

# The Triumph of Justice Stevens and the Principle Of Generality

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## INTRODUCTION

The recent spate of takings decisions by the U.S. Supreme Court—all coming down on the side of government—reflects the leadership and considerable influence of Justice John Paul Stevens. In the 2004 term, Justice Stevens authored two takings decisions, *Kelo v. City of New London*,<sup>1</sup> upholding the use of eminent domain to promote economic development, and *San Remo Hotel, L.P. v. City & County of San Francisco*,<sup>2</sup> refusing to permit property owners to mount duplicative takings claims against local governments in state and federal court. His influence is also reflected in the Court's third takings decision of the term, its unanimous ruling in *Lingle v. Chevron U.S.A.*,<sup>3</sup> repudiating the “substantially advance” takings test. In addition, in 2003, Justice Stevens authored the opinion for the Court in *Brown v. Legal Foundation of Washington*,<sup>4</sup> rejecting a takings challenge to a program supporting legal services for the poor, and in 2002, he authored the opinion for the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>5</sup> rejecting takings claims based on a development moratorium.

This successful run justifies a comprehensive appraisal of Justice Stevens' work on the takings issue, including an examination of the major themes of his takings opinions, an analysis of how he has influenced the direction of the Court's thinking on the takings issue, and an assessment of the state of takings doctrine as he reaches the height of a long and illustrious career.

Justice Stevens was appointed to the Supreme Court by President Gerald R. Ford and took his seat on the Court on December 19, 1975. In rough outline, Justice Stevens' career on the Court in relation to takings doctrine falls into three discrete phases. The first should be called the Era of Disinterest, because for the first ten years of his career (with one notable exception) Justice Stevens wrote and did little of significance in the area of takings. This lack of activity may have reflected a lack of curiosity about the issue, or perhaps the lesser influence that a junior Justice customarily exerts. The second phase should be called the Era of Exile, because it is characterized by a series

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<sup>1</sup> 125 S. Ct. 2655 (2005).

<sup>2</sup> 125 S. Ct. 2491 (2005).

<sup>3</sup> 125 S. Ct. 2074 (2005).

<sup>4</sup> 538 U.S. 216 (2003).

<sup>5</sup> 535 U.S. 302 (2002).

of dissents, usually expressing his views alone, reflecting increasing disillusion with the direction of the Court's takings doctrine, including in *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>6</sup> *Dolan v. City of Tigard*,<sup>7</sup> and *Lucas v. South Carolina Coastal Council*.<sup>8</sup> The final phase should be called the Era of Triumph, because it represents Justice Stevens leading a firm Court majority in the articulation of an increasingly coherent vision of takings law, one that cuts back in important respects on the decisions from which Justice Stevens dissented during the Era of Exile.

There are several plausible, possibly overlapping explanations for the arc of Justice Stevens' career on takings. In part his stances relative to the rest of the Court may reflect the shifting ideological makeup of the Court itself, first in the direction of a more pro-takings position,<sup>9</sup> and more recently toward the center.<sup>10</sup> One can also view the Court's recent takings decisions as an indication that the property-rights agenda has begun to founder on its contradictions with other aspects of conservative judicial ideology. In particular, the property rights agenda conflicts with conservatives' stated commitments to restrained constitutional interpretation based on fidelity to text and history,<sup>11</sup> as well as to judicial respect for state and local government autonomy within our federal system.<sup>12</sup> It also is no doubt true that the most recent takings cases presented more favorable sets of facts from the government standpoint than some prior cases. Finally, as Professor Richard Lazarus has argued, the Court's decisions suggest that divisions on the Court, perhaps triggered by Justice Scalia's confrontational style, undermined and ultimately destroyed a fragile majority that might have constructed a stable, relatively expansive takings jurisprudence.<sup>13</sup>

While there is some force to all of these explanations, this paper seeks to focus on the substance and internal logic of Justice Stevens' thinking over time, and attempts to discern whether and how his thinking has influenced the overall direction of the Court's takings decisions. As discussed below, an examination of Justice Stevens' career reveals a number of interesting and

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<sup>6</sup> 482 U.S. 304 (1987).

<sup>7</sup> 512 U.S. 374 (1994).

<sup>8</sup> 505 U.S. 1003 (1992).

<sup>9</sup> For example, with the appointment of Justice Antonin Scalia to the Court in 1986.

<sup>10</sup> For example, with the appointment of Justice Ruth Bader Ginsburg to the Court in 1993.

<sup>11</sup> See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (explaining why a strict originalist approach to constitutional interpretation does not support an expansive regulatory takings doctrine).

<sup>12</sup> See *Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (observing that "[t]he plurality opinion [in favor of a takings claim] would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts").

<sup>13</sup> See Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court* (draft article presented at 2005 Georgetown Conference on Litigating Regulatory Takings Claims).

important themes, including (1) support for the broad authority of the political institutions of government to reshape the content of property interests over time; (2) opposition to the temporary regulatory takings theory; and (3) emphasis on the need for an interpretation of the Takings Clause that does not intrude too deeply into the political process or interfere with the ability of government to respond flexibly to emerging social problems. Over time, Justice Stevens' consistent articulation of these themes has greatly influenced the Court's takings decisions.

But the most significant—and certainly the most consistent—thread of Justice Stevens' thinking on takings has been his focus on whether the challenged government action is general in character, affecting not only the claimant but others in the community as well, or whether instead the action singles out a particular owner for unique treatment. As will become apparent from the discussion that follows, Justice Stevens' focus on the issue of generality reflects two underlying considerations. The first, rooted in straightforward economic theory, is that general regulations should be less likely to raise takings concerns than particularized restrictions because they typically produce both burdens and countervailing benefits for individual property owners. The second is that when political institutions act in general terms, rather than in a targeted fashion, there is more reason for confidence that the decision reflects a thoughtful, carefully considered assessment of all relevant costs and benefits, rather than the opportunistic highjacking of the political process to benefit some special interest.

Justice Stevens did not originate the idea that the generality of government action should matter in takings law. It was Justice Oliver Wendell Holmes, in the seminal case of *Pennsylvania Coal Co. v. Mahon*,<sup>14</sup> who coined the phrase “reciprocity of advantage”<sup>15</sup> to explain how government regulation, applied broadly across the community, will produce not only burdens but corresponding benefits for individual owners. And Justice Lewis Powell, in a decision issued a few years after Stevens joined the Court, offered one of the most articulate expressions of this idea, in the context of zoning:

The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision of open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these

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<sup>14</sup> 260 U.S. 393 (1922).

<sup>15</sup> *Id.* at 415.

benefits must be considered along with any diminution in market value that the appellants might suffer.<sup>16</sup>

Nonetheless, Justice Stevens, more than any other member of the Court, made the concept of generality his own. He forcefully and consistently emphasized the importance of this factor in takings analysis, ultimately succeeding in making it a centerpiece of the Court's takings doctrine.

### I. THE ERA OF DISINTEREST

Over his first ten years on the Court, Justice Stevens contributed little to the development of takings doctrine. He was generally a silent joiner in majority opinions, sometimes siding with the takings claimant,<sup>17</sup> sometimes siding with the government.<sup>18</sup> He had been on the bench six years before he offered his first utterance in a takings case. In *Dames & Moore v. Regan*,<sup>19</sup> involving various challenges to the resolution of the Iranian hostage crisis, Justice Stevens wrote a very short concurring opinion addressing a takings issue in the case. He chided the majority for addressing whether the Court of Claims would have jurisdiction over potential takings claims based on suspension of private legal claims against Iran, stating, without elaboration or explanation, that such claims would be so insubstantial that it was not even worthwhile for the Court to address the jurisdictional issue.

More substantively, the following year, in *Texaco, Inc. v. Short*,<sup>20</sup> Justice Stevens, writing for a unanimous Court on the takings issue,<sup>21</sup> authored an opinion rejecting a takings claim based on an Indiana statute providing that mineral leases that remained unused for twenty years automatically lapsed unless the owner filed a statement of claim with the State.<sup>22</sup> Justice Stevens viewed the case as governed by the states' longstanding authority to define the scope and limits of private property interests: "In ruling that private property may be deemed to be abandoned and to lapse upon the

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<sup>16</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980).

<sup>17</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

<sup>18</sup> See, e.g., *Agins*, 447 U.S. 255; *Andrus v. Allard*, 444 U.S. 51 (1979).

<sup>19</sup> 453 U.S. 654, 690 (1981).

<sup>20</sup> 454 U.S. 516 (1982).

<sup>21</sup> Four Justices dissented on a procedural due process issue. See *id.* at 540-54.

<sup>22</sup> At least superficially pointing in an opposite direction, in *United States v. Locke*, 471 U.S. 84 (1985), decided three years later, Justice Stevens dissented from the Court's decision rejecting a takings claim based on a federal statute providing for extinguishment of mining claims based on failure to make a timely annual filing. Justice Stevens argued that the owners had achieved substantial compliance with the statute and that it was therefore unnecessary to address the constitutional issue. *Id.* at 128-29 (Stevens, J., dissenting).

failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect.”<sup>23</sup>

Justice Stevens did cast one significant—and arguably surprising—takings vote during this period, in the first takings case he heard as a member of the Supreme Court, *Penn Central Transportation Co. v. City of New York*.<sup>24</sup> By a vote of six to three, the Court rejected a takings claim based on New York City’s designation of Grand Central Terminal as a historic landmark. The designation barred the company from making any substantial change to the exterior of the structure, including building a potentially remunerative office tower above the terminal. Justice Stevens joined Justice William Rehnquist’s dissenting opinion, representing one of the very few instances (but not the only one) in which Stevens and Rehnquist ended up on the same side of a hotly contested takings case.

Justice Stevens’ vote in *Penn Central* has long been viewed as an anomaly given his relatively consistent support for the government side in takings disputes. Moreover, as I discuss below, some of Justice Stevens’ most recent writing on takings appears more consistent with the majority opinion in *Penn Central* than with the Rehnquist dissent. From a broader perspective, however, there is logical harmony between Justice Stevens’ vote in *Penn Central* and his career-long preoccupation in takings cases with the relative generality of the government action. For one focused on this issue, *Penn Central* was a very difficult and troubling case.

The critical feature of the New York City landmark law was that it applied historic designations only to individual buildings. Grand Central Terminal was one of some 400 similarly designated buildings across the city. All told, however, landmark designation applied to only a tiny fraction, less than one-tenth of one percent, of all the buildings in the city. The major issue that divided the Court in *Penn Central* was whether the extreme selectivity of the landmark law meant that it went “too far” for takings purposes.

In upholding the law, the Court rejected the company’s attempt to draw a sharp distinction between landmark designations, which apply only to “selected parcels,”<sup>25</sup> and zoning or historic district laws, which “regulate all properties within given physical communities.”<sup>26</sup> The Court said that landmark designation did not amount to “discriminatory, or ‘reverse spot,’ zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.”<sup>27</sup> Rather, the Court said, the designation was based on “a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”<sup>28</sup>

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<sup>23</sup> 454 U.S. at 530.

<sup>24</sup> 438 U.S. 104 (1978).

<sup>25</sup> *Id.* at 132.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

In addition, the Court rejected the argument that landmark designation, because it does not apply to all properties within a particular area, is “inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action”<sup>29</sup> allegedly demanded by the Constitution. In the first place, the Court observed that it had frequently rejected takings claims based on regulation which “burdens some more than others,”<sup>30</sup> and that zoning laws themselves, though they apply across an entire community, often impose different burdens on different landowners. More fundamentally, the Court observed that it was simply incorrect that the company was “solely burdened and unbenefited”<sup>31</sup> by the landmark law:

Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole . . . , we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.<sup>32</sup>

Justice Rehnquist’s dissent, joined by Justice Stevens, was devoted almost entirely to a refutation of the argument that the regulation was sufficiently general in character to defeat the takings claim.<sup>33</sup> While the dissenters recognized that zoning succeeds in creating “an average reciprocity of advantage,”<sup>34</sup> to use Justice Holmes’s felicitous phrase, they posited that “no such reciprocity exists” in the case “[w]here a relatively few buildings, all separated from one another, are singled out and treated differently from surrounding buildings.”<sup>35</sup> They viewed the landmark law as imposing “a substantial cost”<sup>36</sup> on a small minority of property owners “for the general benefit of all its people.”<sup>37</sup> The dissent concluded, “It is exactly this imposition of general costs on a few individuals at which the ‘taking’ protection is directed.”<sup>38</sup>

It is fair to say that the majority and the dissenters in *Penn Central* both scored some points. In any event, as traced below, the concern about whether government actions single out

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<sup>29</sup> *Id.* at 133.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 134.

<sup>32</sup> *Id.* at 134-35.

<sup>33</sup> The first sentence of the dissent reads: “Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.” *Id.* at 138 (Rehnquist, J., dissenting).

<sup>34</sup> *Id.* at 140 (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 139.

<sup>37</sup> *Id.* at 147.

<sup>38</sup> *Id.*

specific owners for special burdens has remained a consistent theme of Justice Stevens' takings work throughout his career.

One other noteworthy Stevens opinion of this period is his concurring opinion in *Moore v. City of East Cleveland*,<sup>39</sup> in which the Court struck down as a violation of due process a housing ordinance restricting occupancy of residential dwellings to narrowly defined family units. Justice Stevens agreed that the ordinance violated due process, but in a famous aside stated that Justice Sutherland's opinion for the Court in *Euclid v. Ambler Realty*<sup>40</sup> had "fused the two express constitutional restrictions on any state interference with private property that property shall not be taken without due process nor for a public purpose without just compensation into a single standard."<sup>41</sup> This reasoning is arguably reflected in the Court's later embrace of the so-called "substantially advance" takings test.<sup>42</sup> Justice Stevens, along with the rest of the Court, ultimately had to "eat crow"<sup>43</sup> on the notion that takings doctrine incorporates substantive due process analysis in *Lingle v. Chevron*,<sup>44</sup> discussed below.

## II. THE ERA IN EXILE

Ten years after his appointment to the Court, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,<sup>45</sup> Justice Stevens offered his first comment on a major, substantive takings issue. *Williamson County* was one in the series of Court cases in the 1980s circling around the question of whether the Takings Clause requires government to pay financial compensation for the period that a regulation found to be a taking was in effect, even if the government rescinds the regulation as soon as the judicial finding of a taking is handed down. In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>46</sup> the Court held that a takings claimant can recover compensation for a "temporary taking" in such circumstances.<sup>47</sup> In the prior *Williamson County* case the Court declined to reach the merits of the remedy issue because the takings claim was not ripe. But Justice Stevens filed a concurring opinion in the case expressing his view that the temporary takings theory, later embraced in *First English*, should be rejected. While

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<sup>39</sup> 431 U.S. 494 (1977).

<sup>40</sup> 272 U.S. 365 (1926).

<sup>41</sup> 431 U.S. at 514.

<sup>42</sup> See *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

<sup>43</sup> To quote Justice Scalia's famous quip during the oral argument in *Lingle*.

<sup>44</sup> 125 S. Ct. 2074 (2005).

<sup>45</sup> 473 U.S. 172 (1985).

<sup>46</sup> 482 U.S. 304 (1987).

<sup>47</sup> *Id.* at 318.

he recognized that an owner might have a claim on some theory for injuries suffered as a result of “unfair” government procedures, he thought there should be no liability under the Takings Clause for “temporary harms” which “are an unfortunate but necessary by-product” of legitimate government decision-making processes.<sup>48</sup>

In 1987, in accord with the views he expressed in *Williamson County*, Justice Stevens, in his most harshly worded takings opinion, dissented from the decision in *First English*. He expressed the concern that, as a practical matter, the decision would “undoubtedly have a significant adverse impact on the land-use regulatory process,”<sup>49</sup> and that as a result “[m]uch important regulation will never be enacted.”<sup>50</sup> In doctrinal terms, he objected to the majority’s reliance on takings cases involving temporary government seizures or occupations of private property to justify the conclusion that temporary implementation of regulations later found to be takings supported claims for financial compensation. Using language that he would have the opportunity to reprise fifteen years later, as discussed below, he objected that “regulatory takings and physical takings are very different . . . . While virtually all physical invasions are deemed takings, a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property’s value.”<sup>51</sup> Just a few weeks later, in *Nollan v. California Coastal Commission*,<sup>52</sup> striking down a development exaction as a taking, Justice Stevens, still smarting from the *First English* case, castigated Justice William Brennan for what he perceived as the “severe tension” between Brennan’s support for the majority position in *First English* and his position in *Nollan* that the Court was improperly constraining the discretion of government regulators.<sup>53</sup>

The other major Stevens takings opinion of 1987 was his opinion for the Court in *Keystone Bituminous Coal Ass’n. v. DeBenedictis*, 480 U.S. 470 (1987).<sup>54</sup> In that case, by a five to four vote, the

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<sup>48</sup> 473 U.S. at 204 (Stevens, J., concurring). In *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), another in the series of cases leading up to *First English*, Justice Stevens wrote the opinion for the Court, deferring the remedy issue once more, on the ground that the county had not reached a “final, definitive” position on the plaintiff’s development application.

<sup>49</sup> 482 U.S. at 322 (Stevens, J., dissenting).

<sup>50</sup> *Id.* at 340.

<sup>51</sup> *Id.* at 329 (citations omitted).

<sup>52</sup> 483 U.S. 825 (1987).

<sup>53</sup> *Id.* at 867 (Stevens, J., dissenting).

<sup>54</sup> 480 U.S. 470 (1987). During the same year, Justice Stevens authored the opinion for the Court in *Bowen v. Gilliard*, 483 U.S. 587 (1987), rejecting (unanimously on the takings issue) the claim that the imposition of certain attribution requirements on welfare beneficiaries effected a taking. In *Hodel v. Irving*, 481 U.S. 704 (1987), Justice Stevens concurred in the Court’s judgment striking down a federal statute restricting the fractionation of Indian lands through inheritance, but on due process grounds rather than based on the takings theory embraced by the majority. A decade later, in *Babbitt v. Youpee*, 519 U.S. 234 (1997), an eight to one ruling again striking down federal legislation addressing fractionation of Indian lands, Justice Stevens dissented on the takings issue, arguing that “the Federal Government, like a State, has a valid

Court rejected a takings claim based on a state statute restricting coal mining quite similar to the state statute held to be a taking sixty-five years earlier in *Mahon*. The Court's decision is difficult to decipher, no doubt in part because Justice Stevens had to struggle to maintain his majority in support of sustaining the statute. The Court's opinion purports to apply the two-part takings test of *Agins v. City of Tiburon*,<sup>55</sup> but also appears to apply the more open-ended *Penn Central* analysis. The Court invokes the principle of *Mugler v. Kansas*,<sup>56</sup> that no regulation designed to protect the general public from harm can constitute a taking, yet ultimately does not rest on that principle.

For present purposes, the most significant aspect of Justice Stevens' opinion in *Keystone* is his emphasis on the issue of generality. First, the opinion highlights the fashion in which regulatory measures can positively benefit individual property owners:

Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions we, in turn, benefit greatly from the restrictions that are placed on others.<sup>57</sup>

In general, regulatory restrictions, Justice Stevens observed, "are 'properly treated as part of the burden of common citizenship.'"<sup>58</sup>

Applying this thinking to the facts in *Keystone*, Justice Stevens indicated that the critical factor distinguishing *Mahon* was that in *Keystone* the restrictions applied across the board, including to the coal companies themselves, whereas in *Mahon* the restrictions narrowly protected those who had bargained away their surface rights. In *Mahon*, the state had imposed a burden on the coal companies "only to ensure against damage to some private landowners' homes";<sup>59</sup> by contrast, in *Keystone*, the state, by regulating in a more comprehensive fashion, demonstrated a commitment "to protect the public interest in health, the environment, and the fiscal integrity of the area."<sup>60</sup> Thus, in Justice Stevens' view, *Keystone* was less like *Mahon*, and more like *Plymouth Coal Co. v. Pennsylvania*,<sup>61</sup>

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interest in removing legal impediments to the productive development of real estate." *Id.* at 246 (citing, among other decisions, his opinion for the Court in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)).

<sup>55</sup> See 447 U.S. 255, 260 (1980) (stating that a regulation effects a taking if it "does not substantially advance legitimate state interests, or denies an owner economically viable use" of the property).

<sup>56</sup> 123 U.S. 623 (1887).

<sup>57</sup> 480 U.S. 470, 491 (1987).

<sup>58</sup> *Id.*, quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

<sup>59</sup> *Id.* at 487. (discussing *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

<sup>60</sup> *Id.* at 488.

<sup>61</sup> 232 U.S. 531 (1914).

also involving mining restrictions, which the *Mahon* Court had distinguished on the ground that it involved a regulation that “secured an average reciprocity of advantage that has been recognized as a justification for various laws.”<sup>62</sup>

*Keystone* represented a fragile, unstable precedent. Apart from the close division on the Court, the decision does not reflect the application of settled doctrine. *Keystone* technically represents a “win” for Justice Stevens. But the analysis in the case is so fractured, and the outcome was so overshadowed by the results in *First English* and *Nollan* in the same year, that it is best understood as a product of his period in exile. However, at least in his emphasis on the generality of the regulation—the type of generality that Stevens evidently had found lacking in *Penn Central*—he outlined the foundation for a more stable regulatory takings jurisprudence to come.

The next takings case in which Justice Stevens offered his personal views was *Lucas v. South Carolina Coastal Council*,<sup>63</sup> in which the Court held that the South Carolina Beachfront Management Act effected a taking of David Lucas’ oceanfront building lots. The case purported to establish a new “categorical” rule that a regulation that denies the owner all economically viable use of private property automatically constitutes a taking. But the decision qualifies this rule in various respects, in particular by stating that even a regulation that denies all economically viable use does not constitute a taking if it parallels “background principles” of state property or nuisance law.<sup>64</sup>

Justice Stevens, in dissent, objected to the new categorical rule, primarily on the ground that it did not reflect that the “singling out” of individual owners to bear special burdens is the “central” concern of takings law. He observed that a regulation might “single out a property owner without depriving him of all of his property,” and it might “deprive him of all of his property without singling him out.”<sup>65</sup> What ultimately matters, Justice Stevens said, “is not the degree of diminution in value, but rather the specificity of the expropriating act.”<sup>66</sup>

Continuing in the same vein, Justice Stevens criticized the Court for neglecting what he called “the first and, in some ways, the most important factor in takings analysis: the character of the regulatory action.”<sup>67</sup> For example, he justified the special scrutiny applied by the Court in exactions cases as partly rooted in the Court’s concern about singling out. Similarly, as he had explained in *Keystone*, the Kohler Act (held to be a taking in *Mahon*) was distinguishable from the Subsidence Act (at issue in *Keystone*) because the latter was “substantially broader”<sup>68</sup> than the former, in the sense that the Subsidence Act affected not only those who sold the surface estate to the coal companies but

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<sup>62</sup> 480 U.S. at 488, quoting *Mahon*, 260 U.S. at 415.

<sup>63</sup> 505 U.S. 1003 (1992).

<sup>64</sup> *Id.* at 1029.

<sup>65</sup> *Id.* at 1067 (Stevens, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1071.

<sup>68</sup> *Id.* at 1072.

all affected surface owners, including the coal companies. Finally, Justice Stevens cited zoning—to be distinguished from “spot zoning”<sup>69</sup>—as the type of general regulation previously upheld against takings claims.

As a matter of theory, Justice Stevens justified focusing on the generality of the government action based on the Court’s “broader understandings of the Constitution as designed in part to control the ‘mischiefs of faction.’”<sup>70</sup> He cited a series of First Amendment decisions in which the Court had upheld neutral laws of general applicability even though they impinged on certain individuals’ or groups’ religious beliefs. Justice Stevens concluded, “[i]f such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.”<sup>71</sup>

Under this analysis, Justice Stevens concluded that the South Carolina law did not effect a taking. The statute did not apply only to Mr. Lucas or to a few landowners, but rather applied to “the coastline of the entire State.”<sup>72</sup> Indeed, the statute represented South Carolina’s contribution to a national effort to control coastal development under the auspices of the federal Coastal Zone Management Act. Moreover, the South Carolina law applied not only to owners of undeveloped property, but also prevented owners of developed property from rebuilding structures that were destroyed by storms, or from repairing erosion-control structures. This generality, in its various aspects, Justice Stevens concluded, “indicate[d] that the act is not an effort to expropriate owners of undeveloped land.”<sup>73</sup> The generality of the law, combined with “the risk inherent” in investments in coastal property, as well as the “compelling purpose” of the law, persuaded Justice Stevens that the law did not effect a taking, even assuming Lucas’ property had been rendered valueless.<sup>74</sup>

Justice Scalia, speaking for the majority, dismissed Justice Stevens’ focus on the generality of regulation on the ground that it “renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.”<sup>75</sup> Paradoxically, however, at another point in the opinion, Justice Scalia appeared to embrace the legitimacy of Stevens’ approach in a backhanded

<sup>69</sup> *Id.* at 1073.

<sup>70</sup> *Id.* at 1072 n.7 (quoting THE FEDERALIST NO. 10, at 43 (James Madison) (G. Wills ed. 1982)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1074.

<sup>73</sup> *Id.* at 1075.

<sup>74</sup> *Id.* at 1075-76.

<sup>75</sup> *Id.* at 1028 n.14. Justice Scalia also argued, with considerable force, that Justice Stevens’ reliance on First Amendment cases to support his proposed principle was misplaced. “The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion,” he observed, “is a law that destroys the value of land without being aimed at land.” *Id.* He acknowledged that this characterization fit the ban on manufacturing of alcoholic beverages upheld in *Mugler v. Kansas*, 123 U.S. 623 (1887). “But,” he said, “a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions.” *Id.*

way. To justify the Court's new *per se* rule he observed that, "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned."<sup>76</sup> Implicit in this statement is a recognition that, when an owner retains some economically viable use, regulation will typically both burden and benefit the owner, by restricting permissible uses but also making more valuable the uses that remain. In this fashion, ironically enough, outside the realm of the new *per se* takings category, the *Lucas* majority opinion actually supports the idea that the generality of a regulation should be a bulwark against takings claims.

A few years later, in *Dolan v. City of Tigard*,<sup>77</sup> Justice Stevens, in a dissenting opinion, expanded further on the theme of generality. *Dolan* involved a takings claim based on a requirement that a hardware store owner, as a condition of permission to expand her store, dedicate a portion of the property for a public bike path and a stream-side greenway. Building on its earlier ruling in *Nollan*, the Court ruled that the city could impose such "exactions" only if it could demonstrate a "rough proportionality" between the burdens imposed by the conditions and the projected impacts of development.<sup>78</sup>

Justice Stevens dissented on various grounds, arguing that the Court's proportionality test lacked support in prior precedent, was inconsistent with the parcel-as-a-whole rule, and threatened to revive the kind of intrusive judicial scrutiny of government decision-making that characterized the *Lochner* era. But, focusing on the issue of generality, he also criticized the majority for ignoring the substantial benefits that Ms. Dolan was likely to derive from the development conditions imposed on her property. Apart from the benefit of receiving permission to proceed with the expansion, the proposed greenway would have increased the carrying capacity of the stream during serious floods, conferring considerable benefits on all stream-side property owners, including Ms. Dolan herself.

Apart from his dissenting vote in *Penn Central*, the next (arguably) most surprising vote by Justice Stevens in a takings case is his decision to supply the fifth vote to support Justice Kennedy's opinion for the Court in *City of Monterey v. Del Monte Dunes*.<sup>79</sup> The case is especially noteworthy because it apparently is the first and only Supreme Court decision to directly uphold a just compensation award in a regulatory takings case. The principal legal issue in the case, prosecuted in federal court under 42 U.S.C. § 1983, was whether the plaintiff had properly been granted the opportunity to have a jury resolve several of the disputed issues. Reaching a narrow result based on the specific facts, the Court upheld the use of a jury to resolve certain issues. However, the Court

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<sup>76</sup> *Id.* at 1017-18 (quoting *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) & *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>77</sup> 512 U.S. 374 (1994).

<sup>78</sup> *Id.* at 391.

<sup>79</sup> 526 U.S. 687 (1999).

rejected the Ninth Circuit's use of the *Dolan* "rough proportionality" test to evaluate whether a use restriction effects a taking, ruling that *Dolan*, and implicitly *Nollan*, prescribe tests exclusively applicable to exactions. In addition, the Court deferred resolution of several other issues, including whether regulatory takings cases can generally be tried before juries, and whether an allegation that the city's actions failed to substantially advance a legitimate state interest stated a taking claim, the issue the Court ultimately resolved in *Lingle*.

It is reasonable to suppose that Justice Stevens voted to affirm the takings award in *Del Monte Dunes* at least in part because city officials had focused specifically on plaintiff's land and had not acted pursuant to any general ordinance or plan for the community. The Court emphasized that the theory of the case was that "the city's denial of the final development permit was inconsistent not only with the city's general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city."<sup>80</sup> In this sense, Justice Stevens' vote to affirm in *Del Monte Dunes* is consistent with his vote to reverse in *Penn Central*. While the cases are otherwise quite different, both involved application of special restrictions to individual properties, rather than the enforcement of broad rules.

In *Palazzolo v. Rhode Island*,<sup>81</sup> Justice Stevens wrote another solitary dissent. The primary issue in the case was the validity of the so-called "notice rule" adopted by some lower federal and state courts. According to this rule, a purchaser with notice of a regulation at the time of purchase should be barred from pursuing a takings claim based on the regulation. The theory underlying the rule was that a takings claimant could not plausibly contend that his reasonable investment-backed expectations had been thwarted by a law in place at the time of purchase. The Court resolved the case by rejecting the notice rule, while at the same time strongly suggesting that a purchaser's notice of regulatory constraints remained an important (but not necessarily dispositive) factor in takings analysis.

In Justice Stevens' view, the Court sought to resolve an issue not actually presented by the case. His reading of the Court's opinion was that the takings claim was ripe, even though the plaintiff had not exhausted all possible administrative avenues for relief, because the theory of the case was that the state's coastal regulations, on their face, effected a taking. If that was the case, Justice Stevens argued, then the proper party to have brought the suit was the owner of the property at the time the regulation was originally adopted, not Mr. Palazzolo, who acquired the property after the regulation was already in place. Accordingly, in Justice Stevens' view, Palazzolo lacked standing to prosecute the takings claim and the case should have been rejected on that basis.<sup>82</sup>

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<sup>80</sup> *Id.* at 722.

<sup>81</sup> 533 U.S. 606 (2001).

<sup>82</sup> Justice Stevens made clear in a footnote that in a case properly raising the issue, he would agree with the position of a majority of the Court, most clearly articulated by Justice O'Connor in a concurring opinion, *see id.* at 632-36 (O'Connor, J., dissenting), that a purchaser's advance notice of a regulatory constraint should be a relevant factor in the takings analysis. *See id.* at 643 n.6. (Stevens, J., dissenting).

Parenthetically, Justice Stevens briefly addressed the topic of generality in commenting on how he would have resolved the case on the merits. He said that, in his view, even in the case of a “newly adopted regulation,” the regulation should not be deemed to effect a taking “if it (1) is generally applicable and (2) is directed at preventing a substantial public harm.”<sup>83</sup> He thought it was “quite likely” that a regulation prohibiting the filling of wetlands would meet these criteria. In support of these criteria, Justice Stevens cited the majority opinion in *Lucas*, in which the Court suggested that the government would not be liable for ordering the closure of a nuclear power plant astride an earthquake fault, and Justice Kennedy’s concurring opinion in *Lucas*, expressing the view that the common law of nuisance “is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”<sup>84</sup>

### III. THE ERA OF TRIUMPH

With the Court’s decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,<sup>85</sup> Justice Stevens switched from the (mainly) losing side in takings cases to the winning side. In *Tahoe* and in four subsequent Court decisions over the next three years, the government prevailed in each case. Justice Stevens was in the majority every time. He was the author of four of these decisions, *Tahoe-Sierra*, *Brown*, *Kelo* and *San Remo*, and his influence is apparent in *Lingle* as well.

In *Tahoe-Sierra*, the Court, by a vote of six to three, affirmed a Ninth Circuit decision rejecting a takings claim based on a thirty-two-month moratorium on development in sensitive areas surrounding Lake Tahoe. In many respects, *Tahoe-Sierra* was a highly favorable case for the government. Certainly in comparison with the regulation in *Lucas*, and even the less onerous regulation in *Palazzolo*, the moratorium in *Tahoe-Sierra* imposed a relatively light burden on property owners. In addition, for reasons that have remained obscure, plaintiffs sued on the theory that the moratorium constituted a *per se* taking under *Lucas*, and did not pursue a potentially more plausible claim under *Penn Central*. Lastly, *Tahoe-Sierra* involved a joint federal-state effort to protect one of the world’s great natural wonders, the bright blue waters of Lake Tahoe. For whatever combination of reasons, apart from the property rights stalwarts, Chief Justice Rehnquist and Justices Scalia and Thomas, the Court had little difficulty concluding that the takings claims had no merit.

One of the primary reasons Justice Stevens cited for rejecting the claims was that, “with a temporary ban on development there is a lesser risk that individual landowners will be ‘singled

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<sup>83</sup> *Id.* at 641 n.3.

<sup>84</sup> *Id.*

<sup>85</sup> 535 U.S. 302 (2002).

out' to bear a special burden that should be shared by the public as a whole."<sup>86</sup> "At least with a temporary moratorium," Justice Stevens wrote, "there is a clear 'reciprocity of advantage,' because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted."<sup>87</sup> Thus, Justice Stevens believed, whatever economic burden a moratorium imposed, it also provided all affected landowners with a corresponding benefit. Indeed, he suggested that in this case, based on experiences in other similar situations, "there is reason to believe property values often will continue to increase despite a moratorium."<sup>88</sup> "Such an increase makes sense in this context," he wrote, "because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state."<sup>89</sup> Of course, Justice Stevens' reasoning supports not only the economic fairness of a moratorium, but the fairness of development restrictions more generally, at least when affected owners retain some options for use of their property so that they can share in the economic benefits of community protections.

Justice Stevens' opinion in *Tahoe-Sierra* is also noteworthy because it allowed him to reclaim some ground lost in *First English*. The decision in *Tahoe-Sierra* expressly reaffirms the validity of the remedial holding in *First English*. But *Tahoe-Sierra* certainly limits the scope of that decision, and arguably undermines its reasoning. The plaintiffs in *Tahoe-Sierra* argued that *First English* supported their argument that a short-term moratorium justified a claim for compensation based on a "temporary taking" theory.<sup>90</sup> In *First English* the Court reasoned that a successful takings claimant was entitled to compensation for the interim period that a regulation held to be a taking was in effect by equating temporary enforcement of use restrictions with the kinds of temporary government occupations of private property held to be takings in prior cases. This reasoning at least suggested that any temporary restriction, not merely a restriction cut short by a judicial finding of a taking, might be deemed a compensable taking. Justice Stevens, writing for the Court in *Tahoe-Sierra*, rejected this potential line of reasoning by emphasizing, as he had in his dissent in *First English*, the fundamental distinction between occupations of private property and restrictions on the use of private property.

*Tahoe-Sierra* also placed a highly restrictive gloss on the *Lucas per se* rule. As discussed, Justice Stevens dissented in *Lucas*, harshly criticizing the new rule on the ground that it had no logical relationship to the key question in takings cases, that is, the relative generality of the government action. In *Tahoe-Sierra*, Justice Stevens reduced *Lucas* to virtual meaninglessness by declaring that it applies only when a regulation renders a fee interest in real property literally

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<sup>86</sup> *Id.* at 341 (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 (1987)).

<sup>87</sup> *Id.* (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 316.

“valueless.”<sup>91</sup> Notwithstanding the (questionable) concession in *Lucas* that the South Carolina beach law rendered Lucas’ land valueless, few if any regulations actually have that effect in the real world. As a result, *Lucas* appears to have been transformed into a legal curiosity, largely eliminating the conflict between the *per se* rule of *Lucas* and the Stevens generality principle.

The Court’s 2003 decision in *Brown*, authored by Justice Stevens, is also consistent, in a tangential way, with a focus on the generality of the government action. The Court, by a vote of five to four, rejected a takings challenge to Washington State’s Interest on Lawyers’ Trust Account (IOLTA) program. The Washington program, like similar programs in other states, generates substantial funding for legal services for the poor from the interest earned on client funds held by private attorneys. In a prior case, *Phillips v. Washington Legal Foundation*,<sup>92</sup> the Court had ruled that the interest earned by IOLTA accounts represents the “property” of the clients. In *Brown*, however, the Court ruled that the program did not effect an unconstitutional taking without just compensation under the Takings Clause. Assuming for the sake of argument that use of the interest by the government effected a “taking,” the Court reasoned, plaintiffs were not entitled to compensation because, given the applicable legal regime, they would not have been able to earn any interest on the funds in the absence of the program. Under general banking regulations, on-demand checking accounts are ineligible to receive interest, unless the accounts are held by non-profit groups. The income generated by the IOLTA programs is based on the requirement that client funds be deposited in a designated IOLTA account managed by a nonprofit administrator, transforming funds that otherwise would be incapable of generating interest into funds that do generate interest. By contrast, the dissenters argued that, regardless of whether the plaintiffs could have reaped any interest absent the IOLTA program, the interest was their property and the government’s allocation of the funds to legal services constituted a taking which plaintiffs were entitled to challenge under the Takings Clause.

The differing analytic approaches in the Court’s opinion, authored by Justice Stevens, and in the dissenting opinion of Justice Scalia, are analogous to the debate over the degree to which the generality of the government action should be a factor in a takings case. Under Justice Stevens’ approach, the “fairness and justice” of the program was properly evaluated by considering the overall effect of government actions on the plaintiffs’ financial status. This is consistent with Justice Stevens’ approach of evaluating regulatory takings claims by considering both the burdens and the benefits associated with government action. On the other hand, Justice Scalia’s approach of focusing narrowly on the interest earned by IOLTA accounts is more consistent with a viewpoint that would place less emphasis on reciprocity of advantage in regulatory takings analysis.

*Brown* is also important in the evolution of the Court’s takings jurisprudence in another respect. Largely as an aside, the Court observed that one “condition” for the exercise of the taking power

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<sup>91</sup> *Id.* at 329.

<sup>92</sup> 524 U.S. 156 (1998).

is that the taking be for a “public use,” and this condition was satisfied because there was no doubt about the “legitimacy” of the use of IOLTA funds.<sup>93</sup> This premise implicitly repudiates the theory that the illegitimacy of government action, that is, the failure of a government action to “substantially advance” a legitimate purpose, can provide an affirmative basis for a takings claim. Thus, *Brown* presaged the repudiation of the substantially advance takings test just a few years later in *Lingle v. Chevron U.S.A.*<sup>94</sup>

In *Lingle*, the Court, in an opinion by Justice O’Connor, resolved the long-simmering debate over the “substantially advance” test by ruling that this formula “prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.”<sup>95</sup> The Court presented various reasons for repudiating the test, including that it had been derived from due process precedents, was inconsistent with the central concern in takings cases about the burdensomeness of government action, and was inconsistent with the premise of every takings claim that the government action must serve a legitimate “public use.” But the decision also reflects Justice Stevens’ preoccupation with the issue of the generality of a regulation. The Court observed that the “substantially advance” test did not fit in takings doctrine because it did not “provide any information about how any regulatory burden is *distributed* among property owners.”<sup>96</sup> A test that “tells us nothing” about how a regulation’s burden “is allocated” among the property owners in a community, the Court said, “cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.”<sup>97</sup> An owner subject to an effective regulation “may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation.”<sup>98</sup> On the other hand, the Court said, an ineffective regulation “may distribute any burden broadly and evenly among property owners,” demonstrating that the “substantially advance” test was “untenable” as a freestanding takings test.<sup>99</sup> Thus *Lingle* reinforces the principle that an important consideration in any takings case is whether and to what degree a regulation imposes a restriction broadly across the community.

*Lingle* also reinforces the teaching of *DelMonte Dunes* that the *Dolan* and *Nollan* tests are limited to the context of exactions. The Court acknowledged that both decisions invoked the “substantially

<sup>93</sup> 538 U.S. 216, 231-32 (2003).

<sup>94</sup> 125 S. Ct. 2074 (2005). The discussion in *Brown* about “public use” also presaged the Court’s ruling in *Kelo*, 125 S. Ct. 2655 (2005), that economic development can constitute a legitimate public use. Justice Sandra Day O’Connor’s decision to join in the Court’s opinion in *Brown* is difficult to square with her later vitriolic dissent in *Kelo*, as is her opinion in *Lingle*, which emphasized the importance of judicial deference to the political branches on economic policy matters. See *id.* at 2667 (responding to Justice O’Connor’s dissent in *Kelo* by observing that her criticism of the majority position in that case is inconsistent with the opinion for the Court she authored in *Lingle*).

<sup>95</sup> *Id.* at 2083.

<sup>96</sup> *Id.* at 2084.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

advance” formulation, but observed that neither decision actually applied that test. In addition, the Court emphasized that each case involved a type of “unconstitutional condition,” because the conditions at issue, if imposed unilaterally, would unquestionably have constituted *per se* physical takings.

Justice Stevens’ latest significant contribution to the Court’s takings jurisprudence is *Kelo v. City of New London*,<sup>100</sup> upholding the city’s use of eminent domain to promote a downtown redevelopment project in an older New England city. *Kelo* does not deal with the question of whether a government action rises to the level of taking; instead, it deals with the distinct question of whether an acknowledged taking serves a “public use.” Thus, *Kelo* raises different issues from those raised by a regulatory takings case. Nonetheless, the generality versus particularity of the government action comes into play in this context as well.

*Kelo* reaffirms the longstanding proposition that “the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*.”<sup>101</sup> At the same time, the Court held that the use of eminent domain to promote a legitimate public purpose, such as urban redevelopment, is not improper simply because new private owners will end up owning the property. For the purpose of distinguishing between proper and improper uses of eminent domain, Justice Stevens said that one important criterion should be whether the power is being executed within “the confines of an integrated development plan.”<sup>102</sup> “As with other exercises in urban planning and development,” he observed, the City of New London was “endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts.”<sup>103</sup> Given the “comprehensive character” of the city’s plan, Justice Stevens said, as well as the thorough, deliberative process through which it was adopted and implemented, it was appropriate to resolve the legitimacy of the government’s action not by reference to individual properties, but rather “in light of the entire plan.”<sup>104</sup> Viewed from this perspective, there was no question that the taking in *Kelo* served a public use.

The requirement of a planning process articulated in *Kelo* serves as a safeguard against “faction” in the same fashion that the generality of a regulatory program protects against faction in the regulatory takings context. The fact that a city’s exercise of the eminent domain power is in accord with a community plan provides significant assurance that a particular owner is not being unfairly singled out to bear the burden, albeit compensated, of having to sell property against his will. In both types of cases, it is the generality of the government action that helps save it from challenge under the Takings Clause.

In an ironic sense, Justice Stevens’ reliance on the City of New London’s planning process creates a full circle with the Court’s *Penn Central* decision. In *Penn Central* the majority attempted

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<sup>100</sup> 125 S. Ct. 2655 (2005).

<sup>101</sup> *Id.* at 2661.

<sup>102</sup> *Id.* at 2667.

<sup>103</sup> *Id.* at 2665.

<sup>104</sup> *Id.*

to rebut the dissenters' objection that the landmarks law singled out particular property owners by arguing that the designation decisions were at least made in the context of a careful planning process that justified the city's selection of specific structures for designation. *Kelo* is distinguishable from *Penn Central*, in the sense that *Penn Central* dealt with the question of whether a regulation rose to the level of a taking mandating payment of compensation, whereas *Kelo* dealt with the question of whether a compensated taking served a public use. Nonetheless, Justice Stevens' reliance on a comprehensive plan in *Kelo* appears to echo the Court's reasoning in *Penn Central*. In addition to moving the Court on the takings issue, Justice Stevens' views may also have evolved over time. No doubt he would still consider *Penn Central* a difficult and troubling case. But it is a nice question whether Justice Stevens, if he had it to do all over again, would dissent in *Penn Central*.<sup>105</sup>

#### CONCLUSION

In a few short years, the Supreme Court has accomplished a remarkable reworking of its takings jurisprudence. The chief elements of this reform include lopping off the endlessly confusing "substantially advance" inquiry; narrowing the *Lucas per se* rule to practical irrelevance; providing a neat, narrow definition of the scope of the *Dolan* and *Nollan* tests; and creating at least the beginnings of a predictable *Penn Central* analysis focused in significant part on the generality versus the particularity of the government action.<sup>106</sup> While other members of the Court contributed in important ways to this effort,<sup>107</sup> Justice Stevens above all others paved the way for and then executed this remarkable transformation of takings doctrine.

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<sup>105</sup> The other Supreme Court takings case decided in the 2004 term year, *San Remo Hotel, LP v. City and County of San Francisco*, 125 S. Ct. 2491 (2005), in which Justice Stevens once more wrote the opinion for the Court, resolved that a takings claimant required to litigate a takings claim in state court under *Williamson County* is not entitled to relitigate the same claim under federal law in federal court. The Court's opinion discussed the relatively technical question of whether the Court should craft an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause. The Court declined to create such an exception, without offering guidance on how takings claims should be resolved on the merits. Perhaps the most important aspect of *San Remo* is the concurring opinion of Chief Justice Rehnquist, joined by three other Justices, suggesting that *Williamson County* may have been mistaken in establishing the state-litigation requirement in the first place.

<sup>106</sup> For a recent and particularly thoughtful application of the principle of generality in the context of wetlands regulation, see the opinion of Judge Henry Saad of the Michigan Court of Appeals in *K & K Construction, Inc. v. Department of Environmental Quality*, 267 Mich. App. 523 (Mich. Ct. App. 2005).

<sup>107</sup> Justice Kennedy, in particular, deserves credit for masterfully managing the Court's reassessment and ultimate repudiation of the "substantially advance" test, beginning with his thoughtful concurring opinion in *Eastern Enterprises*, his agonizingly constructed opinion for the Court in *DelMonte Dunes*, finally leading to the Court's decision in *Lingle* overthrowing the test.