federal court. In order to avoid the bar of issue preclusion, they asked the court to exempt Fifth Amendment takings claims from the full faith and credit statute⁸ on the grounds that a federal court should disregard the state court decision in order to assure that the federal claims were considered on the merits. The Supreme Court refused to make an exception to the full faith and credit statute for takings claims. It ruled that the petitioners were not entitled to re-litigate unsuccessful state-law claims under federal law in federal court.

⁵ 447 U.S. 255 (1980).

⁶ *Id.* at 260.

⁷ *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2082 (2005).

⁸ 28 U.S.C. § 1738 (2000).

The Essays and Authors

As part of our ongoing series of papers on significant environmental legal and policy issues, the Environmental Law Center, the Land Use Institute of Vermont Law School, and the *Vermont Journal of Environmental Law* are pleased to present a group of essays on the Supreme Court's takings jurisprudence as reflected in these three cases. The essays examine the cases from a variety of interesting perspectives. They place the cases in context, and illuminate the development of the Supreme Court's takings jurisprudence over time.

The authors of the essays are particularly well qualified to assess the takings cases and their impact. All of them have a direct connection to the history, policy, and legal issues leading to the Court's decisions.

Richard Brooks, Professor of Law at Vermont Law School, Founding Director of the Environmental Law Center, and self-described "former denizen of New London" was instrumental in the City's community development project in the 1960s and co-authored the New London Model Cities program. In 1975, he drafted the Connecticut Coastal Management legislation that was applied in the *Kelo* case. His teaching and scholarship since that time have included land use planning and coastal management law.

Professor Brooks critically examines the *Kelo* opinion in light of the history of American planning, concluding that the Court failed to articulate a convincing rationale for defining the public purpose aspect of "public use."

John Echeverria, Executive Director of the Georgetown Environmental Law and Policy Institute and frequent commentator on regulatory takings issues, served as co-counsel for the Governor and Attorney General of Hawaii in the *Lingle* case. He has represented governments, citizen groups, and economists in a variety of takings cases and written extensively about the Supreme Court's takings jurisprudence.

Mr. Echeverria puts *Kelo*, *Lingle*, and *San Remo* in context with an examination of the evolution of Justice Stevens takings jurisprudence from dissenter to formulator of the Court's majority view.

Marc Mihaly, Assistant Professor of Law, Acting Associate Dean for the Environmental Law program and Director of the VLS Environmental Law Center, represented communities and municipalities in a variety of redevelopment efforts during his lengthy career in private practice. As a specialist in land use law, he participated in a number of regulatory takings cases in California. His law firm, Shute, Mihaly & Weinberger, represented the defendants in *Agins v. City of Tiburon*⁹ and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.¹⁰

⁹ 447 U.S. 255 (1980).

¹⁰ 535 U.S. 302 (2002).

Professor Mihaly evaluates the *Kelo* opinion in light of current public-private urban redevelopment efforts and their contractual nature, concluding that neither the Court's majority nor its dissenters understood the realities of modern urban renewal projects.

L. Kinvin Wroth is the former Dean of VLS and Director of its new Land Use Institute. He was previously Dean of the University of Maine School of Law. While in Maine, he helped found Greater Portland Landmarks, Inc., a historic preservation organization, and served on the Portland Model Cities Task Force. For many years he was a member and chair of the New Gloucester, Maine planning board. More recently in Vermont, he was a member of the working group that produced a proposal for designated opportunity zones and master plan/master permitting legislation.

Professor Wroth compares United States takings jurisprudence, as reflected in *Kelo* and *Lingle*, with the current legal bases of Canadian domestic expropriation law. He also considers the interplay of the two domestic regimes and the expropriation provisions of the North American Free Trade Agreement.