The Takings Clause, Version 2005:
The Legal Process of Constitutional Property Rights

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Abstract

The three takings decisions that the Supreme Court issued at the end of its October 2004 Term marked a stunning reversal of the Court's efforts the past three decades to use the Takings Clause to define a set of constitutional property rights. The regulatory takings doctrine, which once loomed as a significant threat to the modern regulatory state, now appears after *Lingle v. Chevron* to be a relatively tame, if complicated, check on exceptional instances of regulatory abuse. At the same time, the Public Use Clause, formerly an inconsequential limitation on the state's eminent domain authority, now appears ripe for revision and tightening after a stirring four-justice dissent in *Kelo v. City of New London* and an enormous public protest decrying the majority decision.

Notwithstanding this reversal, the 2005 decisions offer a coherent approach to Takings Clause enforcement—albeit one that is likely to frustrate commentators, theorists, and property rights advocates. More clearly than ever before, the Court in its 2005 decisions abandoned the difficult, if not impossible, task of providing a clear normative justification for the Takings Clause. Instead, its decisions reveal a marked preference for preserving and furthering its vision of an institutional system of governance—a jurisprudence that is focused on the question of *who* should decide rather than on the substantive issue of *what* should be decided, and that is committed to the passive virtue of deference. In short, the Rehnquist Court explicitly chose to adopt a "legal process" approach to takings. Because it privileges structure and process over explicit considerations of substantive legal and normative issues, this approach is unsatisfactory to property and constitutional theorists; because it defers to government decisions, it is maddening to property rights advocates; and because it is technocratic and abstract, it is unsatisfactory to the public. Given the prominence of the legal process approach to constitutional review of state regulatory action in the post-New Deal era, however, judicial passivity remains attractive, if unromantic, to judicial actors. Ultimately, recognizing the Court's shift away from defining constitutional property rights via the Takings Clause offers important descriptive and prescriptive insights into the future of takings law in the Roberts Court, especially if a majority of justices decide to tighten review of eminent domain actions or otherwise heighten judicial review under the Takings Clause.

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[S]o we have to eat crow no matter what we do. Right?
- Justice Antonin Scalia, from the oral argument in *Lingle v. Chevron* (2005)[1]

Introduction

The Supreme Court's understanding and enforcement of the Takings Clause got unexpectedly weird in the October 2004 term.[2] Not so long ago, following the Supreme Court's four takings decisions in its 1986-87 term[3] and *Lucas v. South Carolina Coastal Commission* (1992),[4] the Takings Clause appeared ready to serve as a tool for the rollback of the regulatory state.[5] This vision proved illusory. Instead of a sharp, anti-statist tool, by October 2004 the regulatory takings doctrine had come to resemble a sprawling experimental novel—poised to resolve the deepest conflicts of modern life, yet filled with repetitious and highly technical language that has never fully revealed the doctrine's intent and implications, and understood only by adepts able to master its subtle intricacies.[6] Judges and academics had come to expect, if not

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[1] 2005 WL 529658 (Feb. 22, 2005) (oral argument in Lingle v. Chevron U.S.A. Inc., 125 S.Ct. 2074 (2005)).

[2] The Takings Clause, the Fifth Amendment, provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. It serves both to limit the exercise of eminent domain and to require compensation for confiscatory regulations, and its application extends to state and federal governments. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239, 241 (1897); DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 2-5 (2002).

[3] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (condition that property owner dedicate easement to public in order to receive land use approval effected a taking because the easement failed to bear an essential nexus to the government's purpose in requiring condition); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (remedy for regulatory takings violation is compensation, and property owner may recover damages for taking during the period in which the regulation was in place); Hodel v. Irving, 481 U.S. 704 (1987) (federal program that required small fractional ownership interests in tribal land escheat to tribe upon owner's death effected a taking by seizing one of the essential rights of property ownership, the right to pass on property to heirs); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (legislation that required coal companies to leave in place coal where mining would cause subsidence of surface did not effect a taking).

[4] 505 U.S. 1003 (1992). The property owner won in *Lucas*, and property owners won three of the four decisions in the 1986-87 Term (*Nollan*, *First English*, and *Hodel*), while the only government victory was in *Keystone Bituminous*, a seemingly anomalous decision that appeared to reverse the result in the first modern takings case, decided by Justice Holmes in 1922, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[5] This perception was most closely associated with Richard Epstein's influential book *Takings*. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); *see generally* Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 641-63 (1998) (offering political and jurisprudential history of takings jurisprudence, with emphasis on its increasingly conservative cast after the Warren Court).

[6] Supreme Court justices themselves often make this complaint. *See, e.g.*, Eastern Enterprises v. Apfel, 524 U.S. 498, 541 (1998) (Kennedy J., concurring in the judgment and dissenting in part) ("[I]t is fair to say [that regulatory takings] has proved difficult to explain in theory and to implement in practice. Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law."); *Nollan*, 483 U.S. at 866 (Stevens J., dissenting) ("Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (identifying a regulatory taking "has proved to be a problem of considerable difficulty"). These complaints

accept, the doctrine's evolving complexity. At the same time, the Public Use Clause's prospects as a substantive limit on the exercise of eminent domain appeared dormant, if not dead.[7] But in three decisions issued in May and June 2005, the Court signaled broad consensus favoring an end to major doctrinal development in regulatory takings while it cut the doctrine back at its margins;[8] and, paradoxically, revealed a dramatic and bitter split among the justices over the meaning and bite of the public use limitation on eminent domain.[9] And while the regulatory takings cases—which Court-watchers once awaited eagerly—were issued with hardly any notice, the eminent domain decision provoked a torrent of public outcry. This appears, on its face, to constitute an odd reversal, one that cries out for theoretical explanation and prescriptive intervention.

Alas, the search for coherence in takings jurisprudence has resulted in a multitude of theories but no consensus. Each theory—whether based on conceptions of common law property rights or constitutional conceptions of justice, or based on utility, natural law, or communitarian or republican conceptions of the good—offers significant insight into the vexing legal, political, and normative issues that judicial enforcement of the Takings Clause raises. But no single theory of property or of constitutional limits on state regulation and expropriation has proven capable either of satisfactorily rationalizing existing takings law or of persuading the courts or the theory's opponents that its approach is best. And as with their forbearers in the pantheon of Supreme Court takings decisions, the decisions from 2005 failed to confirm the supremacy of any one existing theory or approach.

The 2005 decisions do cohere—only not in the way we might think, expect, or even prefer. They make plain that when faced with the difficult political and jurisprudential issues raised by the relationship between private property and the regulatory state, the Court's greatest concern is with itself—that is, with the role of federal judicial review in a tri-partite, federalist system. The Court has abandoned the difficult, if not impossible, task of providing a clear normative justification for the Takings Clause in favor of preserving and furthering its vision of an institutional system of governance. It has preferred to direct its takings jurisprudence towards the question of *who* should decide rather than towards the substantive issue of *what* should be decided. In short, the Court has chosen to adopt a "legal process" approach to takings—a

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are nothing, however, compared to those lodged in the law reviews. For a recent comprehensive citation to that literature, *see* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 n.2 (2002).

[7] *See* Corey J. Wilk, *The Struggle over the Public Use Clause: Survey of Holdings and Trends, 1986-2003*, 39 REAL PROP. PROB. & TR. J. 251 (2004) (reporting that in the period between 1986 and 2003, the vast majority of federal courts and a smaller, but still large majority of state courts upheld proposed takings against challenge under public use clause); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 96 (1986) [hereinafter Merrill, *Economics of Public Use*] (reporting that in the period between 1954-1986, no federal courts and only a small minority of state courts held that a proposed taking failed to serve a public use).

[8] *See* Lingle v. Chevron U.S.A. Inc., 125 S.Ct. 2074 (2005) (invalidating test for regulatory takings that asks whether a regulatory act "substantially advances" a legitimate state interest); San Remo Hotel, L.P. v. City and County of San Francisco, 125 S.Ct. 2491 (2005) (under full faith and credit statute, a plaintiff whose federal regulatory takings claim is resolved by a state court is precluded from re-litigating the claim in federal court).

[9] *See* Kelo v. City of New London, 125 S.Ct. 2655 (2005) ("public use" requirement for exercise of eminent domain under Fifth Amendment did not bar city's exercise of eminent domain power in furtherance of an economic development plan that would result in acquired property's use for private development).

jurisprudential commitment that did not begin in the 2005 decisions, but that has only become truly clear after them.

The legal process approach to adjudication, with roots in the constitutional crisis raised by the New Deal, ascended within the post-war legal academy as an effort to elaborate a legitimating set of adjudicatory norms and institutional practices for the modern administrative state.[10] Several of the legal process school's most significant concepts form the core of the 2005 decisions. The legal process approach commanded that judges should rely on "reasoned elaboration" expressed in fulsome, consistent, and rational decisions;[11] engage in a "maturing of collective thought" through the careful, incremental exercise of common law development;[12] and, ultimately, create and protect a self-limiting judicial institution that performs those tasks in which it is competent.[13] Courts, as one among many institutions of public and private governance, have specific competencies within which they have authority to settle specific, narrowly-focused questions; outside those competencies, however, courts should defer to the expert decisions of other institutions. The fundamental questions for legal process adherents concern the "constitutive or procedural understandings or arrangements" and "institutionalized procedures" that serve as the source of substantive social arrangement and that enable those arrangements to operate effectively.[14] Thus, the key questions for courts and legal academics concern which institutions should decide which questions, and what form and procedures should be used in those decisional processes. The actual *answers* to those quests are significantly less important.

Each of the 2005 decisions inevitably concerned the allocation of decision-making authority within the institutionalized procedures of local land use decision-making. In *Kelo v. City of New London*, its eminent domain case, the Court based its decision most clearly on the majority's respect for longstanding precedent and on the issue of whether "public use" is a question better suited for legislative bodies or for courts.[15] In *San Remo v. City and County of San Francisco*, the Court based its decision on whether state courts could provide sufficient review of claims brought under the federal constitutional takings clause, or whether judicial review by the lower federal courts should be made available to takings plaintiffs.[16] And in *Lingle v. Chevron*, the Court both settled a niggling doctrinal issue by casting off an unreasoned test from a twenty-five year old decision, and provided an authoritative elaboration of the precise legal forms that compose the complicated regulatory takings doctrine.[17] Decided unanimously, *Lingle* offered a settled logic, made operational through a mixture of default standards and categorical rules, by which courts should decide when and precisely how much to defer to the administrative decisions of federal, state, and local government agencies. In sum, these decisions, which represent a nearly random sample of substantive and procedural takings issues,

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[10] *See infra* notes 277-281.

[11] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 145-50 (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994).

[12] Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959).

[13] HART & SACKS, *supra* note 11, at 696, 1009-11.

[14] *Id*. at 3-4.

[15] *See infra* text accompanying notes 120-122.

[16] *See infra* text accompanying notes 83-87.

[17] *See infra* text accompanying notes 49-63.

provide an institutional blueprint for the protection of constitutional property rights rather than a definition of the boundaries and normative justification of those rights.[18]

The article proceeds as follows. Part I summarizes the 2005 decisions, placing them in the context of takings decisions of the past fifty years. Part II sorts and summarizes prevailing theories of takings and explains the extent to which the Court relies on the competing rationales of fairness, utility, and the institution of property rights as a basis for its enforcement of the Takings Clause. Reviewing the Court's stated rationales for its 2005 decisions, I argue that the Court relies slightly on an abstract conception of fairness, somewhat more on property rights as an institution, and hardly at all on utilitarian rationales. Part III shifts towards an institutionalist perspective by considering, but then rejecting as incomplete, an argument that federalist principles are the principal motivation behind the Court's takings decisions. In Part IV, I explain the legal process approach and demonstrate its remarkable salience throughout the 2005 decisions, and then summarize the descriptive and predictive implications of this insight. Recognizing the legal process concepts at the core of the 2005 decisions enables a better understanding of the frustrations of takings doctrine for commentators, theorists, and property rights activists, and, at least with respect to *Kelo*, a large segment of the American public. The recognition also identifies the jurisprudential limitations facing the Roberts Court if it decides to reinvigorate the Takings Clause as a powerful check on state actions.

I. Takings 2005

A. Pre-2005

Viewed as abstractly and uncontroversially as possible, takings doctrine and logic prior to the three decisions issued in the spring of 2005 had developed as follows. The Takings Clause text is ambiguous,[19] and the framers provided relatively little guidance as to their intent.[20]

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[18] The Fifth Amendment in fact contains two clauses that protect private property rights against interference by state actors: the aforementioned Takings Clause and the Due Process Clause. *See* U.S. CONST. amend. V. ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). Although the 2005 decisions and this Article occasionally discuss the Due Process Clause in its substantive manifestation, my concern with "constitutional property rights" extends only to how the Court has used its takings decisions to define them. *See, e.g., infra* notes 49-52 (discussing *Lingle*'s distinction between the substantive due process and takings inquiries). For a significant recent effort to provide a comprehensive and coherent theory of constitutional property rights that includes substantive and procedural due process rights to property and the Takings Clause, see Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

[19] By this I mean ambiguous as to at least two key issues: the meanings of the words "taken" and "public use." U.S. CONST. amend. V ("[N]or shall private property be *taken* for public use without *just compensation*.") (emphasis added). As to "taken," it was unclear until the twentieth century that the term "taken" extended outside the context of eminent domain; and, at the moment that the extension was recognized, the precise point at which a regulation effects a taking was immediately deemed a "question of degree" that could not be resolved "by general propositions." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). As to "for public use," which in the Fifth Amendment serves to modify "taken," the phrase lends itself to multiple interpretations: the phrase might merely *limit* the Clause's command to eminent domain actions generally; or it may require government to pay compensation *only* when it takes property for public uses rather than for private uses; or it may allow the government to take property *only* for public *uses*, while prohibiting takings for private uses. Since the nineteenth century, courts have settled on the latter plausible interpretation as the correct one. *See* DANA & MERRILL, *supra* note 2, at 193-94.

Neither English or colonial practices,[21] nor the views of commentators who inspired the constitutional framers,[22] nor the early years of the Clause's enforcement by the U.S. Supreme Court and state supreme courts provide clear evidence of its meaning.[23] In light of this confusion, two contested issues have come to predominate the Takings Clause's modern development: the extent to which it requires compensation for government regulation that diminishes the value of private property (as opposed to the forced sale imposed on property owners via eminent domain); and the extent to which the "public use" phrase limits government's power to "take" property through its power of eminent domain.[24] These issues were at stake in two of the 2005 decisions.

With respect to regulatory takings, the Supreme Court has typically, although not universally, allowed government to regulate broadly against nuisance activities and thereby lower private property value without compensation, especially where the regulation provided reciprocal benefits to the affected property owner.[25] Over the course of the twentieth century, government entities, and especially local governments, expanded the use of their police powers to regulate a vast array of land uses through a myriad of planning techniques. During this period, the Court had deferentially reviewed these regulatory efforts' effects on individual property owners, although the Court had developed tests that require courts to apply more rigorous scrutiny for certain categories of regulations and regulatory effects.[26] For regulations that do not fall within such categories, the Court had interpreted the Takings Clause to require compensation only when a regulation goes "too far,"[27] a standard applied through "essentially ad hoc, factual inquiries."[28] Critics of the doctrine complain strenuously of its incoherence and vagueness.[29]

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[20] *See* Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 539-40 (1995). *But see* Andrew S. Gold, *Regulatory Takings and Original Intent*: *The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 192-206 (1999) (arguing that Madison's writings provide sufficient evidence of the framers' intent).

[21] *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 557-66 (1972).

[22] *See* DANA & MERRILL, *supra* note 2, at 19-25.

[23] *See* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 790 (1995). The historiography of the origins and early understandings of the Takings Clause, which matured significantly in the early- and mid-1990s and found little evidence of strong judicial enforcement (*see, e.g.*, Hart, *supra*, and Treanor, *supra*), has since been contested. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 137 (3d ed. 2005) (citing articles challenging Hart and Treanor's work). My purpose here is not to sort and evaluate the various historical claims, but to note that history does not dispositively provide an absolutely authoritative approach to the Takings Clause.

[24] Admittedly, the narrative provided here ignores issues of just compensation and procedure. I consider these important and frequently litigated issues, *see* DANA & MERRILL, *supra* note 2, at 169 (noting that compensation challenges arise frequently in eminent domain litigation); 254-55 (noting the importance of procedural issues for the land development industry), throughout the article and omit them here only for purposes of narrative economy.

[25] *See* Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1458-72, 1490-1520 (1997); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 110-11 (1990).

[26] *See infra* notes 63-64.

[27] *Pennsylvania Coal*, 260 U.S. at 416.

[28] *Penn Central*, 438 U.S. at 124-25.

Although the Rehnquist court seemed to shift towards imposing stronger constitutional property protections, the regulatory takings doctrine had not changed radically since its re-emergence in the 1978 *Penn Central* decision.[30] As recently as 2002, the Court characterized its takings jurisprudence as a consistent effort to resist creating broad per se rules that would impose strict compensation requirements on regulatory entities.[31]

With respect to the public use issue in eminent domain, federal courts did not generally review eminent domain action during the nineteenth century, and state courts failed to enunciate a singular approach to the limits of government's taking powers.[32] During the twentieth century, and especially over the past fifty years, state and federal courts have allowed government entities to take land and ultimately give or sell the property to private individuals for a public purpose, rather than strictly for public use, so long as the government could demonstrate that the land was taken for a public purpose and would result in public benefits.[33] More recently, property rights advocates have had some success in persuading state courts to scrutinize eminent domain actions, most prominently when the Michigan Supreme Court reversed an especially deferential public use precedent.[34]

The settled context for the Court's 2005 decisions, then, featured regulatory takings as a complicated but increasingly stable area of law, and "public use" as a fairly simple, well-settled limit on eminent domain power.

B. *Lingle*: A Reasoned Elaboration of Regulatory Takings

At first glance, *Lingle* appears to be an uncontroversial effort at doctrinal housekeeping that is intended only to clarify whether courts should continue to apply a "would-be doctrinal rule or test" that had been repeated, though never directly applied, "in a half dozen or so" Supreme Court decisions.[35] The decision is brief, clear, and unanimous—ironically, *Lingle* is probably the shortest takings decision since *Agins v. City of Tiburon*,[36] the decision it revises,

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[29] *See* Poirier, *supra* note 6, at 97-98 nn.2-3 (citing sources). Some commentators have found virtue in the doctrine's vagueness, however. *See, e.g.*, CAROL M. ROSE, *Crystals and Mud in Property Law*, *in* PROPERTY AND PERSUASION 199, 219-21 (1994); Poirier, *supra* note 6, at 150-83.

[30] Commentators on the right and left have come to this conclusion. *See* Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187 (2004) (conservative natural rights advocate expressing profound disappointment); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1437-38 (1993) (liberal environmentalist noting the limits of the Rehnquist Court's efforts to reconstruct property and takings law).

[31] *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 326 (2002).

[32] *See generally* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204-14 (1978) (describing minor role for federal courts prior to the Fourteenth Amendment's extension of Fifth Amendment rights under the Takings Clause to states).

[33] *See* James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845, 850-53.

[34] *See* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) *(reversing* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)); Southwestern Illinois Dev. Auth. v. Nat'l City Environmental, L.L.C., 768 N.E.2d 1 (Ill. 2002). *See generally* Steven J. Eagle, *The Public Use Requirement and Doctrinal Renewal*, 34 ENVTL. L. REP. 10999 (2004) (noting reversal of judicial deference towards eminent domain actions for economic development).

[35] *Lingle*, 125 S.Ct. at 2077-78.

[36] 447 U.S. 255 (1980).

and the first major takings decision since *Agins* to be issued without a significant concurrence or dissent.[37] Under review in *Lingle* was Hawaii's legislative effort to cap the amount of rent that an oil company could charge dealers to whom the company leased its gas stations. The legislation was enacted in order to address concerns about the price effects of market concentration in retail gasoline sales.[38] In its complaint challenging the legislation, Chevron, the *Lingle* plaintiff, included, among other claims, an allegation that the legislation effected a facial taking of its property for which compensation was due.[39] For this claim, Chevron relied upon the first prong of a test that had originated in the Supreme Court's 1980 decision *Agins v. City of Tiburon*, which stated that a legislative act effects a taking if it "does not substantially advance legitimate state interests, . . . or [it] denies an owner economically viable use of his land."[40]

After a trial at which each side called expert witnesses to testify to the legislation's practical effect, the federal district court ultimately accepted the view of Chevron's economist that the rent cap provision would not advance the state's interest in protecting consumers from high gasoline prices, and would in fact result in a price increase.[41] Indeed, the only issue for which the district court granted summary judgment, and the only issue on appeal, was the plaintiff's claim that the regulation, on its face, failed to advance the purpose for which the government had adopted it.[42] The Ninth Circuit affirmed the district court's application of the legal standard to Chevron's facial taking claim, and, ultimately, its finding that a taking had occurred.[43] Consistent with some state and federal appellate courts' application of *Agins*,[44]

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[37] Justice Kennedy's concurrence in *Lingle* was very brief and unsubstantial. *See Lingle*, 125 S.Ct. at 2087 (Kennedy, J., concurring); *infra* note 66.

[38] *Lingle*, 125 S.Ct. at 2078.

[39] *Id*. at 2079.

[40] *Agins*, 447 U.S. at 260.

[41] Chevron U.S.A., Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1192 (D.Haw. 2002). The expert reasoned that oil companies would most likely raise wholesale gasoline prices to offset losses resulting from the rental cap. *See id*. The case had been remanded to the district from the Ninth Circuit following an appeal of the district court's earlier grant of summary judgment to Chevron. *See* Chevron U.S.A., Inc. v. Cayetano, 57 F. Supp. 2d 1003 (D.Haw. 1998). The remand required the court to settle a genuine issue of material fact as to whether the state's rent cap legislation would benefit consumers. *See* Chevron U.S.A., Inc. v. Cayetano, 224 F.3d 1030, 1037-42 (9th Cir. 2000).

[42] *See Chevron*, 57 F. Supp. 2d at 1014; *see also* Brief for Respondent at *1-*3, *Lingle*, 125 S.Ct. at 2074 (No. 04-163), 2005 WL 103793 (focusing almost exclusively on whether legislation "substantially advances a legitimate state interest," while noting only cursorily that plaintiff had been deprived of property from rent cap); Brief of Appellee, Chevron U.S.A., Inc. v. Cayetano, 363 F.3d 846, 852 (9th Cir. 2004) (No. 02-15867), 2002 WL 32290809 (same).

[43] The Ninth Circuit twice upheld the legal standard that the District Court used. *See Chevron*, 363 F.3d at 849-55; *Chevron*, 224 F.3d at 1033-37.

[44] *See, e.g.*, Richardson v. City and County of Honolulu, 124 F.3d 1150, 1165-66 (9th Cir. 1997) (invalidating affordable housing ordinance for failure to substantially advance a state interest); *cf.* Clajon Production Corp. v. Petera, 70 F.3d 1566, 1579 (10th Cir. 1995) (applying *Agins* test to conclude that restriction on issuance of hunting licenses to out-of-state hunters substantially advanced Wyoming's legitimate interest in conserving game animals for its residents); Smith v. Town of Mendon, 822 N.E.2d 1214, 1221 (N.Y. 2004) (applying *Agins* test to conclude that restriction on development in conservation areas substantially advanced Town's legitimate interest in preserving environmentally sensitive areas); Sheffield Development Company, Inc. v. City of Glenn Heights, 140 S.W.3d 660, 677 (Tex. 2004) (holding that *Agins* test remained authoritative and, as such, City's downzoning and moratorium on development of landowner's parcel substantially advanced City's interest in avoiding ill effects of urbanization).

though counter to the majority of law review commentary,[45] the lower courts in *Lingle* read the test disjunctively to mean that compensation was due if a plaintiff could show that the government regulation failed either prong of the test—even in the absence of evidence that the regulation, as applied, diminished the use or value of plaintiff's property.

The question presented to the Supreme Court in *Lingle* was whether the *Agins* "substantially advances" test was an "appropriate" one for determining whether a regulation effects a taking.[46] The "substantially advances" test did not belong within takings jurisprudence, the Court reasoned, because of what the test allowed property owners to plead under the Fifth Amendment and because of what it required courts to do as part of their review of the property owners' claims. Having incorrectly articulated the test in the disjunctive as two distinct inquiries—that is, a plaintiff could plead under either the "substantially advances" or the denial of an economically viable use test—*Agins* allowed a property owner to allege that a regulatory act effects a taking solely on the basis of the character of the government's action, and without reference to whether the act had any economic effect on the use of his land.[47] Furthermore, the "substantially advances" test, especially as applied without reference to the regulation's effect on the owner's property, invited courts to scrutinize the purpose, wisdom, and functionality of a regulatory act in an open-ended and potentially rigorous way.[48]

The *Agins* test thus fundamentally mistook the nature and purpose of the Takings Clause, *Lingle* held, and, in the process, made three fundamental errors. The first error was categorical. Judicial review of a government act's functionality and wisdom belongs within a substantive Due Process test rather than a takings test.[49] The second error was procedural: the test focused on the wrong details and as a result mistook the Takings Clause's normative purpose. A complaint alleging that a regulation fails to "substantially advance" a legitimate state interest sheds no light on the key issues of takings analysis, which are "the *magnitude or character of the burden* a particular regulation imposes upon property owners" and how such burden "is *distributed* among property owners."[50] A property owner's takings claim must identify the property owner's loss and individualized burden rather than of the government's mistake. Third, the test misconceptualized the role of judicial review because it "would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[51] The "substantially advances" test thus miscasts the court as a super-legislature, able to second-guess and overrule the decisions of elected officials. As a result of

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[45] *See* John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?,* 29 ENVTL. L. 853 (1999); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1299, 1328-33 (1989); Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operations of the* Agins *Tests*, 33 URB. LAW. 343 (2001). *But see* R. S. Radford, *Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 ENVTL. L. REV. 353 (2004).

[46] *Lingle*, 125 S.Ct. at 2078.

[47] *Id.* at 2083-84.

[48] *Id*. at 2085-86.

[49] *Id*. at 2083-84. This confusion, the Court conceded, extended beyond *Agins*, and the Court only began to correct it in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), when it disentangled the origins of regulatory takings and declared it to be in the Takings Clause rather than in substantive due process. *See Lingle*, 125 S.Ct. at 2983 (citing *Williamson County*, 473 U.S. at 197-99).

[50] *Lingle*, 125 S.Ct. at 2084.

[51] *Id*. at 2085.

applying the wrong substantive legal standard, which forces courts to scrutinize the cause and mechanism of the regulatory act rather than its effects, the *Agins* test "has no proper place in our takings jurisprudence."[52]

This conclusion assumes, of course, that there *is* a singular takings jurisprudence out of which the *Agins* test could be cast—a contested proposition, to say the least.[53] By sorting and reasonably elaborating history, doctrine, and normative justification appears, the Court confidently stated that a coherent regulatory takings jurisprudence indeed exists, and cast *Lingle* as an ending—the end, ultimately, of the complicated common law development of regulatory takings, at least as a major jurisprudential and political undertaking. It presented this coherence in two ways: as an unbroken historical narrative of doctrinal development, and as a singular, cohesive doctrine.

This historical narrative looks substantially as follows. No regulatory takings doctrine existed until *Mahon*, when Justice Holmes articulated his "storied but cryptic formulation" therein that a regulation that "'goes too far'" effects a taking.[54] "Beginning with *Mahon*," a limited regulatory takings doctrine emerged, requiring compensation in those rare instances when a regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster."[55] *Penn Central* forms the key precedent for the regulatory takings doctrine and the default standard for the judicial review of takings claims,[56] and the categorical exceptions to *Penn Central*, which identify particular regulatory acts as constituting per se takings are outlying instances, mere exceptions that prove the centrality of the *Penn Central* test. Viewed in retrospect within the trajectory of this narrative, the decisions establishing the respective categories, *Lucas v. South Carolina Coastal Council* [57] (total diminution in value) and *Loretto v. Teleprompter Manhattan CATV Corp.*[58] (physical invasion), and *Nollan v. California Coastal Commission*[59] and *Dolan v. City of Tigard*[60] (individualized development conditions that require dedication of land), did not signal a radical departure from judicial deference—or, as we can now see from *Lingle*'s sweeping narrative, from the grand progression established by *Penn Central* and continued over the next three decades to the present.[61] *Lingle* thus appeared to reject any

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52 *Id.* at 2087.

53 *Lingle* was not itself a radical departure from recent decisions; in fact, it echoed and cited similar statements by six justices in *Tahoe-Sierra*. *See* 535 U.S. at 323-27. But unlike *Tahoe-Sierra*, *Lingle* was the rare takings case that attracted every justice.

54 *Lingle*, 125 S.Ct. at 2081 (quoting *Pennsylvania Coal*, 260 U.S. at 415).

55 *Id*.

56 *See id.* at 2082 (characterizing the *Penn Central* factors as "the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules."); Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar instead remains the principles set forth in *Penn Central* itself. . . ."); *see also Tahoe Sierra*, 535 U.S. at 326 n.23 (quoting "polestar" statement from *Palazzolo* concurrence).

57 505 U.S. 1003 (1992).

58 458 U.S. 419 (1982).

59 483 U.S. 825 (1987).

60 512 U.S. 374 (1994).

61 Significantly, Justice Scalia's decision in *Lucas*, seen generally as an effort to depart from the *Penn Central* narrative, itself helped solidify it. *Lucas* first conceded that the regulatory takings doctrine was a modern invention established first in *Mahon* as an effort to curb government overreach and protect private property. *See Lucas*, 505 U.S. at 1014. What began as an effort to naturalize the *Lucas* holding that a regulation depriving a property owner of all economic value effects a taking unless the government can identify "background principles of nuisance and

more expansive vision of the normative purpose for the Takings Clause's application to regulatory takings beyond compensating property owners for exceptionally burdensome regulation. Although this conclusion was foreshadowed in both *Palazzolo v. Rhode Island*[62] and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[63] the unanimous decision in *Lingle* appears to provide a stronger sense of closure.

The cohesive doctrine looks substantially as follows. Presented with a regulatory act whose effects fall within certain enumerated categories that represent "functional equivalences" to the "paradigmatic taking" of eminent domain for which compensation is always required, a court must apply heightened scrutiny.[64] These categories, which include permanent physical invasions, complete diminutions in value, and regulatory conditions imposing permanent physical invasions, are narrow and finite in number. But presented with regulatory acts whose effects fall outside of these categories, courts must apply a deferential balancing test.[65] Because it must look only to regulatory effects, a court adjudicating a takings claim does not consider what the "substantially advances" test requires: judicial review of a regulation in isolation from consideration of its effects on property and the rights of ownership, and rigorous scrutiny of a regulatory act's wisdom and effects.[66] Using *Lingle* as the occasion to strike the "substantially advances" test, then, the Court clarified, solidified, and narrowed its regulatory takings doctrine.

Indeed, *Lingle* reads not unlike the final chapter of a mystery novel in which the detective reveals all of the clues that led to the crime's solution and faces no contradiction from any of the other characters—including the police commissioner who doggedly pursued a different theory of the crime.[67] To resolve the viability of the *Agins* two-part test, the majority cast *Agins*' disjunctive test out of the takings narrative by parsing the doctrine's progression and cleaning up some loose ends. Thus, earlier decisions that either confused the Due Process and Takings Clauses, or that imported due process concepts into the adjudication of a takings claim ceased to

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property law" that restrict the owner's use of the property, see *id*. at 1026-32, ultimately became in *Lingle* a contained, rarely invoked application of the nuisance exception to a compensation requirement.

62 533 U.S. 606 (2001).

63 535 U.S. 302 (2002). *See* Laura Underkuffler, Tahoe*'s Requiem: The Death of the Scalian View of Property and Justice* , 21 CONST. COMMENTARY ___ (forthcoming, 2005)(manuscript at 6-10, on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=820266.

64 *Id.* at 2081.

65 *Id.* at 2081-82.

66 *Id*. In a brief solo concurrence, Justice Kennedy left open the possibility that a regulation like that challenged in *Lingle* might be "so arbitrary or irrational as to violate due process" rather than the Takings Clause. *Lingle*, 125 S.Ct. at 2087 (Kennedy, J., concurring) (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in part and dissenting in part)).

67 Here, the dogged police commissioner is played by property rights advocates who clung to the "substantially advance" test as evidence that a different, more expansive Takings Clause still existed and awaited exhumation. *See, e.g.*, R.S. Radford, *Of Course a Land Use Regulation That Fails To Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL L. REV. 353 (2004) (asserting that substantial advancement test was a part of the "mainstream" takings doctrine); Larry Salzman, *Twenty-Five Years of the Substantial Advancement Doctrine Applied to Regulatory Takings: From* Agins *to* Lingle v. Chevron, 35 ENVTL. L. REV. 10481, 10483 (2005) (arguing, prior to the Court's decision in *Lingle*, that the Court used the substantial advance test as a "cause-effect" test of regulations that imposed real constitutional constraints on local governments while it steered clear of *Lochner*-style judicial review).

be takings cases.[68] *Agins*, and its suggestion of judicial scrutiny of a regulation's wisdom, had been a red herring. We know that now because finally, after *Lingle*, we understand regulatory takings as the doctrine that justifiably and correctly enforces the narrow normative commands of the Fifth Amendment.

C. *San Remo*: The Settled Institutions of Takings Litigation

San Remo v. City of San Francisco also required the Court to consider the implications of an earlier regulatory takings decision. In its 1985 decision *Williamson County Planning Commission v. Hamilton Bank of Johnson City* [69] the Court held that in order to ripen a federal constitutional takings claim alleging that the application of a regulation required compensation, a claimant must "seek compensation through the procedures the State has provided for doing so."[70] Courts have read *Williamson County* as requiring claimants to raise all of their state claims in state court before their federal takings claims are ripe for adjudication in federal court.[71] The *San Remo* petitioners, hotel owners forced by the city of San Francisco to pay a high fee to convert their business from long-term residential rentals to short-term tourist uses,[72] strategically filed and preserved federal constitutional takings claims in order to have those claims heard in a federal forum rather than in state court.[73] Some federal circuits, most prominently the Ninth Circuit, had previously held that where a takings claim has been litigated first in state court in the adjudication of takings issues under state law, and state law and federal constitutional law are coextensive or substantively equivalent, then the federal court is precluded from reconsidering the issues.[74] In the *San Remo* litigation, the Ninth Circuit held that the California Supreme Court's ruling on the property owners' substantive as-applied claims under state takings law constituted an "'equivalent determination' of such claims under the federal takings clause," and thus precluded the lower federal courts from reconsidering the claims under circuit precedent.[75]

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[68] *See Lingle*, 125 S.Ct. at 2083-84 (classifying the early zoning decisions, *e.g.*, Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) and Nectow v. City of Cambridge, 277 U.S. 183 (1928), as due process cases, rather than as takings cases, and criticizing language in other decisions that seemed to "commingl[e] . . . due process and takings inquiries. . . .").

[69] 473 U.S. 172 (1985).

[70] *Id*. at 194.

[71] *See San Remo*, 125 S.Ct. at 2501 (assuming *Williamson County* requires a "final state judgment" before a federal takings claim becomes ripe in federal court); *id*. at 2508 (Rehnquist, J., concurring in judgment) (agreeing that *Willamson County* requires a claimant to seek compensation in state court before bringing a federal takings in federal court, but questioning whether decision was correct). Numerous federal circuits had come to the same conclusion. *See, e.g.*, Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 379-80 (2d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 689-90 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994); National Advertising Co. v. City and County of Denver, 912 F.2d 405, 413-14 (10th Cir. 1990).

[72] *San Remo*, 125 S. Ct. at 2495-96.

[73] *See id*. at 2496-2500 (recounting the litigation's procedural history).

[74] *See* Dodd v. Hood River County, 136 F.3d 1219, 1227 (9th Cir. 1998). Not all circuits were in agreement on this issue. *See* Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118, 130 (2d Cir. 2003) (holding that it would be "both ironic and unfair" if the takings ripeness rule precluded claimants from ever bringing a Fifth Amendment takings claim).

[75] San Remo Hotel, L.P. v. City and County of San Francisco, 364 F.3d 1088, 1098 (9th Cir. 2004). Petitioners' facial challenge to the city's regulations could have been insulated from preclusion because it did not face the ripeness requirement that their as-applied challenge did under *Williamson County*. *See San Remo*, 125 S. Ct. at 2503 (citing San Remo Hotel, 145 F.3d 1095, 1105 (9th Cir. 1998)). Because petitioners raised the facial issue in state court, however, they did not properly reserve it under *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964). *See San Remo*, 125 S.Ct. at 2503 (discussing San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 106-09 (Cal. 2002)).

For many property rights advocates and takings plaintiffs' attorneys, this result unfairly excludes takings claims from beginning in the lower federal courts.[76] Worse, they argue, a claimant may never have her specific Fifth Amendment takings claim heard if a federal court finds that state and federal law are coextensive and that the state court adjudication of the state law takings claim (which was required under *Williamson County*) was identical to a federal takings claim.[77] Where a property owner is convinced that she cannot get a fair hearing from her state's courts and views the federal judiciary as her only opportunity for a fair hearing, the preclusive effect of a state court determination appears to the property owner to be exceptionally unjust.[78] In their brief before the Court, the *San Remo* petitioners argued that "'federal courts [should be] required to disregard the decision of the state court' in order to ensure that federal takings claims can be 'considered on the merits in . . . federal court.'"[79]

In affirming the Ninth Circuit's decision for the entire Court,[80] Justice Stevens characterized the question presented as whether federal courts may "craft an exception" to the Full Faith and Credit Statute[81] for claims brought under the Takings Clause.[82] By redrafting the question,[83] Justice Stevens neatly rejected petitioners' characterization of the issue as one of righting procedural unfairness. Framing the issue in this manner and responding to it as reframed, the Court's decision did not focus specifically on the substantive issue of property rights; rather, the decision and its reasoning involved judicial comity, efficiency, and a restrained

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[76] *See, e.g.*, Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671 (2004); J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209, 240 43 (2003); Madeline J. Meacham, *The* Williamson *Trap*, 32 URB. LAW. 239 (2000); George A. Yuhas, *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 URB. LAW. 465 (2000).

[77] *See* Berger & Kanner, *supra* note 76, at 687-688; Breemer, *supra* note 76, at 240; Meacham, *supra* note 76, at 241; Yuhas, *supra* note 76, at 474.

[78] *See* Breemer, *supra* note 76, at 260-63 (describing California's procedural and substantive barriers to receiving compensation under state law).

[79] *San Remo*, 125 S.Ct. at 2501 (quoting Brief for Petitioner at 8, 14, *San Remo*, 125 S.Ct. at 2491 (No. 04-340)).

[80] Chief Justice Rehnquist's concurrence, which was joined by three other justices, called for the Court to reconsider *Williamson County*'s state litigation requirement, but did not question the majority's conclusion that state court takings judgments have a preclusive effect on federal courts where state and federal law are coextensive. *See id*. at 2507 (Rehnquist, C.J., concurring in judgment).

[81] 28 U.S.C. § 1738 (2000). The Full Faith and Credit Statute provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . ." *Id*. The statute was originally enacted in 1790 as a Congressional response to Article IV, § 1 of the U.S. Constitution, which states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *See* Act of May 26, 1790, ch. 11, 1 Stat. 122.

[82] *San Remo*, 125 S.Ct. at 2495.

[83] The Court initially granted certiorari in *San Remo* on the question of whether "a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim." Petition for Writ of Certiorari at *i, *San Remo*, 125 S.Ct. at 2491 (No. 04-340), 2004 WL 2031862.

interpretation of legislation,[84] while the virtual unavailability of a federal forum raised no substantive concern. Nothing prevents takings plaintiffs from raising their federal constitutional claims in state court, the Court reasoned, and state courts are fully capable of adjudicating federal constitutional claims.[85] Plaintiffs can in turn appeal an adverse state court ruling to the U.S. Supreme Court—a process that existed long before *Williamson County*, and that was the route through which *Mahon* itself began the modern regulatory takings saga.[86] If state adjudication of state law claims also resolves federal constitutional claims, so much the better—everyone saves the time and money involved in repetitious litigation. Furthermore, because state courts have more experience at resolving the complex questions that land use disputes raise, their resolution will likely be more expert and fairer than those of federal courts.[87] The Court's understanding of the constitutional scheme and its prescription for an optimal system of adjudication commands that state courts serve as the first, and perhaps only, setting for litigation.

The Court rejected the property owner's account of Kafkaesque unfairness—my property has been confiscated and the courthouse door has been slammed shut!—and substituted the abstract vision of a functional and efficient system of federal governance. Takings litigation must begin and may end in state court; the courthouse doors are open, but property owners do not get to choose the one through which they enter and from which they exit; and in any event, the choice of doors for entrance and exit has no significant effect on outcome. The Court's account assumes that state courthouses are at worst interchangeable with federal courts and, at best, are better suited as institutions to handle the state and local issues implicated in a takings claim. The adjudication of property disputes, therefore, is subsumed within questions of justiciability, jurisdiction, and court bureaucracy, and largely ignores the plaintiff's concerns regarding a fair hearing.

A concurrence threatened to challenge the system of adjudication the majority upheld. Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, wrote separately to declare that he was not persuaded of the constitutional necessity of *Williamson County*'s

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[84] *See San Remo*, 125 S.Ct. at 2505 (refusing to read an exemption into the Full Faith and Credit Act, 28 U.S. § 1738 (2000), where Congress has not expressed any such intent, and therefore applying "our normal assumption that the weighty interests in finality and comity" to dismiss petitioners' claim that they needed access "to an additional appellate tribunal").

[85] To provide a more detailed explanation, the Court disposed of petitioners' argument in several ways. First, the Court held that the reservation of federal claims for adjudication in federal court pending the resolution of state claims in state court, which the Court expressly allowed in *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), only allowed reservation and reassertion of federal claims in federal court when plaintiffs confined the scope of the state court's inquiry to issues of state law. *See San Remo*, 125 S.Ct. at 2502-03. Because the petitioners had chosen to broaden the issues reviewed by the state court beyond those of state law, their reservation of federal takings claims did not fall within *England*'s parameters. *Id*. at 2503. Second, the Court noted that it had "repeatedly held" that plaintiffs can be deprived of the opportunity to litigate claims in federal court if the issues have already been "actually decided" in state court, even when plaintiffs had been sent to state court in order to ripen a claim. *Id*. at 2504-05 (discussing Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980)). To hold otherwise, the Court stated, would create an exception to the Full Faith and Credit Statute without Congressional authorization. *Id*. at 2505-06. Finally, the Court asserted that state courts are "fully competent" to hear federal constitutional claims arising from local land use decisions and "undoubtedly have more experience" in resolving such issues. *Id*. at 2507.

[86] *Id*. at 2506.

[87] *Id*. at 2507.

litigation requirement (as opposed to its administrative exhaustion requirement).[88] The requirement that property owners exhaust state judicial remedies before proceeding in federal court instead may be merely prudential, Justice Rehnquist suggested, and the Court should reconsider the expansiveness of *Williamson County*'s ripeness rule.[89] Without directly challenging the majority's assertion that state courts could constitute a proper setting for takings litigation, the concurrence questioned why they would constitute the *only* setting—a rule that *Williamson County* has been read to create and that *San Remo* acknowledges.[90] Conceding that the Court had previously held that some federal constitutional challenges to state government action were barred from federal court,[91] why, the concurrence asked, must takings claims against the application of land use regulations be relegated to state court when First Amendment and Equal Protection Clause challenges to land use actions could begin in federal court?[92] If speech and equal protection could trump the majority's vision of an integrated, seamless system of constitutional adjudication within a federal system, why not property?

But ultimately, as with *Lingle*, *San Remo* appears consistent with precedent in both doctrine and spirit. The Court in both decisions reaffirmed and appears to have further secured its narrow approach to regulatory takings for reasons of administrative and bureaucratic competence, discretion, and efficiency. Unlike *Lingle*'s surprising unanimity, however, the concurrence's invitation to future takings plaintiffs to present the Court with an argument about *Williamson County*'s state court litigation requirement in the foreground makes the approach to takings procedure not quite as secure as Justice Stevens's opinion appears.

D. *Kelo*: Institutional Competency and Public Use

Returning to issues the Court had last confronted two decades before, *Kelo* concerned the extent to which the "public use" limitation in the Takings Clause restricts government from using its eminent domain power to further economic development and raise revenue in an economically distressed city.[93] The petitioners in *Kelo* were longtime homeowners who challenged an eminent domain action initiated by the City of New London, Connecticut.[94] As part of an extensive economic development plan, the city hoped to redevelop riverfront property and adjacent parcels on which Pfizer, a pharmaceutical company, planned to build a global research facility.[95] The development plan called for construction of, among other things, a hotel/conference center, a technology park, and retail space, all of which would be privately owned and operated.[96] Petitioners' land was targeted for use as privately operated research and office space and, more vaguely, as "park support" and perhaps parking lots.[97] The city authorized

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88 *See San Remo*, 125 S.Ct. at 2509-10 (Rehnquist, J., concurring in judgment).

89 *See id*.

90 *See id*. at 2509.

91 *See id*. at 2508 (citing Fair Assessment in Real Estate Assn., Inc. v. McNary, 454 U.S 100, 116 (1981) (holding that taxpayers are "barred by the principle of comity" from asserting constitutional challenges to state tax systems in federal court)).

92 *See id*. at 2509 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)).

93 *See Kelo*, 125 S.Ct. at 2658.

94 *Id*. at 2660.

95 *See id*. at 2658-59.

96 *See id*. at 2659-60.

97 *See id*.

the New London Development Corporation, a private nonprofit, to utilize the city's eminent domain power to take whatever property it could not privately purchase in order to assemble land for the proposed project.[98] Among the allegations included in the suit they filed in state court, the *Kelo* homeowners claimed that the city's taking failed to meet the public use requirement of the federal constitution because it took land from private individuals only to give it, ultimately, to another private individual for the latter's private use.[99] Overruling a state trial court that had invalidated under the Fifth Amendment some but not all of the proposed eminent domain actions, the Connecticut Supreme Court, by a 4-3 margin, upheld all of the city's proposed takings for economic development as actions taken "in the public interest" and for a "public use."[100]

Writing for only four other justices, Justice Stevens upheld the city's actions, based—like *Lingle* and *San Remo*—on the weight of precedent and the institutional settlement and relative competencies of the political and judicial actors involved in land use regulation and federal constitutional adjudication under existing precedent. But of the three 2005 takings decisions that preached obedience to doctrinal stability and concern about the correct role for the federal constitution and federal courts, *Kelo* engendered by far the most internal protest and external criticism, as both Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, and Justice Thomas, writing only for himself, authored vigorous dissents.

The dispute between majority and dissent over precedential authority focused on two decisions: *Berman v. Parker* (1954),[101] in which the Court upheld the taking of allegedly non-blighted property as part of a larger redevelopment plan;[102] and *Hawaii Housing Authority v. Midkiff* (1984),[103] in which the Court upheld efforts by a state agency to reform patterns of land ownership in Hawaii that forcibly transferred fee title from lessors to lessees. A unanimous decision in *Midkiff* authoritatively declared that the Court had "long ago rejected any literal requirement that condemned property be put into use for the general public."[104] Under long-settled law, then, the "public use" limitation would prohibit a "purely private taking" but allow the use of eminent domain for a "public purpose."[105] The fact that a taking for economic development purposes leaves the taken property in private hands does not render the taking's primary purpose any less public—particularly where, as in *Kelo* (and *Berman*), the taking was part of an authorized, "carefully formulated," comprehensive plan for redevelopment.[106] According to the majority, the Public Use Clause merely sorts eminent domain actions based upon their purpose, not upon their results or the mechanics of the taking.[107]

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98 *See id*. at 2659.
99 *See id*.
100 *See id*. at 2660-61 (discussing Kelo v. City of New London, 843 A.2d 500, 515-21, 527 (Conn. 2004)).
101 348 U.S. 26 (1954).
102 *Kelo*, 125 S.Ct. at 2665-66 (citing *Berman*, 348 U.S. at 33-35).
103 467 U.S. 229 (1984).
104 *Id.* at 244.
105 *See Kelo*, 125 S.Ct. at 2662-64.
106 *Id*. at 2664-66.
107 *Id*. at 2666.

The two dissents disagreed, although in different ways and for quite different reasons.[108] Justice O'Connor conceded that the takings upheld in *Berman* and *Midkiff* had not resulted in pure public ownership and use of the taken land, but she placed the majority's decision outside the limits established in *Berman* and *Midkiff*.[109] Unlike the blighted property in *Berman*, or the oligarchic pattern of property ownership in *Midkiff*, New London's eminent domain actions took land for economic development purposes where the pre-taking land use did not inflict "affirmative harm on society."[110] Having extended those precedents beyond their limits, the majority had left "public use" a toothless limit that is now unable to invalidate any eminent domain actions—even one that would take property from one individual and give it to another for no public purpose at all.[111]

Justice Thomas also conceded that binding precedent required an expansive understanding of public use, but unlike his fellow dissenters, he rejected *Berman* and *Midkiff* as catastrophically mistaken. At the turn of the twentieth century, Justice Thomas argued, the Court had taken a wrong turn when it replaced the plain meaning of the constitutional text's Public Use Clause with an amorphous "public purpose" test.[112] Rejecting a premise upon which the modern interpretation of the Takings Clause relies—that textual meaning, early history, and contemporaneous commentary are ambiguous and mixed with respect to the meaning of "public use"[113]—he recast the modern doctrinal trajectory as the tragic result of judicial acquiescence to legislative hubris.[114] Justice O'Connor's understanding of the Takings Clause, like the majority's, cast the judiciary as a brake on the worst abuses of legitimate government authority; Justice Thomas, by contrast, viewed the Takings Clause as establishing a firm and broad constitutional limitation on the taken property's ultimate use.[115] "Purpose" was irrelevant for Justice Thomas; once the government's authority is established under relevant federal constitutional or state law, then the only issue would be the kind of "use" the government planned for the taken land. If the government or the public "actually uses the taken property," then it is constitutionally permissible; anything less, such as land taken for economic development and given or sold to a private entity, is not.[116] Furthermore, Justice Thomas argued

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[108] Given the strong disagreements in their dissents, *see* text accompany *infra* notes 115-119, it is unclear why Justice Thomas joined Justice O'Connor's dissent—indeed, it seems even less explicable than Justice Kennedy's concurrence, which appears to depart from the majority opinion despite the fact that he signed on to Justice Stevens's decision in its entirety. *See infra* note 122. I will treat Justice Thomas's dissent as presenting separate and distinct arguments from Justice O'Connor's, and will not attempt to reconcile them.

[109] *Kelo*, 125 S.Ct. at 2673-75 (O'Connor, J., dissenting). To do so, Justice O'Connor was forced to disavow as dicta strongly deferential language from her own opinion in *Midkiff*, which declared that the public use requirement in the Takings Clause is "coterminous with the scope of a sovereign's police powers." *Id*. at 2675 (quoting *Midkiff*, 467 U.S. at 240). Significantly, the majority decision neither relied upon, nor even cited, this language.

[110] *Id*. at 2674-75.

[111] *Id*. at 2675.

[112] *See id*. at 2683 (Thomas, J., dissenting) (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896)).

[113] *See supra* notes 19-23, 32 33 and accompanying text (arguing that text and historical evidence are ambiguous, if not conclusively in favor of an expanded reading of "public use," which would include takings for a "public purpose").

[114] *See Kelo*, 125 S.Ct. at 2678-82 (Thomas, J., dissenting) (arguing that the plain text and historical evidence make a narrow reading of "public use," which would require taken land to be used by the government or public, the "most natural" one).

[115] *Id*. at 2680.

[116] *Id*. at 2682.

in favor of an antecedent inquiry into whether the government has the expressly enumerated power to engage in the proposed eminent domain action at all under the Necessary and Proper Clause,[117] thereby providing for a far more searching review than either the majority or dissent contemplates.[118] For Justice Thomas, *Berman* and *Midkiff* should be ignored as "unreasoned" rather than respected and distinguished or reshaped as precedent.[119]

But the *Kelo* majority did not rely solely upon precedent in upholding New London's eminent domain actions. It also concluded that legislative authority, institutional competence, and the Court's role in a federal system dictated finding the city's actions permissible—and in so doing, the Court relied upon concerns similar to those that had proved pivotal in its *Lingle* and *San Remo* decisions. Federal courts owed "respect" both to the legislative determinations of the state and local governments that authorized and carried out the eminent domain action and to the state court that upheld them. This respect explains why the Court has neither developed "rigid formulas" nor engaged in "intrusive scrutiny" to second-guess elected state and local legislative determinations of the public needs and uses for takings.[120] Even if it wanted to develop a formal rule for "public use," the majority argued, it would be too difficult to develop a practical, enforceable test that would both successfully limit the use of condemned property for the benefit of the general public and sufficiently defer to state and local governments' efforts to meet the ever-changing needs of society.[121] Relative institutional competence and authority, coupled with the limits of legal form, dictate judicial deference. Should citizens desire additional limits to eminent domain authority, the majority counseled, they could petition their state courts and politically elected legislatures to provide more rigorous judicial review under state constitutions or eminent domain statutes.[122]

The dissenters did not share the majority's concerns about legal process and form. For Justice O'Connor, "an external, judicial check" on the exercise of eminent domain, "however limited," is necessary for the Public Use Clause in the Federal Constitution to have any meaning.[123] She and her three fellow dissenters would find impermissible a "'purely private taking'" that would, as in this case, take property that was not inflicting an affirmative harm on society and give it to another private entity.[124] Like the majority, Justice O'Connor's dissent would defer greatly to legislative judgments "[b]ecause courts are ill-equipped to evaluate the efficacy of proposed legislative initiatives."[125] Indeed, her approach would presumably uphold

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117 U.S. CONST. art. I, § 8 (granting Congress power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

118 *Kelo*, 125 S.Ct. at 2680 (Thomas, J., dissenting).

119 *Id*. at 2687.

120 *Id*. at 2664 (majority opinion).

121 *Id*. at 2662.

122 *See id*. at 2668 nn. 22-23 (identifying states that had elected to limit eminent domain authority). In a separate concurrence, Justice Kennedy articulated a test that would require courts to apply heightened scrutiny to a taking that the property owner plausibly alleges would benefit a private party, in order to make certain the taking was in fact reasonable and intended to serve a public purpose. *See id*. at 2669-70 (Kennedy, J., concurring). Because he also joined the majority, Justice Kennedy did not signal any fundamental disagreement with the Court's decision.

123 *Id*. at 2673, 2677 (O'Connor, J., dissenting).

124 *Id*. at 2674 (quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984)).

125 *Id*.

takings that result in either public property (even if the pre-condemnation use was non-harmful) or that result in property formerly used for harmful purposes ending in private hands.[126] But for both dissents, economic development takings produce adverse consequences that require correction under the Fifth Amendment: government entities captured by wealthy and powerful interests will take property from the poor and political minorities, resulting in the Motel 6 being taken for a Ritz-Carlton.[127] Immediate and long-term damage to individual property owners and to the entire institution of private property, according to the dissenters, trumps concern about such systemic values as federalism and institutional competence.[128]

* * *

The 2005 decisions examined relatively narrow substantive and procedural issues relating to the regulatory takings doctrine, as well as a fundamental issue regarding the Public Use clause. Strangely, each decision accomplishes something different from what one might have expected, given the questions they presented: resolving the narrow substantive regulatory takings issue prompted the Court to declare a unanimous agreement about the doctrine as a whole; resolving the procedural regulatory takings issue led the Court to agree unanimously about the judicial process for adjudicating takings claims, even as it revealed significant unease about that process; and reaffirming the existing approach to the Public Use clause produced not only a bitter, broad split among the justices, but also a public outcry against that longstanding approach. When the Court reviewed the different sets of precedents and reconsidered the particular legal and systemic questions that these disparate issues raised, it was pulled in different directions. Each of the three decisions, however, shared an underlying jurisprudential logic regarding the relative institutional competences operating in land use regulation, a logic that the remainder of this Article will explicate.

II. Justifying Takings Law and the Search for Coherence

The case summaries and analysis in Part I signaled this Article's ultimate argument that the Court views its takings jurisprudence as an institutional check on the legal processes of land use regulation. Before the Article explicitly makes that argument in Part III and especially in Part IV, this Part sorts the prevailing theories that seek to justify either what the Court does, or what it should do, when it resolves takings claims.

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126 Having so limited her approach, Justice O'Connor failed to reconcile the fact that *Berman* upheld the taking of non-harmful land that ended up in private hands. *See* Berman v. Parker, 348 U.S. 26, 34-35 (1954). She merely acknowledges this fact and seems to approve *Berman*'s willingness to accept the government's claim that the correct baseline for analysis was not parcel-by-parcel harm but neighborhood-by neighborhood harm, whereby Berman's property becomes harmful solely because it is surrounded by harmful uses. But the taking is still of a non-harmful use, and therefore is inconsistent with her proposal.

127 *See Kelo*, 125 S.Ct. at 2676-2677 (O'Connor, J., dissenting). Justice Thomas's dissent emphasized what he saw as the majority decision's disproportionate effects on minorities. *See id*. at 2686-87 (Thomas, J., dissenting).

128 *Id*. at 2677 (O'Connor, J., dissenting).

Such takings theories abound. Some theorists have found coherence in Supreme Court decisions and either rejoice or fret over what they discover.[129] Sometimes their lamentations subside a decade or more later;[130] sometimes the reverse occurs and their once-triumphant tones turn frustrated and despondent.[131] Others, having searched for coherence, claim to have found nothing and would impose something better.[132] Still others are strangely satisfied with the muddle of it all, finding in doctrinal vagueness and incoherence a recognition of property's inherent social and communitarian nature;[133] or they declare this incoherence to be a symptom of the impossibility of resolving the intractable theoretical and political disputes that constitutional limits on the regulation of property raise.[134] But each offers some underlying justification for its normative vision of takings jurisprudence.

This Part is in some ways a compendium of frustration, a snapshot of the intellectual spirit that attempts, against all odds, to make sense of takings as constitutional text and common law, and as a judicial check on regulatory overreach. Although I concede that my tendency is to appreciate the muddle and find fault in rigid coherence—if only for its consequences, both anticipated and unanticipated—I have no axe to grind in this Part.[135] Nor is my argument that the search to incorporate and apply some external normative theory from another discipline to the issue of constitutional property rights is an irrelevant, irresponsible, or illegitimate move for legal academics.[136] My purpose instead is two-fold: first to summarize and explain the most significant efforts to justify a particular approach to takings, and then to note how the Court has either rejected, ignored, or invoked without conviction every coherent approach or theory that commentators have brought to bear on the issues. This part is organized around the three dominant rubrics for understanding takings law: fairness, utilitarianism, and the validation and protection of property as a social and legal institution.

A. Fairness Rationales

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[129] *See, e.g.*, Gregory Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1752 (1988) (lamenting that the "dominant narrative" in takings law circa 1987 understands the Takings Clause as a necessary and powerful constitutional check on local regulators as all-powerful); Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 153-55 (1995) (celebrating that Court's takings decisions articulate a logical, coherent approach that limits non-compensable regulation to nuisance and landowner actions that cause harm).

[130] *See, e.g.*, Gregory Alexander, *Ten Years of Takings*, 46 J. LEGAL EDUC. 586, 593-94 (1996) (noting the limited nature of Court's expansion of regulatory takings doctrine),

[131] *See, e.g.*, Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUP. CT. REV. 5, 28 (lamenting the fact that *Tahoe-Sierra*, 535 U.S. at 302, "has not left us with a pretty picture").

[132] *See, e.g.*, Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1080-81 (1993) (characterizing takings as the "doctrine-in-most-desperate-need-of-a-principle," before proceeding to propose an approach that would require compensation when the government "conscripts someone's property for state use").

[133] *See, e.g.*, Poirier, *supra* note 6 (arguing that the vagueness in takings doctrine is socially and politically beneficial).

[134] *See* James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143 (1997).

[135] Elsewhere, I have argued that the Court's efforts in its two exactions decisions to provide relatively precise rules to limit government regulations have resulted in a series of consequences that either fail to further the Court's intended ends or that force local governments to under-regulate land use. *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004).

[136] *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

"Fairness"—which, along with utilitarian approaches, is the most generally accepted rationale for constitutional property rights protections[137]—appears in takings decisions and commentary in three guises. In the Court's most oft-cited rationale for its takings doctrines, fairness and justice serve as abstract principles that guide, but do not mandate or direct, legal rules. In the second, which is more of a prominent rationale among commentators than in the Court's decisions, the Takings Clause's fairness rationale serves to protect a victim of a failed political process that has left her vulnerable to exploitation by a majoritarian decision. And in the third, which some academic commentators propose, and which the popular protest against *Kelo* illustrates, fairness serves to validate popular or vernacular conceptions of property rights by protecting the expectations and norms of ordinary observers.

1. Doctrinal Fairness: General Principles of Fairness and Justice

The concept of fairness in takings jurisprudence—which, the Court has stated, emanates from the Fifth Amendment itself—serves as the most significant and oft-cited justification for constitutional property rights protection. The so-called "*Armstrong* principle," which holds that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole,"[138] sets out a basic fairness rationale that helps explain the regulatory takings doctrine.[139] The Court has also characterized the Takings Clause's defense against unjust state action as protection from excessively intrusive regulation that "goes too far"[140] or that, in its effects, lacks proportionality to the public's needs.[141] Unsurprisingly, the Court cited the *Armstrong* principle explicitly in *Lingle*, explaining that the principle's conception of fairness serves a more fundamental role in Takings Clause jurisprudence than the "various justifications" that scholars have also attributed to regulatory takings.[142]

An analogous understanding of fairness also animates constitutional limitations on eminent domain. The "just compensation" clause requires that the property owner be made whole to compensate fairly for her loss. The "public use" clause, as restated in the *Calder v. Bull* principle, invalidates the taking of property from one individual merely to give it to another.[143] By favoring one individual over another, the state imposes a severe burden on the less favored without any apparent legitimate purpose. Accordingly, the state's action is void, as the Court

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137 *See* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998-99 (1999); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1181-82 (1967) [hereinafter Michelman, *Property, Utility, and Fairness*].

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

139 The Court invokes this language from *Armstrong* quite regularly, especially in its regulatory takings decisions. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 321; *Palazzolo*, 533 U.S. at 617-18; *Penn Central*, 438 U.S. at 123.

140 *Pennsylvania Coal*, 260 U.S. at 415.

141 *See, e.g.,* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) ("[C]oncerns for proportionality animate the Takings Clause."); Eastern Enters. v. Apfel, 524 U.S. 498, 528-29 (1998) (plurality opinion) (finding a regulatory taking where the retroactive burden was "substantially disproportionate to the parties' experience"). Proportionality appears more explicitly in the Court's conditional approval of exactions cases which require that a condition on land development be roughly proportional to the development's expected harms. *Dolan*, 512 U.S. at 391.

142 *Lingle,* 125 S.Ct. at 2080; *see also id*. at 2081 (invoking also the "goes too far" language from *Mahon*, 260 U.S. at 415).

143 Calder v. Bull, 3 U.S. 386, 388 (1798).

restated as recently as 1984.[144] Again, the fairness principle is so essential to the Court's understanding of the Takings Clause that the *Kelo* majority itself invoked the *Calder* principle, despite ruling against plaintiffs when the government defendant planned to transfer their taken land to a private entity.[145] And the *Armstrong* and *Calder* fairness principles are interchangeable, as Justice O'Connor's *Kelo* dissent made explicit.[146]

But the invocation of principles may be less meaningful than it appears. Granted, the 2005 decisions cited fairness as a justification for their results and for the doctrines they follow and establish. But, as in earlier decisions, they did so more ritualistically than materially. Most significantly, they failed to develop analytical or operational tools that would allow any of these fairness principles to matter.

Kelo is most striking in this regard. For the *Kelo* dissenters, nothing could eclipse the manifest unfairness of the state's actions, which in this case led government agencies to force the transfer of petitioners' homes and parcels simply because their current residential uses were deemed insufficiently advantageous to New London's coffers.[147] Because of the Court's willfully blind deference, the dissenters argued, government agencies can now simply take from those with fewer resources and give to those with more.[148] If the Court's invocation of abstract fairness principles actually drove their decision, *Kelo* would have established stricter enforcement of the *Calder* principle in order to protect against a state actor's injustice to individual property owners—at least as the dissenters viewed both the principle and the facts in *Kelo*.[149]

But the majority found the dissenters' fairness concerns irrelevant. After citing *Calder*, the majority decision immediately declared that the judgments of the state court and the state's political branches were legitimate, and explained that the Court had long ago abandoned a strict "used by the public" requirement in "public use" doctrine in favor of one that allows a taking for a public purpose.[150] The Court's focus shifted, in other words, from concern for the treatment of the particular property owner to a generalized, deferential analysis of the property's ultimate, post-taking use. Nor was the Court willing or able to consider any injustice in the compensation offered to the *Kelo* property owners (and to others whose property is taken for economic development)[151]—an issue that raises the question of whether economic development takings are

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144 *Hawaii*, 467 U.S. at 245.

145 *See Kelo*, 125 S.Ct. at 2661.

146 *See id*. at 2672 (O'Connor, J., dissenting).

147 *Id*. at 2676.

148 *Id*.

149 *Id*. at 2674-75.

150 *Id.* at 2661-63 (majority opinion).

151 *See id.* at 2668; *id*. at 2672 (O'Connor, J., dissenting). The compensation issue was raised in one of the amicus curiae briefs presented to the Court in *Kelo*, *see id*. at 2668 n.21 (majority opinion), and, at oral argument, Justice Kennedy appeared interested in considering the compensation issue in economic development takings. *See* Transcript of Oral Argument at *15, *Kelo*, 125 S.Ct. at 2655 (No. 04-108), 2005 WL 529436. But none of the Court's found decisions, including Justice Kennedy's concurrence, explicitly discussed it.

Just compensation is also an issue in regulatory takings actions, in which compensation is also the constitutionally required remedy. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). On the complexity of fixing compensation for so-called temporary takings in which

especially unfair, given the allegedly profitable uses to which the taken property will be put.[152] Fairness in the abstract may well be one of the Court's considerations when it reviews eminent domain actions under the Fifth Amendment, but the fairness principle is clearly overshadowed as a significant rationale by other concerns.

The same holds true for the Court's tendency to provide quick, relatively facile analyses of alleged regulatory injustices. Modern regulatory takings decisions appear to oscillate in their fairness considerations: when it finds that a regulatory taking has occurred, the Court tends to rely upon a narrow conception of fairness to the property owner and largely ignores the state's interest in regulating a proposed use; but when it rejects a regulatory takings claim, the Court largely ignores any marginal unfairness that a property owner has suffered.[153] Consider the restatements of regulatory takings substance and procedure offered in *Lingle* and *San Remo*. *Lingle* offers a logic in which property owners are likely to be compensated for a taking if the regulation's effects fall within particular categories because the Court assumes that those types of effects represent per se unfairness—no matter the extent of the injustice and no matter the unfairness to others of allowing the property owner compensation. If a regulatory action falls outside of those categories, however, the Court's logic leaves property owners with little chance of winning—no matter the extent of the injustice they suffer and no matter the benefits that others receive from the regulation. Again, as in *Kelo*, the Court's other concerns supersede any worry the Court might have regarding the particular individualized unfairness that the property owner claims to have experienced.

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a government entity rescinds a regulatory act that has effected a taking, see ELLICKSON & BEEN, *supra* note 23, at 267-74.

[152] Critics have argued that current enforcement of the Just Compensation Clause typically does not include the subjective premium over market value that a property owner would otherwise have demanded before selling, whatever surplus over market value the owner may have been able to negotiate as part of the sale (especially if the property that would be taken will be worth more as part of a larger land assemblage), and the loss of autonomy that a forced transfer imposes. *See* Richard A. Epstein, Kelo*: An American Original: Of Grubby Particulars & Grand Principles*, 8 GREEN BAG 2D 355, 359-61 (2005); Lee Ann Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962-67. More specific, identifiable losses may also remain uncompensated, such as relocation expenses, replacement costs, and, for commercial landowners and lessees, the disruption to their business and the lost good will associated with their former location. *See* Merrill, *Economics of Public Use*, *supra* note 7, at 83; Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 890-92 (1989). *But see* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain* (Notre Dame Legal Studies Paper No. 06-01, 2006), *available at* http://ssrn.com/abstract=875412 (collecting data on government's tendency to overcompensate, especially through hefty relocation awards). Commentators have proposed various means to address this "uncompensated increment." *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Bargaining for Takings Compensation* (Bar Ilan Univ. Pub. Law, Working Paper No. 13-05, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=806164 (advocating a scheme whereby property owners' self-assessments of the property's value would be factored into a compensation figure); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 963-64 (2003) (imposing a heightened means-ends test on use of eminent domain power patterned after *Dolan*, 512 U.S. at 374, and *Nollan*, 483 U.S. at 825); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 952, 1005-06 (1982) (advocating blunt imposition of market inalienability on some forms of property).

[153] *See* Underkuffler, *supra* note 63, at 22-28. As Underkuffler explains, the Court's blindness to the relational quality of the justice issue in land use regulation was made easier by the facts of its decisions in the late 1980s and 1990s (especially *Lucas*), in which the regulatory issues appeared technical and the property owner's loss was great. But the three major substantive regulatory takings decisions of this century, *Palazzolo*, *Tahoe-Sierra*, and *Lingle*, featured either less sympathetic plaintiffs (such as Chevron) or striking public interests (large quantities of wetlands in *Palazzolo* and Lake Tahoe in *Tahoe-Sierra*). *See id.* at 25-26.

The Court relied upon quite similar logic in upholding the procedural scheme under review in *San Remo*. In a decision that reached the opposite conclusion from the Ninth Circuit's decision that the Court upheld in *San Remo*, the Second Circuit characterized the effect of barring consideration of federal constitutional claims in federal court under the Full Faith and Credit Act as "unfair."[154] Although it did not expressly reject the assertion that this would be "unfair," the Court's series of responses—that neither the Constitution nor Congress has compelled access to federal court for federal constitutional claims, and that facial takings claims have no ripeness requirements and can therefore be filed initially in federal court—failed to consider the appearance of unfairness, especially for litigants convinced that their state court system undervalues and under-protects property rights.[155] Justice Rehnquist's concurrence, by contrast, characterized the results of *Williamson County*'s ripeness requirements and the Full Faith and Credit Act as "dramatic," especially when seen in comparison to First Amendment and equal protection challenges to local land use decisions, which face no ripeness requirements and can be litigated initially in federal court. Thus, Justice Rehnquist and three other justices signaled their willingness to reconsider what they perceived to be an unfair system of adjudication.[156] For the majority, however, logical systems of judicial review serve as proxies for fairness; the sense of fairness articulated so eloquently in the *Armstrong* principle itself plays little role in the workings of these systems.

2. Fairness in the Political Process: Protection Against Democratic Excess

A more precise understanding of fairness, and one that offers a somewhat more discernible approach to judicial review, attempts to identify when a failure in the political process has left an individual or an identifiable group victim to the "democratic excess" of a political majority.[157] Compensation is due under the Takings Clause, in this view, when the government takes property from the politically vulnerable, or from an individual or a small group of people, and in so doing either violates its norm of providing compensation in similar circumstances or chooses which property to take based on the identity of the particular landowner.[158] Precisely when, and on whose behalf, courts should intervene is a subject of significant debate among political process theorists—a debate which itself illustrates the theory's relative indeterminacy. One cannot tell in advance either which types of individuals or groups need greater protection, which levels (federal, state, or local) or branches (executive, legislative, or judicial) of government are most likely to fail to protect the politically vulnerable, or who in a particular instance was exploited *because* she was politically vulnerable.[159]

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154 *San Remo*, 125 S.Ct. at 2504 (quoting Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118, 130 (2003)).

155 *See id*. at 2504-07.

156 *See id*. at 2509-10 (Rehnquist, C.J., dissenting).

157 William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865, 897 - 98 (1991).

158 *See* Daniel Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 306-08 (1992); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 872 (1995) [hereinafter Treanor, *The Original Understanding*].

159 *See* James E. Krier, *Takings from Freund to Fischel*, 84 GEO. L.J. 1895, 1909-10 (1996) (reviewing WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995) [hereinafter FISCHEL, REGULATORY TAKINGS]); Carol M. Rose, *Takings, Federalism, Norms*, 105 Yale L.J. 1121, 1140-41 (1996) (reviewing FISCHEL, *supra*).

Both the *Armstrong* and *Calder v. Bull* principles certainly focus on the relationship between the state's treatment of the property owner and of others, and implicit in both is the concern that the property owner has suffered as a result of her unequal access to an unfair or undemocratic political process. Indeed, *Lingle*'s summary of the doctrine's logic explained that part of the Court's concern in its categorical takings rules is to protect against the "unique burden" that particular types of regulatory effects impose upon their victims.[160] The Court appeared to assume that when regulatory effects are dramatic—resulting in permanent physical invasions and total diminutions in property value—then the democratic process has unfairly treated the individuals by taking significant property rights from them.[161] In other words, the Court appears to view its functional equivalence categories as a proxy for instances of political process failure.[162]

But in rejecting the *Agins* test, *Lingle* demonstrated that the Court's focus is not on checking, or even considering, the specific political process that results in particular regulatory action, but is instead on the actual effects of the regulatory action itself.[163] What the government did and how and why the government did it are not the key questions that courts are to ask of regulations challenged under the Takings Clause. Rather, as *Lingle* made clear, courts should consider only the impact the government's actions have had on the property owner. Clear, actual failures in the political process are more appropriately considered under the Equal Protection Clause, where evidence of the process by which individuals are excluded and singled out is far more relevant,[164] while irrational regulatory actions are considered under a substantive due process analysis.[165] The *process* itself is not the subject of takings claims.

Furthermore, the "functional equivalence" to confiscation that *Lingle* made plain is the "common touchstone" of regulatory takings doctrine is both over- and under-inclusive as a proxy for political process failure.[166] Not all total diminutions in value, for example, fall on the politically vulnerable and voiceless—as the *Lucas* decision, which concerned regulation that affected expensive beachfront property owners and a plaintiff who had been a successful land developer, illustrates.[167] Indeed, the Court's rendering of the facts in its *Nollan*, *Dolan*, and *Loretto* decisions, which concerned plaintiffs who owned beachfront property[168] and property

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160 *Lingle*, 125 S.Ct. at 2082.

161 *See, e.g.*, *Lucas*, 505 U.S. at 1017-18 ("Surely, at least, 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.") (internal citations and quotations omitted).

162 *See* Farber, *supra* note 158, at 303-05.

163 *See Lingle*, 125 S.Ct. at 2084 (rejecting *Agins* substantial advancement test because it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights . . . [or] about how any regulatory burden is *distributed* among property owners").

164 *See* ELLICKSON & BEEN, *supra* note 23 at 156-57.

165 *See Lingle*, 125 S.Ct. at 2083-84.

166 *Id.* at 2082.

167 *See* Vicki Been, *Lucas v. the Green Machine: Using the Takings Clause to Promote Efficient Regulation?*, *in* PROPERTY STORIES 221, 224-28, 250-51 (Gerald Korngold & Andrew P. Morriss eds., 2004).

168 *See Nollan*, 483 U.S. at 827.

used for commercial gain,[169] do not classify the plaintiffs as members of the Takings Clause version of discrete, insular minorities.[170] Although the Court never identified a particularly egregious process failure in local political institutions, it established rules in each decision that virtually assured that the plaintiffs would win a judgment awarding compensation.

Political process theory also fails to capture the results in cases that fall outside the narrow categories of heightened scrutiny, where plaintiffs usually lose. These decisions rarely consider whether the property owners have suffered from significant frustrations with the political process or were singled out for a special burden. Why has the political process failed when an owner loses the full value of her home, even if she is wealthy and powerful enough to seek political voice in the state and local democratic process, but not when she loses, say, 95% of the value or some other percentage that approaches, but does not meet, the 100% threshold?[171]

Even more clearly, political process theory cannot explain *Kelo* or *San Remo*. The Court demonstrated no more than a cursory concern with the administrative process that led to New London's decision to exercise its eminent domain authority over the *Kelo* plaintiffs' property; as a result, the majority concluded that the economic development plan's careful formulation deserved deference.[172] That the formulation was careful may speak to the needs for economic development and the rationality of the plan itself, but it ignores whether the affected homeowners were singled out or lacked sufficient voice to participate in that formulation. And if the Court was truly concerned about the possibility of local and state institutions exploiting individual property owners, then it would surely allow regulatory takings plaintiffs to preserve their federal constitutional claims for federal courts—a step the Court refused to take in *San Remo*.

3. Fairness in the Vernacular: Social Norms as a Constitutional Baseline

While the Court repeatedly finds an abstract call for fairness in the Fifth Amendment and has expressed it in the generalities of the compensation requirement and the *Armstrong* and *Calder v. Bull* principles, it has failed to provide any precise limiting factor or test. But doctrine does not exhaust the relationship between property and fairness in the vernacular expression of property rights by non-lawyers, as the popular response to *Kelo* demonstrates. The largely inchoate public distaste for a Constitution that would allow a city to take someone's property for economic development is a popular, as opposed to doctrinal or theoretical, understanding of constitutional rights, or what Bruce Ackerman famously called an "ordinary observer's" understanding of widely held social expectations and disputed legal rules.[173] This non-technical,

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169 *See Dolan*, 512 U.S. at 379 (plaintiff was a hardware store owner); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (plaintiff owner was the owner-landlord of a residential apartment building in Manhattan).

170 The focus on "discrete, insular minorities" emanates, of course, from Justice Stone's famous footnote in *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938), and was extended to a broader constitutional jurisprudence in John Hart Ely's DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77 (1980). The takings version of political process theory traces its history from these texts. *See* Treanor, *The Original Understanding*, *supra* note 158, at 872-73.

171 *See Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting); *see also* Walcek v. United States, 49 Fed. Cl. 248, 271 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002) (discussing the very high threshold required to meet diminution of value test for takings).

172 *Kelo*, 125 S.Ct. at 2664-65.

173 *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 15-16 (1977).

non-textual vision of fairness offers a set of possible constitutional baselines that would fill in the gaps the Court has left in its open-ended, venerable fairness principles.

This baseline arises out of what Carol Rose has identified as the norms and narration that underlie ordinary conceptions of ownership.[174] In vernacular expressions of ownership, property is more than simply a relationship with the thing that is owned, or a relationship with others in relation to the owned thing—it is also experienced and understood as a narrative, and part of a broader narrative of the self and its relationship to a broader community.[175] When property is confiscated by the state, or its value is diminished by state action, the property owner's claims naturally slip into a narrative structure, one that often features an amorphous but compelling claim that the state has violated her constitutional property rights. Consider, for example, the following tales:

> *I purchased this coastal property with the intent to build my beachfront dream house, and now the state won't let me build anything and the property is worthless*.[176]
>
> *This house has been in my family for over 100 years; I was born here, as were my children; my son lives next door with his family in a house that he received as a wedding gift; and now the city wants to take my family's houses and give them to a large corporation which will tear them down*.[177]

Innocent of wrongdoing, surprised by a heartless government's action, and threatened with the loss of cherished property, the owner appears as an exceptionally sympathetic victim whose woeful tale creates a sense of demoralization in those who hear it.[178] No one's property is safe when one person's property is taken in a way that violates the norms of government behavior. These are powerful, persuasive narratives, and takings plaintiffs' attorneys and property rights activists have utilized the ability of the well-told takings story to advance their legal and political cause.[179]

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[174] *See* CAROL M. ROSE, PROPERTY & PERSUASION 5-6 (1994). My use of "scientific" in this context comes from Ackerman's notion of the "scientific policymaker," whose vision is opposed to the ordinary observer. *See* ACKERMAN, *supra* note 173, at 11, 15.

[175] *See generally* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 51 (1990) (hypothesizing a series of characters whose order of preferences in the distribution and use of property illustrates the various ways individuals tell property stories). In the words of the editors of a recent collection of essays telling the story behind numerous canonical property decisions, "our regime of property law emerges and evolves" out of the narrative conflicts described in "property stories." Gerald Korngold & Andrew P. Morriss, *Introduction*, *in* PROPERTY STORIES 1, 2 (Gerald Korngold & Andrew P. Morriss eds., 2004).

[176] This is a stylized version of the facts in *Lucas*, 505 U.S. at 1007-09.

[177] This is a stylized version of the facts in Wilhelmina Dery's claim as it is described in Justice O'Connor's *Kelo* dissent. *See Kelo*, 125 S.Ct. at 2671.

[178] *See* William Michael Treanor, *The* Armstrong *Principle: The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1161 (1997) [hereinafter Treanor, *The* Armstrong *Principle*]. Frank Michelman originally identified the costs resulting from the "demoralization" experienced by property owners, their sympathizers, and other observers following an especially painful uncompensated loss from regulation. *See* Michelman, *Property, Utility, and Fairness*, *supra* note 137, at 1214.

[179] *See* Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It (Still) Matters*, 14 DUKE ENVTL. L. & POL'Y F. 441, 443-47 (2004); Treanor, *The* Armstrong *Principle*, *supra* note 168, at 1158-70; Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative*

Common to these narratives is the implicit outrage at the idea that an individual who owns property and makes normal use of it can have her ownership and future expectations disrupted by an unforeseen regulatory or eminent domain action. A baseline of constitutional rights from the ordinary observer's perspective must therefore protect an owner's expectations in both her affective investment in a narrative of ownership and use, and in her financial investment in the fungible value of her property.[180] This baseline would also require that the owner's use of her property be consistent with the norms of community behavior and would not cause harm to others. Her property may only be subject to confiscation if the community's needs are great and the community has no other alternative but to take the owner's land.[181] A vernacular fairness rule, then, would protect an owner's normal expected use of her land if it is reasonably similar to and congruent with the uses to which fellow community members put their land.[182]

But the Court has not adopted either an ordinary observer's perspective or a community norm baseline as a general approach to takings. In *Tahoe-Sierra*for example, the majority explicitly rejected the dissent's effort to consider a temporary moratorium from the landowner's point of view, asserting that such a perspective would find every restriction on use to be a taking for which compensation is due.[183] The narrow regulatory takings categories do appear to consider both the perspective and the baseline: the physical invasion and the total diminution in value tests certainly have the value of simplicity, and the decisions that established each test dwell on the extent and severity of the regulatory effect owners experience in relation to other property owners.[184] As *Lingle* declared, however, these categories are quite narrow; and outside

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Backlash Against Environmentalists, 6 FORDHAM ENVTL. L. J. 637, 641-46 (1995). An especially influential example of the pro-property owner takings narrative, which Justice Thomas cited in his *Kelo* dissent, was a report issued in 2003 by the Institute for Justice collecting numerous instances of allegedly unconstitutional eminent domain actions. *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2003), *available at* http://www.castlecoalition.org/report/; *see also Kelo*, 125 S.Ct. at 2676 (Thomas, J. dissenting) (citing BERLINER, *supra*).

[180] This is how Laura Underkuffler summarizes the "common conception" of property rights and takings. *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY 45 (2002).

[181] *See* Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 NOMOS 223, 239-40 (1994).

[182] *See, e.g.*, FISCHEL, REGULATORY TAKINGS, *supra* note 149, at 352-61; Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 729-33 (1973); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003).

[183] *See Tahoe-Sierra*, 535 U.S. at 324 n.19 (responding to *id*. at 348 (Rehnquist, J., dissenting)).

[184] *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 234-35 (1990). *Loretto*, for example, specifically characterized the physical invasion as the "special kind of injury" an owner suffers from a stranger's presence on her land. *Loretto*, 458 U.S. at 435-46. Similarly, *Lucas* explicitly adopted the landowner's point of view in analogizing a total diminution to a physical appropriation. *See Lucas*, 505 U.S. at 1017-18. *Lucas* also appeared to adopt a community norm baseline, referring to the "understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property." *Id*. at 1027. Although owners may reasonably expect occasional restrictions on the uses they make of their land, the Court asserted "our constitutional culture" protects against a regulation that extends so far as to erase all economically viable uses of land. *Id*. at 1028.

The Court's exactions decisions similarly turn, at least in part, on the physical invasion created by the requirement that property owners dedicate an easement as a condition for a government agency's discretionary development approval. *See Dolan*, 512 U.S. at 394; *Nollan*, 483 U.S. at 831; *see also* FISCHEL, REGULATORY TAKINGS, *supra* note 149, at 58 (arguing that the *Nollan* decision, which required compensation for a condition on

of them, the perspective of the ordinary owner or observer and a community norm baseline appear to be irrelevant. Only an actual permanent invasion, or a total diminution in value and use, or a condition on development that requires the dedication of land, enjoy the stringent protection provided by what appears to be the conception of vernacular fairness incorporated within the relevant category. Whereas an ordinary observer would likely see a 90% diminution as warranting compensation as a rule, the Court does not.[185] Thus *Lingle*'s restatement of the Court's regulatory takings doctrine, with its default balancing test and exceptional, categorical rules, seems to be the product not of the ordinary observer but of what Ackerman called the "scientific policymaker" who "manipulates technical legal concepts" to illuminate the relationship between legal rules and a self-consistent set of larger principles.[186]

Kelo similarly rejected a popular, community-norm-based conception. Justice O'Connor began her dissent in *Kelo* by telling the story of the displaced property owners from their perspective. She also emphasized that the *Kelo* plaintiffs did not use their property in such a way that it caused harm to others, unlike the blighted property in *Berman* and the oligopolistic land trusts in *Midkiff*.[187] The majority, by contrast, began its narrative of the facts by focusing on the conditions of New London and on the city's decision-making process,[188] and by asserting that the condition of the plaintiffs' property was irrelevant in the face of precedent, as well as the judgments of state and local legislators and the state supreme court.[189]

Perhaps the Court's mere invocation of a vernacular fairness is a recognition that ordinary observation could not help formulate a workable federal constitutional test, and an acknowledgement that this perspective begs as many questions as it resolves. Whose fairness would be at stake if a Court accepts on its face, and attempts to apply, an ordinary observer's sense of fairness? Whose narrative counts—the property owner's claim that her property has been unfairly taken, or claims brought by neighbors and the general public alleging that the property owner's expectations should not have included protection against regulation or a necessary eminent domain action? The claims of both owner and community proliferate in a regulatory state where local, state, and federal authorities react to real and perceived environmental and social impacts from land use, and where courts serve as a final means for an individual property owner to challenge majoritarian decisions. And these claims or narratives themselves produce a proliferation of counter-claims and -narratives from government officials and other members of the community who both assert the need for regulation and condemn the property owner's present or proposed use of her land. Providing compensation to property owners who consider themselves unfairly treated will not resolve the conflicts in competing

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development where the property owner merely sought to build a house that would be consistent with "normal" California beachfront housing, applied a community norm baseline).

185 *See Lucas*, 505 U.S. at 1019 n.8; NEDELSKY, *supra* note 174, at 321 n.82.

186 ACKERMAN, *supra* note 173, at 11, 15. As I have argued elsewhere with respect to the Court's exactions decisions, the Court's efforts to provide, at the margins, an ordinary observer's conception of property when owners suffer the functional equivalent of confiscation, have resulted in the legal tests and administrative rules of the scientific policymaker. *See* Fenster, *supra* note 135, at 648 (noting this irony at work in the Court's exactions jurisprudence).

187 *See Kelo*, 125 S.Ct. at 2671, 2674-75 (O'Connor, J., dissenting).

188 *See id*. at 2658-59 (majority opinion).

189 *See id*. at 2664-65 & n.16. Such opposing renditions of a case's facts are fairly common in disputed takings decisions. *See* Alexander, *supra* note 129.

vernacular accounts of unfairness. Fairness, in either its doctrinal or vernacular form, has not provided, and indeed may be unable to provide, a stable and coherent approach to takings.

B. Utilitarian Rationales

Utilitarian rationales for the Takings Clause consider how judicial enforcement of the Fifth Amendment can produce the private property regime that will best meet the proponent's stated or unstated normative assumptions regarding how to maximize a society's wealth.[190] Libertarian utilitarians view a compensation requirement for regulation and limitations on eminent domain as means to limit inefficient government interference in the optimal private ordering of land use and ownership;[191] others utilize constitutional limits to tease out optimal means to check, rather than debilitate, local government.[192] Whether deeply skeptical or agnostic about government's role, however, all utilitarians view the Takings Clause as an instrument of governance, a means by which the political decisions of regulators and agencies that wield eminent domain authority can be externally controlled by judicial review.

A common assumption among utilitarians who view the Takings Clause as a significant tool for wealth creation holds that strong, strictly enforced property rights both clarify and secure ownership and the extent of property's allowed use, and thereby induce labor and investment.[193] Utilitarian rationales rely on political economic theories of government behavior to identify the structural defects of state decision-making and operations that cause ineffective regulations and excessive exercises of eminent domain authority. Police power authority, for example, provides government with strong incentives to avoid taking title to property and compensating the owner. Because a government agency can thereby shift regulatory costs onto property owners, a rational agency would never choose to take land and incur the constitutionally-required payment of compensation. Government experiences the "fiscal illusion" that its regulations are inexpensive because property owners, rather than the state, bear the regulatory costs.[194] Thus, government would always choose to regulate rather than use its eminent domain power when it can substitute regulation for outright takings, no matter if the taking would result in a "better," more wealth maximizing outcome than the regulation.[195] In order to act efficiently, the government agency must fully internalize the costs of regulation through the "price" of compensation paid to

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[190] Bentham provides the classic utilitarian approach to property rights. *See* JEREMY BENTHAM, *Principles of the Civil Code*, *in* THE THEORY OF LEGISLATION 111-14 (C.K. Ogden ed., 1931).

[191] *See, e.g.*, Richard A. Epstein, *A Clear View of the Cathedral*, 106 YALE L.J. 2091, 2094-96 (1997) (arguing that a stable property rights system that limits to a small category those instances in which the state may take or regulate property will maximize wealth).

[192] *See, e.g.* Michelman, *Property, Utility, and Fairness*, *supra* note 137, at 1214-18 (explicating system by which a compensation requirement can best meet utilitarian ethics by identifying, calibrating, and offsetting efficiency gains, demoralization costs, and settlement costs).

[193] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32-34 (6th ed. 2003); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety* 4-5 (Cornell Legal Studies Research Paper No. 06-001, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875634.

[194] *See* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 620-22 (1984).

[195] This result would occur if the proposed regulatory scheme reduces private property values by more than the public money saved from avoiding compensation. *See* William A. Fischel, *Takings and Public Choice: The Persuasion of Price*, *in* ENCYCLOPEDIA OF PUBLIC CHOICE (Charles K. Rowley & Friedrich Schneider eds., 2003).

property owners. For utilitarians, the Fifth Amendment's compensation requirement solves the fiscal illusion problem by forcing government to consider fully the impact of its decisions.[196]

Of course, merely finding a rationale for a compensation requirement does not identify precisely when and to what extent the requirement should be enforced against regulations. To address this problem, utilitarian commentators have offered various tests to sniff out inefficient government interventions into market activity and with an eye to imposing rules that would result in more effective and fairly administered regulatory programs that better protect property rights and encourage the best usage of land.[197]

The same political economic dynamic that leads government to over-regulate and that therefore requires a limiting constitutional compensation requirement, utilitarians argue, also leads government agencies to misuse or abuse their eminent domain authority and requires analogous constitutional limits. If frustrated by economic development within their jurisdiction or otherwise motivated to change existing patterns of land ownership and use, local officials can too quickly and cheaply take land and as a result will tend to do so excessively and frequently for the benefit of favored or powerful interests. Judicial enforcement of the "public use" and "just compensation" clauses can serve as external checks that force such takings to be productive and wealth-enhancing.[198] Strict limits on the public use of land would limit the objectives of eminent domain actions to the creation of public goods that are insufficiently supplied in the marketplace,[199] or, in a less restrictive view, to instances in which the benefits of the taking outweigh the costs.[200] In addition, a constitutional requirement that would correctly calibrate the just compensation owed to property owners would force government to disgorge excess gains from "naked transfers" of property from one party to another, and to increase compensation to former owners for their loss of implicit, in-kind benefits of the property they lose.[201] A correctly

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196 *See* Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part) (compensation requirement forces government to internalize the costs of its regulatory acts); EPSTEIN, *supra* note 5, at 214-15, 263-73; POSNER, *supra* note 183, at 58; William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269-70 (1988).

197 *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 537-38, 606-08 (2005) (proposing an integrated theory of property based on the assertion that law should create and defend the value of stable ownership in order to enable owners extract maximum utility from their possessions, and arguing that an "undue diminution of value" test for regulatory takings would be consistent with their theory and further its goals); Lawrence Blume & Daniel J. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 624 (1984) (advocating "risk-insurance approach to the taking question" that can improve efficiency of the land market by compensating large risks of regulation); Michelman, *Property, Utility, and Fairness, supra* note 137, at 1222-23 (1967) (proposing rough formulation of when compensation should be paid based upon benefits and costs of regulation, settlement costs, and demoralization costs); Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. LEGAL STUD. 749, 750 (1994) (proposing ex ante and ex post tests to check if pre-regulatory land use was efficient and if post-regulatory efficiency has been achieved).

198 Merrill, *The Economics of Public Use*, *supra* note 7, at 82-87.

199 *See* EPSTEIN, *supra* note 5, at 166-69.

200 *See* Michelman, *Property, Utility, and Fairness, supra* note 137, at 1241.

201 Bell & Parchomovsky, *surpa* note 152 (proposing that property owners self-assess value of their home, and the government can only take the property at that price; but if the government decides not to take the property, the property cannot be sold for less than the self-assessment for seventy years without payment of the shortfall to the government, and the self-assessed price is factored into property tax liability); James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 865-73. On the use of compensation as a means to achieve substantive

calibrated compensation scheme, therefore, would curb government overreach while it would more fully compensate owners of taken property.

For some utilitarians, these constitutional restrictions and their enforcement must be quite strict. Those who find governmental overreach abuse to be the norm—rather than the occasional, correctable result of structural defects in regulatory and taking authority—view municipal efforts to control land use and ownership merely as opportunities for self-interested officials and rent-seeking interest groups to use regulatory authority for private gain.[202] Democratic politics provide neither sufficient internal constraints on the scope of regulation and eminent domain actions nor external political constraints on elected leaders. As a result, land use controls create opportunities for significant corruption and abuse.[203] From this perspective, even correctly calibrated compensation cannot curb both the authority of government agencies to take land on behalf of a favored interest and the willingness and ability of favored interests and officials to utilize that authority.[204] Only a vigorously enforced public use clause that would invalidate any taking that did not result in publicly accessible land can serve as an effective external check on abuse of government authority.[205] Similarly, because regulation serves merely as a means by which rent-seeking private interests and self-motivated officials feather their own nests, the judiciary must apply the regulatory takings doctrine broadly and enforce it strictly as an external check on inevitable government overreach.[206]

The Court's takings decisions have not entirely ignored utilitarian and public choice considerations and skepticism about the wealth-enhancing effects of government action. Justice Holmes began the modern era of regulatory takings by expressing the intuitive public choice notion that "the natural tendency of human nature" is to extend collective authority; a constitutional check on regulations that extend "too far," therefore, operates to preserve the right of private property and all of its attendant benefits.[207] In a more recent decision, Justice Scalia similarly hypothesized that, absent a constitutional limit, government agencies would leverage their police powers to achieve unstated, unrelated, and even illegitimate goals through regulation—which would lead, presumably, to excessive regulation that fails to perform the regulatory purpose of reducing the harms created by a proposed land use.[208]

But Justice Holmes's intuitive version of public choice theory does not represent either a necessary constitutional logic or a norm of judicial reasoning, as the Court has in fact rarely cited

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goals, *see* Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677 (2005).

202 *See* EPSTEIN, *supra* note 5, at 104; Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. L. REV. 1005, 1021-23 (2004) [hereinafter Somin, *Overcoming* Poletown].

203 *See* Somin, *Overcoming* Poletown, *supra* note 203, at 1011-16.

204 *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, ms. at 32-36 (George Mason Law & Economics Research Paper No. 06-01, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874865.

205 *See id*. at 5-7.

206 *See* EPSTEIN, *supra* note 5, at 100-04.

207 *Pennsylvania Coal*, 260 U.S. at 415.

208 *See Nollan*, 483 U.S. at 837 n.5 (establishing the "essential nexus" test for conditions placed on development in part because, absent a constitutional limit, government agencies would leverage their police power to achieve goals that are unrelated to legitimate land use purposes).

utilitarian concerns as a significant ground for enforcing constitutional property rights protections. Indeed, when the Court has considered the consequences of a compensation requirement on a regulation or of a substantive limit on an eminent domain action, it has frequently decided that Takings Clause enforcement is unrelated to, or even opposed to, an optimal utilitarian end. Thus, in recent years the Court has held that some regulatory activity and economic development projects can be wealth-enhancing and necessary for the management of scarce resources—while at the same time curbing regulatory and taking authority through constitutional enforcement would limit the state's ability to help increase societal wealth.[209] The Court has hypothesized that stricter enforcement of the Takings Clause may skew governmental actions and produce suboptimal results by creating incentives for agencies to make decisions in order to avoid judicial scrutiny rather than basing decisions on the wisest course of action available to them.[210] In other words, the Court has decided that judicial conceptions of a utilitarian purpose in land use controls are irrelevant, except where the judiciary is considering the costs of heightened scrutiny to its own administrative utility;[211] the wisest, most utilitarian course of judicial action is to defer to governmental conclusions regarding the utilitarian value of its own regulatory or eminent domain actions.

It is unclear why the Court has largely eschewed the legal academy's fascination with, and development of, a utilitarian analysis of the Takings Clause. The Court may have determined that a utilitarian approach is too indeterminate to adopt, given the persuasive arguments that can be harnessed on behalf of and against the utility of government interventions

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[209] On the potential wealth-enhancing effects of economic development takings, *see Kelo*, 125 S.Ct. at 2662-63 nn.7, 8; on the wealth-enhancing effects of land use regulations, *see Tahoe-Sierra*, 535 U.S. at 339-41 (characterizing a deliberative, careful approach to regional planning that imposes a temporary moratorium on development during the planning process as an important means to avoid "inefficient and ill-conceived growth" and is likely to increase property values throughout the affected region). The state frequently must step in to manage the use of scarce public goods such as clean air, water, park space, and road capacity where the existing distribution of entitlements to use those resources block beneficial contractual arrangements. *See* GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 115-21 (1989). There is a significant literature on the necessity of land use regulations to respond to resource depletion and congestion and on the need to limit a compensation requirement to allow government to shape market activity to manage transitions. *See* Poirier, *supra* note 6, at 179-83; Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 18 (2000). In addition, land use regulation has proven to have both wealth-enhancing effects and popularity among rational homeowners who believe, correctly, that land use controls often raise and protect property values. *See* McUsic *supra* note 5, at 625 n.162; WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 51-52 (2001) [hereinafter FISCHEL, HOMEVOTER HYPOTHESIS].

[210] *See Kelo*, 125 S.Ct. at 2668; *Tahoe-Sierra*, 535 U.S. at 335 (rejecting a rule that would compensate for every delay because it "would encourage hasty decision-making"); *see also* Fenster, *supra* note 135, at 652-58 (identifying the range of consequences, most of them unintended and suboptimal, stemming from the Court's efforts to increase scrutiny of land use exactions); Krier & Serkin, *supra* note 201, at 864-65 (noting the problems that would arise from greater scrutiny of eminent domain actions under public use clause); Michael H. Schill, *Regulations and Housing Development: What We Know*, 8 CITYSCAPE 5, 6-8 (2005) (cautioning that efforts to remove land use regulation find it difficult to distinguish "bad" from "good" regulations).

[211] The Court has cited the potentially catastrophic transactional costs associated with resolving or settling regulatory takings claims, as well as the decisional costs to the judiciary of administering stricter limits on the public use clause. *See Tahoe-Sierra*, 535 U.S. at 335 (rejecting a rule that would compensate for every delay because it "would render routine government processes prohibitively expensive"); *Kelo*, 125 S.Ct. at 2662 (expressing concern about the difficulty of heightened judicial review under the public use clause).

into market activity.[212] A court could follow Richard Epstein and conclude that only an expansive regulatory takings doctrine and a narrow public use clause can adequately maximize wealth; or it could follow Carol Rose and conclude that the best wealth-maximizing approach to takings would be to form a doctrinal compromise in which regulation proceeds flexibly and cautiously, and only those whose investment-backed expectations are severely frustrated receive compensation;[213] or it could recognize that any effort to maximize the utility of constitutional limits on land use controls requires a multi-dimensional analysis that considers an almost unlimited range of concerns, from "takings" to "givings," and from the effects of compensation requirements on the public and on indirectly affected property owners.[214] Neither text nor history nor precedent dictates a choice between those two options. Perhaps, too, the Court has recognized the validity of critiques of utilitarian approaches,[215] or the inadequately theorized concepts on which utilitarians rely to promote vigorous takings enforcement, such as the fiscal illusion of regulation and the cost internalization effect of compensation requirements.[216] It is also possible that the utilitarian approach is not as distinct from others as it might superficially appear, and that an approach emphasizing fairness and one that emphasizes a utilitarian ethic will frequently turn on similar considerations and measures, as Frank Michelman argued more than a generation ago.[217] Viewed this way, the court has not rejected utilitarianism but merely incorporates its insights within other rationales. But significantly, the court did not rely upon a utilitarian rationale as a basis for its 2005 decisions.

C. Private Property as an Institution

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[212] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 134 (2004) (noting economic arguments both for and against providing compensation for regulatory takings); DANA & MERRILL, *supra* note 2, at 27-32 (noting utilitarian arguments in favor of eminent domain authority, as well as reasons for limiting that authority).

[213] *See* Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 19-21.

[214] *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (identifying the underutilization by the public of rare and valuable resources due to excessive constitutional rights that over-protect property); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001) (identifying "givings," in which a government promulgates a regulation that grants benefits to, rather than confiscates the property of, an identifiable individual or individuals); Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 280-81 (2001) (identifying the "derivative taking" that results from the reduction in the value of property near a parcel that is taken by regulation or eminent domain).

[215] For example, a moral hazard problem would arise from an expanded compensation requirement, which will encourage owners to overdevelop and over-invest in their property with the knowledge that any regulatory act that addresses an owner's use of her land will be compensated. *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 614-17 (1986). Commentators have devised solutions to this moral hazard. *See* Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29, 48 (2003) (proposing a compensation scheme that would bar recovery for a property owner's reckless overdevelopment); Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q. J. ECON. 71, 88 (1984) (proposing that compensation only be paid for amount approximating full value of property without overdevelopment).

[216] *See, e.g.*, Barton H. Thompson, *Conservation Options: Toward a Greater Public Role*, 21 VA. ENVTL. L.J. 245, 289 (2002) (summarizing empirical evidence and theoretical arguments against assumptions embedded in fiscal illusion concept); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 387 (2000) (arguing that cost internalization theory of compensation requirement fails because the incentive effects of constitutional cost remedies are "simply indeterminate," and is likely to be as perverse as beneficial).

[217] *See* Michelman, *Property, Utility, and Fairness*, *supra* note 137, at 1225-26.

A final general justification for enforcement of the Takings Clause holds that constitutional compensation and public use requirements are necessary to protect property rights as an essential institution for the maintenance of natural law and of social order and community. Since its earliest modern occurrence in *Mahon*, for example, the Court's regulatory takings doctrine has frequently warned that, if the state is allowed to extend its police powers too far, use of these powers will expand "until at last private property disappears."[218] This justification is not primarily utilitarian insofar as it posits that property's institutional value transcends any particular wealth-enhancing effects; nor is it primarily intended to remedy any particularized unfairness to an individual owner. Rather, this rationale, which includes quite distinct approaches, views the institution of private property as holding significant value for human dignity and the creation of a good society.

1. Property as Natural Right/ Takings Clause as Protective Shield

Natural law (or natural rights) proponents argue that property serves as a pre-legal and pre-political right that remains inherent in personhood under civil society's social compact between the individual and the state.[219] Whether viewed as flowing from a Creator or as developed in human experience and through common law rights, the institution of private property protects from coercive state action the things over which an individual claims dominion and for which she expended her labor. Thus, natural rights proponents argue, in order to protect private property from the inevitable vulnerability that comes with government authority to redistribute entitlements, courts must interpret the Takings Clause strictly and enforce it broadly.[220] Specifically, courts must award compensation to property owners for the regulatory prohibition of non-nuisance harms,[221] and courts must interpret government's authority to take under the public use clause narrowly, and invalidating all eminent domain actions whose end result will be a private use of the taken land except in narrow, historically recognized

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[218] *See Pennsylvania Coal*, 260 U.S. at 415. A taking of particularly important strands of the bundle of property rights also requires compensation under the same logic because to allow otherwise would challenge an essential historical institution. *See, e.g.*, *Hodel*, 481 U.S. at 716 (the right to pass valuable property to one's heirs is an essential right of property).

[219] *See* EPSTEIN, *supra* note 5, at 9-10; Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566-68 (2003).

[220] *See, e.g.*, Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 892-901 (2004) [hereinafter Claeys, *Public-Use Limitations*] (arguing that narrow "public use" limitation for eminent domain actions was an essential assumption of natural rights theory's conception of property); Richard A. Epstein, *Ruminations on* Lucas v. South Carolina Coastal Council*: An Introduction to Amicus Curiae Brief*, 25 LOY. L.A. L. REV. 1233, 1242 (1992) [hereinafter Epstein, *Ruminations*] (defining ownership as "a set of complete and well defined rights over the property," and arguing that any deprivation of "one of the indispensable attributes of ownership" requires compensation); Douglas Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 995-96 (1997) (condemning the "'ad hocly'-edged" [sic] *Penn Central* for an "overly deferential standard of review" and "virtually insurmountable presumption of constitutionality" that "is against a presumption against freedom of ownership") [hereinafter Kmiec, *Inserting the Last Remaining Pieces*]; *cf.* Ellen Frankel Paul, *Moral Restraints and Eminent Domain*, 55 GEO. WASH. L. REV. 152, 153 (1986) (reviewing EPSTEIN, *supra* note 5) (rejecting eminent domain, "however circumscribed," as a legitimate form of state power because of its threat to private property rights).

[221] *See* EPSTEIN, *supra* note 5, at 57-92, 112-21; Douglas Kmiec, *Inserting the Last Remaining Pieces*, *supra* note 220, at 1044-46 (1997).

categories.[222] And in order to secure a natural rights conception of private property, courts must adopt stable, precise, and self-enforcing rules.[223]

But as Carol Rose has noted, natural law conceptions of a pre-political basis for property rights have never had more than a "frail" hold on takings jurisprudence.[224] The Court has occasionally feinted in the direction of natural rights in its decisions establishing per se categories of takings, boldly pronouncing that compensation is required for a particular type of regulatory effect or for the taking of a particularly significant stick in the bundle of property rights.[225] But to understand property rights as a bundle rather than as a coherent whole, and to reward some regulatory effects with compensation while allowing other significant effects without rule-bound, formal protection, is to adopt something that falls significantly short of a natural law approach.[226] The unanimous reiteration of this approach in *Lingle* further demonstrated that the Court has rejected a unitary, natural law theory of property in favor of a theory of property as a disentangled bunch of severable rights. This is not natural law, and natural rights proponents are the first to admit that even at the heights of the Rehnquist Court's apparent expansion of regulatory takings, the Supreme Court did not adopt their view.[227] Indeed, Justice Thomas's dissent in *Kelo*, which expressly adopted a natural law approach to property, failed to garner a single additional justice.[228] And although Justice O'Connor included in her *Kelo* dissent an ironic reversal of Marx's opening to *The Communist Manifesto*—warning that "the specter of condemnation hangs over all property" as a result of the majority's decision[229]—she would allow a much broader array of takings than Justice Thomas.[230]

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222 *See* Claeys, *Public-Use Limitations*, *supra* note 220, at 928.

223 *See* McUsic, McUsic *supra* note 5, at 660-61 (associating natural rights approach with rule formalism). Not all natural rights proponents are equally rule-bound and formalistic, however. *Compare* EPSTEIN, *supra* note 5, at 36 (positing a "simple test" for compensation: "*Would the government action be treated as a taking of private property if it had been performed by some private party?*") *with* Douglas W. Kmeic, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1665-66 (1988) (arguing in favor of a "delicate and dynamic balance" between individual rights and majoritarian governance that restores a strong nuisance limitation on regulations and broadens government liability for compensation).

224 Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 595 (1984).

225 *See, e.g.*, *Lucas*, 505 U.S. at 1017 ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation"); *Hodel*, 481 U.S. at 716-17 (the right to devise property to one's heirs "has been part of the Anglo-American legal system since feudal times" and a total abrogation of that right requires compensation); *Loretto*, 458 U.S. at 434-35 (because it abrogates the right to exclude, a permanent physical invasion necessarily effects a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner"); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" and a regulation that imposes a navigational servitude on a marina owner thereby destroys the right to exclude and requires compensation).

226 *See* EPSTEIN, *supra* note 5, at 20-26 (criticizing Thomas C. Grey, *The Disintegration of Property*, in XXII NOMOS: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980), for characterizing the disintegration of property).

227 *See* Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187 (2004); Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1392 (1993).

228 *See Kelo*, 125 S.Ct. at 2680 (Thomas, J., dissenting) ("The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right. . . .").

229 *Id*. at 2676 (O'Connor, J., dissenting).

230 *See id*. at 2674 (reaffirming, though limiting, *Berman* and *Midkiff*).

This may well be the fault of the theory, not the Court. Any effort to limit non-compensable takings to the regulation of nuisance-like harms must not only rely upon a significantly heightened judicial scrutiny of regulatory and takings decisions, it must also confront the difficult line-drawing issue created by the need to identify the boundaries of nuisance and public use.[231] The natural rights advocate must assert that some line-drawing principle emerges from the Constitution itself—a principle so clear and strong that it trumps states' authority to utilize their police powers and to define the limits of property rights within their jurisdiction.[232] In *Lucas*, Justice Scalia himself conceded the impossibility of engaging in a principled line-drawing exercise between regulations that prevent harm, and thus do not require compensation, and those that confer benefits on others, which do.[233] Once one recognizes the difficulty of line-drawing, property's occasional tendency towards crystalline rules[234] becomes impossible to extend fully to the Takings Clause—whose enforcement, if considered as a means to limit non-nuisance based regulation, would inevitably require courts to make difficult judgments regarding contested land uses on the basis of conditions and norms that change across time and space.[235]

2. Property as Social and Political Institution/ Takings Clause as Mediating Device

An approach that emphasizes property's social nature and collective values foregrounds the relationships that ownership creates and expresses. This approach emphasizes the sense of responsibility and obligations an owner has to others and to the property she owns, as well as the mutual trust that a property regime is intended to foster among members of society.[236] In addition to defining the terms ownership and use, the rules of property law establish both the individual's place in society and her obligations "to respect the legitimate interests of others in controlling certain portions of the physical world."[237] Property serves as a foundation of decency, propriety, and good order. Accordingly, a constitutional property right must operate reciprocally both to protect an individual's ownership entitlements and to redistribute those entitlements when propriety or the community requires it.[238]

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231 *See* Stewart Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys*, 99 NW. U. L. REV. 231, 235-36 (2004) [hereinafter Sterk, *Inevitable Failure*]; Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L.J. 433, 435 (1995).

232 *See* Sterk, *Inevitable Failure*, *supra* note 231, at 236-39.

233 *See Lucas*, 505 U.S. at 1025-26.

234 *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L. J. 1, 9-24 (2000); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1086-88 (1997). Even crystalline rules and institutions of ownership (such as the fee simple, common ownership, publicly held corporations, and the like) change over time. *See* Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1558-65 (2003).

235 Sherwin, *supra* note 234, at 6-8.

236 *See* Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUDIES 1, 13 (1993)

237 JOSEPH WILLIAM SINGER, ENTITLEMENT 134 (2000).

238 *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997); Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 NOMOS 223, 239-40 (1994); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 (1981).

According to Joseph Singer, the Court has adopted at least a version of this approach in its 2005 takings decisions.[239] The Court, he argues, enforces constitutional rights by balancing a property-rule right that views ownership as paramount and the home as a "castle," against a liability-rule right in which ownership entitles an individual only to full compensation for her investment-backed expectations when the government takes her property for public needs.[240] This balance produces a "citizenship model" of property rights in which owners' rights to use, protect, and profit from their home are limited by their obligations, for the good of the community to which they belong, both to restrain themselves and, at times, to act affirmatively.[241] Thus, the map of regulatory takings claims that *Lingle* set out recognizes property as a "castle" when it is besieged by extreme regulatory effects, but otherwise subjects owners' expectations "to the crucible of human judgment to determine their reasonableness."[242]

This social view of property embraces precisely what natural law proponents fear as an excess of state intervention into the inherent rights of ownership—the political, community-based nature of decisions over how land is to be used. In this view, the social and political processes by which regulations are formulated and enacted are opportunities for successful dispute resolution and education about the advantages of self-government and the need to be sociable—rather than an inevitable legal catastrophe in which rights are ignored and trampled.[243] Insofar as the Takings Clause largely defers to the local political process but requires compensation or invalidates eminent domain actions when property rights are especially diminished or individuals are explicitly singled out, it functions both to protect and mediate. It encourages, if not forces, property owners to work with their neighbors, safe with the knowledge that a baseline of constitutional protection will be extended when their efforts result in the invalid or uncompensated expropriation of their property.

Without going so far as expressly adopting an educational or mediatory rationale for its decision in *Lingle*, the Court characterized its takings jurisprudence as an effort to balance concern for the individual with deference to the community and democratic will. Although *Lingle*'s "functional equivalence" doctrine identifies those regulatory instances that are "so onerous that its effect is tantamount to a direct appropriation or ouster" and thus require compensation,[244] the determination of when a regulation is *equivalent to* appropriation or ouster requires a court to "remain cognizant" of the government's authority to "adjust[] . . . rights for the public good," and consequently of the impossible burden government would face if it must pay compensation for every change in its laws.[245] Thus, the categories of per se takings relieve

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239 *See* Joseph William Singer, *The Ownership Society & Regulatory Takings: Castles, Investments, & Just Obligations*, 30 HARV. ENVTL. L. REV. ___ (forthcoming 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=845904.

240 *Id.* at 14.

241 *Id*. at 16-17.

242 *Id*. at 16; *see also* Poirier, *supra* note 6, at 150-83 (the "muddy rules" of property law and takings doctrine lead to negotiation among community members and, ultimately, stronger ties to community); Margaret Jane Radin, *Diagnosing the Takings Problem*, 33 NOMOS 248, 269-70 (1991) (contested liberal legal and political concepts and the need for pragmatic, situated judgments makes takings jurisprudence resistant to clear rules).

243 *See* Fenster, *supra* note 135, at 668-78; Carol M. Rose, *Property as the Keystone Political Right?*, 71 NOTRE DAME L. REV. 329, 363-65 (1996); Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1170 (1985).

244 *Lingle,* 125 S.Ct. at 2081.

245 *Id.* (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979), and citing *Pennsylvania Coal*, 260 U.S. at 413).

the "unique burden" they impose due to their equivalence with appropriation and ouster, while the *Penn Central* default test balances fairness concerns with the need to defer to government attempts to promote the public good.[246] *Kelo* operates similarly, although the majority decision seemed less concerned about unfairness to the individual's loss of their property and any potential shortfalls in compensation.

In this sense, the Court has implicitly, although not as explicitly as Singer appears to claim, adopted a conception of property rights as both an individual right and as an institution within which those rights are balanced against the community's needs, and of the Takings Clause as a means by which courts mediate this balance. Of the rationales I have reviewed in this Part, this conception of the Court's reasons for its 2005 decisions seems best able to capture at least parts of the decisions' substantive purpose. In Part III, I begin to identify the Court's more explicit institutional rationales in its federalist tendencies before arguing ultimately that legal process and institutional settlement in fact serve as the approach underlying the Court's 2005 decisions.

III. The Incomplete Explanation of Federalist Deference

At stake in most, although not all, takings decisions is how the federal constitution's Fifth Amendment applies to the actions of state and local governments. A number of scholars have persuasively asserted that federalist concerns for state law's supremacy over property law and state and local governments' authority to oversee land use in their jurisdictions either explain or should play a stronger role in the Court's takings jurisprudence.[247] These arguments assert the following: States, and not the federal Constitution, generally define property and the rights that attach to it;[248] states, by statute or constitution, authorize local governmental authority to regulate and take property, and can thereby limit that authority;[249] state constitutions include or have been read to include takings provisions, and state courts are perfectly capable of enforcing both those provisions and, if need be, federal ones;[250] and state legislatures have filled any perceived gaps

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246 *Id*. at 2081-82.

247 *See* Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 490-93 (2000); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 327 (1993) [hereinafter Michelman, *Property, Federalism, and Jurisprudence*]; Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 270-71 (2004) [hereinafter Sterk, *The Federalist Dimension*].

248 *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); T.V.A. v. Powelson, 319 U.S. 266, 279 (1943); Abraham Bell and Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74-76 (2005); Durchslag, *supra* note 247 at 494. One could argue, with Richard Epstein on the right and Frank Michelman on the left, that if states were the sole authority in the recognition of property rights, then they could simply define property narrowly in order to preclude a "taking," and thereby render the Fifth Amendment's protection meaningless. *See* Richard Epstein, *Takings, Exclusivity and Speech: The Legacy of* Pruneyard v. Robins, 64 U. CLE. L. REV. 21, 25 (1997); Frank I. Michelman, *The Common Law Baseline and Restitution for Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 57-58 (1997). But as Stewart Sterk argues, for historical and textual reasons, there is no reason to think the Constitution itself confers any foundation for developing a federal property law. *See* Sterk, *The Federalist Dimension*, *supra* note 247, at 224-25.

249 *See* DANIEL R. MADELKER, LAND USE LAW § 1.01 (5th ed. 2003).

250 *See* Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 ECOLOGY L. Q. 1, 34-36 (1999); Sterk, *The Federalist Dimension*, *supra* note 247, at 261-62.

and shortcomings in federal and state constitutional compensations requirements by imposing legislative requirements.[251] In light of these structural and institutional commitments, states and their subordinate agencies are, or should be, granted the autonomy to regulate land use and ownership within their jurisdictions and without overly intrusive federal constitutional rules imposed upon them by the U.S. Supreme Court and enforced by the federal judiciary.[252]

Federalism proponents offer consequentialist claims as well as structural ones, arguing that deference to state law and state courts offers significant beneficial consequences. State courts and legislatures are better situated than the Supreme Court to devise either optimal takings rules that could apply in multiple states, or rules that are narrowly tailored to a state's specific needs or legal culture.[253] The complex nature and wide variance of state property law advises against Supreme Court efforts to impose significant, complicated takings rules that would provide little guidance to state courts and legislatures and local regulators, and that would lead ultimately to uneven enforcement by state and lower federal courts.[254] Deference to lower levels of government also enables state and local jurisdictions to compete for potential residents with differentiated package of public goods, tax rates, and regulatory regimes; individuals can then simulate shoppers in their decisions about where to live to find jurisdictions that offer the most attractive packages of public goods amenities, property values, and taxes, and can thereby reward or punish local governments based on their effectiveness.[255] So long as some minimal legal checks are available to require bad-acting local governments to compensate victims of unfairly outlying regulation, then the market that develops through competitive localism will be more beneficial to property owners than rigorous federal constitutional protections.[256]

Federalism therefore appears to be a persuasive explanation of the Court's takings jurisprudence—and, indeed, two of the 2005 decisions explicitly noted its influence in their outcomes. The *Kelo* majority characterized early twentieth century precedent on public use as having "embodied a strong theme of federalism" in its respect for the decisions of state legislatures, and implied that this principle supported its decision.[257] The Court in *San Remo*

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[251] *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997).

[252] In this sense, the "federalism" at stake in the constitutional protection of property rights is one based upon state autonomy from federal interference, rather than what Ernest Young has characterized as federalism-based "sovereignty" doctrines that bar states from being held accountable for their violations of federal norms. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 3 (2004) [hereinafter Young, *Two Federalisms*].

[253] This may be especially true of state courts, which are freer to depart from the limiting rules on judicial power that emanate from Article III's justiciability doctrine. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836-40 (2001).

[254] Sterk, *The Federalist Dimension*, *supra* note 247, at 226-37.

[255] See FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 209, at 58 71 (summarizing and extending the theory of competitive localism in Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), and the literature that has developed from it); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 527-28 (1991).

[256] *See* FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 209, at 272-75, 283-85; *cf.* George Wyeth, *Regulatory Competition and the Takings Clause*, 91 NW. U. L. REV. 87, 105-06 (1996) (proposing regulatory takings approach that would require compensation when a state fails to behave in a competitive market by taking advantage of property owners and failing to balance the interest of all citizens equitably).

[257] *Kelo*, 125 S.Ct. at 2664. The majority also encouraged property owners to seek more stringent judicial review of economic development takings under state law from their state courts and legislatures. *See id*. at 2668.

suggested that its decision not to except takings decisions from the Full Faith and Credit Act relied in part on its "weighty" interest in demonstrating comity towards state court judgments, as well as on state courts' experience "in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."[258]

But notwithstanding occasional language to support it, federalism appears either to be a secondary rationale or a post hoc explanation for takings decisions. When the Court relies upon federalism at all—which it did not do in *Lingle*'s unanimous explanation of its regulatory takings doctrine—it typically raises it as one among a series of rationales.[259] Perhaps most significantly, the conservative justices who have expressed and voted more regularly for limiting the application of federal constitutional rights to the states, at least with respect to state immunity from federal statutory claims, [260] are those who have been most vocally opposed to the Court's approach to the Takings Clause.[261] At the same time, the justices who have opposed the Court's expansion of federalism in its state sovereign immunity decisions have also cited federalist principles and the need to defer to state judgments and legislatures in takings cases.[262] Even granting the sincerity of conservative justices' commitment to a natural, pre-political right in property, and of liberal justices' commitment to the sovereignty of state governments, one cannot help but conclude that their respective positions in takings cases represent a strategic approach to federalism that defers to state authority only to the extent that such deference creates a result that is consistent with other, competing concerns.[263]

See also Tahoe-Sierra, 535 U.S. at 342 (noting the significant, "suitable" role of state legislatures in engaging in land use regulation such as temporary planning moratoria).

[258] *San Remo*, 125 S.Ct. at 2505, 2507.

[259] *See Kelo*, 125 S.Ct. at 2661-64 (identifying "a strong theme of federalism" in the Court's public use precedents only *after* it stated that the "public purpose" rule, the weight of precedent, the need for judicial restraint, and the difficulty of setting judicial standards to police a more stringent public use test required upholding the challenged taking under the Public Use Clause).

[260] *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that under the Eleventh Amendment, the doctrine of state sovereign immunity bars suit by state employees for money damages against a state employer under the Americans with Disabilities Act of 1990); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (holding that the doctrine of state sovereign immunity bars private damage suits brought under the Age Discrimination in Employment Act of 1967); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress, acting pursuant to its Article I powers, may not abrogate states' immunity from private damage suits).

[261] *See, e.g.*, *Kelo*, 125 S.Ct. at 2677 (O'Connor, J., dissenting) (characterizing majority's deferral to state legislatures for property rights protection a "refusal to enforce properly the Federal Constitution" and "an abdication of our responsibility"); *San Remo*, 125 S.Ct. at 2508-09 (Rehnquist, C.J., concurring) (questioning whether any "federalism-based concerns" and "comity" require takings plaintiffs to exhaust all of the judicial remedies offered by the state before proceeding to federal court). *See generally* Michelman, *Property, Federalism, and Jurisprudence*, *supra* note 247, at 311-314 (explaining that Justice Scalia's decision in *Lucas* gives no deference to state court determinations of its own common law); Young, *Two Federalisms*, *supra* note 252, at 6-7 (identifying justices who tend to favor limits on federal power, three of whom—Chief Justice Rehnquist and Justices Scalia and Thomas—vote consistently in favor of expanding federal constitutional property rights protections against the police powers and taking authority of state and local governments).

[262] *See supra* notes 257, 258 (citing *Kelo*, *San Remo*, and *Tahoe-Sierra*, three majority opinions authored by Justice Stevens that rested in part on federalism grounds); Young, *Two Federalisms*, *supra* note 252, at 41-44 (identifying Justices Stevens, Souter, Breyer and Ginsburg, all of whom tend to vote against expanded federal constitutional protections for property rights, as holding a commitment to a "weak autonomy" model of federalism that would protect state and local regulation against excessive federal preemption).

[263] *Cf.* Michelman, *Property, Federalism, and Jurisprudence*, *supra* note 247, at 303 (noting that conservative justices' commitment to federalism subsides when it conflicts with their commitment to property rights).

Second, if federalism were in fact the central rationale for takings law then one would anticipate different results when the federal government, rather than a state or local government, is the defendant, or when federal definitions of property rights are under review. This has not been the case. In *United States v. Sperry*,[264] for example, the Supreme Court applied the same constitutional tests to a regulatory takings claim as when state or local governments were defendants,[265] while in *Ruckelshaus v. Monsanto Co.*,[266] the Court applied the same constitutional tests to a claim seeking invalidation of a federal statute under the Public Use Clause as when state and local governments were defendants.[267] The Court offered no hint that it considered either its takings jurisprudence or an underlying definition of property to be different when it considered a federally imposed user fee rather than one imposed by a state government.[268] Furthermore, the Federal Circuit, which under the Tucker Act is the sole forum that can award just compensation exceeding ten thousand dollars against the United States,[269] freely applies Supreme Court decisions that arose out of state court when it adjudicates claims brought against state and local governments.[270]

It is true that in two recent decisions on federal statutory redefinitions of property rights, *Hodel v. Irving*[271] and *Eastern Enterprises v. Apfel*,[272] the Court held that the respective property owners were due compensation for having suffered takings imposed by the federal government. This relatively rare result might indicate that the Court enforces the Takings Clause more strictly against the federal government than the states.[273] Neither decision, however, indicates that the fact that the Court was reviewing federal action determined its result. Rather, in *Hodel* the Court

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264 493 U.S. 52 (1989)

265 *See id*. at 59-64 (rejecting claim that charge deducted from an award granted by the Iran-United States Claims Tribunal did not affect a taking, and in the process applying but distinguishing *Loretto*, 458 U.S. at 419, and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)).

266 467 U.S. 986 (1984).

267 *See id*. at 1014-15 (applying, among other cases, *Midkiff* and *Berman* to claim that a federal statute requiring disclosure of trade secrets to competitors with just compensation was invalid under the Public Use Clause).

268 *See, e.g.*, *Sperry*, 493 U.S. at 62 n.8 (comparing user fee in *Sperry* to similar fee in *Webb's Famous Pharmacies*); *Monsanto*, 467 U.S. at 105 (comparing "procompetitive purpose" in *Monsanto* to similar purpose in *Midkiff*).

269 28 U.S.C. § 1491(a)(1).

270 *See, e.g.*, Bass Enterprises Production Co. v. U.S., 381 F.3d 1360 (Fed. Cir. 2004) (applying *Palazzolo,* 533 U.S. at 606, to correct its earlier decisions in Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed.Cir. 2000) and Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed.Cir. 1994), regarding the "parcel as a whole" rule). Earlier decisions seemed to indicate that the Federal Circuit had begun to develop its own approach to regulatory takings in the gaps left open by Supreme Court decisions reviewing state regulation, although at the time commentators noted that such idiosyncracies were more the result of ideological, anti-regulatory commitments than any federalist or programmatic approach the circuit had adopted. *See* David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 828-31 (1999); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 533-38 (1998); Michael C. Blumm, *Twenty Years of Environmental Law: Role Reversals Between Congress and the Executive, Judicial Activism Undermining the Environment, and the Proliferation of Environmental (and Anti-Environmental) Groups*, 20 VA. ENVTL. L.J. 5, 10-11 (2001). *Bass Enterprises*, among other decisions, demonstrates that the federal circuit considers the Supreme Court's takings decisions to apply equally to all state actors, federal or otherwise.

271 481 U.S. 704 (1987).

272 524 U.S. 498 (1998).

273 *See* Sterk, *The Federalist Dimension*, *supra* note 247, at 255-56.

held that the challenged statute effected a taking by expropriating, without compensation, an essential right of property, the right to pass valuable property to one's heirs.[274] The character of the property right taken, and not the identity of the state actor, was the reason the plaintiff was owed compensation. Similarly, the four-justice plurality in *Eastern Enterprises* held that the challenged statute's imposition of "severe retroactive liability" on the plaintiffs substantially interfered with their reasonable investment-backed expectation and therefore effected a taking.[275] Thus, the character of the government action and the extent of the burden on the property owner tipped the balance in favor of the property owner, not the identity of the state actor. In recent decisions, including those from 2005, the Court has not cited *Hodel* and *Eastern Enterprises* as examples of more stringent federal court review of the federal government: the majority in *Kelo* and Justice Kennedy in *Lingle* cited *Eastern Enterprises* as relevant precedent for considering actions against state agencies,[276] and the Court has repeatedly cited *Hodel* as relevant outside of the context of federal government actions.[277]

In short, the Court invokes federalist principles regularly in its takings decisions, and, at least during the Rehnquist Court, a majority of justices appeared to be committed to deferring to state and local government authority over land use controls. But, as Part IV argues, in the 2005 takings decisions federalism operated as part of the Court's broader, legal process-based commitment to institutional settlement and competencies.

IV. Of Institutions and Competencies: The Legal Process of Constitutional Property Rights

The approaches to takings law discussed in Part II seek to identify both what question should be asked about the extent of federal constitutional protections against takings and how it should be answered. The federalist approach discussed in Part III primarily asserts that federal constitutional law should not dominate the regulation and taking of property, which is largely of state concern. But none of these approaches frames takings law in the way the Court does in its 2005 decisions. Resolving a broad array of substantive and procedural issues, *Kelo*, *Lingle*, and *San Remo* provide a vision of structure and process that is consumed with the question of *who* should decide *which* question *when*—not *what* should be decided. This Part argues that the Court's focus most closely resembles that of the legal process school, and appears to borrow three of that approach's core concepts relating to governing institutions and their relative competencies. Recognizing the role of legal process in substantive constitutional doctrine helps

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274 *See Hodel*, 481 U.S. at 716.

275 *See Eastern Enterprises*, 524 U.S. at 528-32; *see also id*. at 549-50 (Kennedy, J., concurring and dissenting) (finding that the statute's retroactivity violated the Due Process Clause rather than the Takings Clause). Justice Kennedy's separate decision provided the deciding vote in *Eastern Enterprises*.

276 *See Kelo*, 125 S.Ct. at 2670 (citing Justice Kennedy's separate decision in *Eastern Enterprises* for the proposition that the constitution may require the invalidation of especially irrational government actions); *Lingle*, 125 S.Ct. at 2087 (Kennedy, J., concurring) (citing his separate decision in *Eastern Enterprises* for the proposition that the substantive due process doctrine protects property owners from especially irrational government actions).

277 *See, e.g.*, Palazzolo, 533 U.S. at 634-35 (O'Connor, J., concurring) (citing *Hodel* for the proposition that the Court has "never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee"); Phillips v. Washington Legal Foundation, 524 U.S. 156, 170 (1998) (citing *Hodel* for the proposition that "possession, control, and disposition are . . . valuable rights" of property, no matter if the property has little or no value to the owner).

us to understand the historical dynamic that resulted in the 2005 decisions, offers some predictive insight into the future of takings law (and especially of the Public Use Clause, if the Roberts Court decides to revisit the issue and overturn or limit *Kelo*), and enables better understanding of the generalized dissatisfaction scholars and the public have with the Court's takings jurisprudence.

A. Legal Process: Institutional Settlement and Competency

The legal process school (or approach) to governance and adjudication came to dominate legal education and public law scholarship in the post-war period, and today it remains a pervasive, if not wholly predominant, understanding of the modern regulatory state and especially of the judiciary's role within it.[278] Five members of the Rehnquist Court—Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer, all of whom remain on the Roberts Court—were explicitly introduced to the legal process approach as Harvard law students.[279] Its great expression was in the unpublished casebook "materials" that bore the name *The Legal Process*, which were developed by Harvard professors Henry Hart and Albert Sacks, used in classes at Harvard, and adopted in mimeographed form for use by the authors' colleagues and by other legal academics.[280] The approach arose out of a confluence of influences, including Justice Brandeis's opinions on the Supreme Court (such as *Erie Railroad Co. v. Tompkins*[281]), legal realism, Felix Frankfurter's administrative law and federal jurisdiction scholarship and teaching at Harvard, and, after Brandeis left the Court and Frankfurter joined it, decisions by Justices Frankfurter, Harlan, and Stone.[282]

Legal process proceeded from three basic claims. First, law is purposive and instrumental, and ultimately a means to "solve the basic problems of social living" and to enable the prosperity and smooth functioning of modern society.[283] Second, the "legal process" extends beyond formal judicial adjudication and statutes, and includes both private ordering (which Hart

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278 *See* William N. Eskridge, Jr., & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2032-33 (1994) [hereinafter Eskridge & Frickey, *Making*]; William N. Eskridge, Jr., & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 709-10 (1991); Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 124-27 (2005); Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 475 (1995); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1149-50 (2005).

279 William N. Eskridge, Jr., & Philip P. Frickey, *Historical and Critical Introduction* to HART & SACKS, *supra* note 11, at cxxv [hereinafter Eskridge & Frickey, *Introduction*]. *See also* J. Harvie Wilkinson III, *The Question of Process*, 98 MICH. L. REV. 1387, 1387 (2000) (chief judge of the Fourth Circuit U.S. Court of Appeals declaring his commitment to legal process approach).

280 On the history of the Hart and Sacks materials, see Eskridge & Frickey, *Making*, *supra* note 278, at 2033-42, and on its adoption by other legal academics, see Eskridge & Frickey, *Introduction*, *supra* note 279, at cii-civ. They were finally published, more as an historical text than as a working casebook, in 1994. HART & SACKS, *supra* note 11. As Neil Duxbury has observed, contemporary readers cannot replicate the materials' role in producing its main intended effect, the "classroom experience" of legal process. *See* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 653 (1993)

281 304 U.S 64 (1938).

282 *See* EDWARD A. PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION 223-28 (2000); Eskridge & Frickey, *Introduction*, *supra* note , at liv-lxviii; Fenster, *supra* note 278, at 124 27; Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 90-91, 94-96 (1935).

283 HART & SACKS, *supra* note 11, at 148.

and Sacks described as the "primary process of social adjustment"[284]) and the modern regulatory state.[285] Third, the processes and structures of the legal process, which compose a "coordinated, functioning whole made up of a set of interrelated, interacting parts,"[286] are "obviously more fundamental than the substantive arrangements in the structure of society . . . since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively."[287] In brief, as both an academic and normative matter, "process," defined quite broadly, overshadowed and perhaps even transcended substance.[288]

Three fundamental concepts and one significant insight from the legal process school are relevant to current takings jurisprudence, and I will focus here only on them.[289] First, the key legal process concept of "institutional settlement" refers to a society's development of "duly established procedures" that are employed by competent institutions to arrive at substantive decisions that are in turn binding and legitimate as a result of the process by which they are made.[290] These institutional arrangements include the federal system of governance, which, Henry Hart explained, offers "varied facilities, providing alternative means of working out . . . solutions of problems which cannot be solved unilaterally."[291] This includes the system of federal courts[292] as well as state laws and institutions.[293] The structured relationship among these various parts, as well as the interrelated and internal procedures utilized to enable this complicated apparatus to function, constitute the institutional settlement that the legal process school both privileged and obsessed over.

"Institutional competency," a second key legal process concept, asserts that a satisfactory institutional settlement would both assign the kinds of disputes or issues that arise to the institutions best able to resolve them, and enable institutions to develop and employ the optimal

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284 *Id*. at 159-61.

285 *Id*. at 342.

286 *Id*. at cxxxvii.

287 *Id*. at 3-4.

288 Gary Peller, *"Neutral Principles" in the 1950's*, 21 U. MICH. J.L. REF. 561, 569 (1988).

289 The primary literature produced during the heyday of the legal process approach, and the secondary literature commenting on and chronicling the approach, is vast. For summaries, see Duxbury, *supra* note 280; Eskridge & Frickey, *Introduction*, *supra* note 279. I am only extracting some of the approach's tenets, although the ones I discuss are among the most significant.

290 HART & SACKS, *supra* note 11, at 4.

291 Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 490 (1954).

292 *See* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994). Federal courts as a subject of academic inquiry was, contemporaneous with the rise of legal process, overtaken by what has become known as the Hart & Wechsler "paradigm," so-called because of the casebook edited by legal process theorists Henry Hart (who was also developing the legal process casebook materials at the same time) and Herbert Wechsler. *See* HENRY M. HART, JR. & HERBERT WECHSLER, eds., THE FEDERAL COURTS AND THE FEDERAL SYSTEM (Foundation, 1953); Fallon, *supra*. The Hart and Wechsler approach to federal courts shared with the legal process school an institutionalist focus, a functionalist approach to governing structures, and a triumphant celebration of the specific, narrow competencies that the judiciary offer. HART & WECHSLER, *supra*, at ix-x. Hart and Wechsler's institutionalism was more narrowly focused on federalism and the preservation of spheres of state sovereign autonomy as opposed to legal process's broader consideration of decision-making institutions, while Hart and Wechsler's functionalism focused on the separation of federal powers, while, again, legal process more broadly considered the legal system as an array of separate yet interlocking institutions. On the relationship between the Hart and Wechsler approach to federal courts and the Hart and Sacks approach to legal process, see Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 689-91 (1989) (book review).

293 *See* HART & SACKS, *supra* note 11, at 168-74.

procedures to reach the best results.[294] Put another way, institutional settlement both assumes and produces competent institutions—and, put together, institutional settlement around competent institutions produces good, informed policy.[295] A regulatory agency, for example, acquires expert skill from its technical knowledge and the experience that it develops through continuing administrative responsibility over a statutorily-created, regulatory scheme. The agency devotes the entirety of its resources and time and for which it develops rules and procedures.[296] A narrowly-focused, expert agency thus has greater competency in the area in which it operates than a court of general jurisdiction, which will have only a fleeting concern about the statute, the agency, and its implementing program.[297]

A third concept arising out of the legal process school that is relevant to the Court's takings jurisprudence relates to the specific processes and competencies of the judiciary—or, as the preface in the Hart and Wechsler casebook on federal courts stated, "what courts are good for."[298] The Hart and Sacks materials presented a straightforward statement of these competencies in contrast to those of political institutions: courts, Hart and Sacks advised, employ reason, as constrained by established technique and procedure, to resolve a dispute. By contrast, substantive policy disputes that can only be resolved by preference or "sheer guesswork" are better "left to be made by count of noses at the ballot box."[299] Courts, unlike legislatures, utilize "reasoned elaboration" in resolving a dispute, explicating the "general directive arrangement" that it applies "in a way which is consistent with the other established application of it," and "in a way which best serves the principles and policies it expresses."[300] A court that interprets a statute, therefore, must find the purpose of the statute and the general policy or principle it is intended to further, and then reason towards a result consistent with the statute's purpose;[301] while a court that applies common law doctrine must similarly attempt to discern from precedent the doctrine's purpose and rule, principle, or standard, and elaborate how the court's conclusions about the case and controversy before it flow from the generally applicable law.[302]

Although the original legal process materials that Hart and Sacks developed concerned statutory and general common law, other process advocates more explicitly extended the approach's insights to constitutional adjudication. As Hart's student Alexander Bickel,[303] among others, characterized it, Supreme Court review of the constitutionality of state action works as

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294 HART & SACKS, *supra* note 11, at 110-12.

295 HART & SACKS, *supra* note 11, at 154; Eskridge & Peller, *supra* note 278, at 721-22; Anthony Sebok, *Reading* The Legal Process 94 MICH. L. REV. 1571, 1574 (1996) (reviewing HART & SACKS, *supra* note 11).

296 Neither the Hart and Sacks material nor the legal process school as a whole focused extensively on administrative agencies and administrative law. As I explain elsewhere, the legal process emerged in part out of an earlier academic and judicial ferment in that field. *See* Fenster, *supra* note 278, at 123-27.

297 HART & SACKS, *supra* note 11, at 1290.

298 HART & WECHSLER, *supra* note 292, at x.

299 HART & SACKS, *supra* note 11, at 110-12.

300 *See* HART & SACKS, *supra* note 11, at 147.

301 *See id*.

302 HART & SACKS, *supra* note 11, at 644.

303 Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 619 (1991).

part of an organic web of competent institutions with set tasks and competencies.[304] Constitutional adjudication by the Supreme Court is limited to guaranteeing certain basic civil rights as a matter of positive law;[305] protecting the integrity of the political process against systematic distortion through exclusion or oppression of minorities;[306] and, above all, to the wise and prudent use of the Court's jurisdiction and power in order to preserve the Court's "mystic," legitimating function and to educate the nation as to correct constitutional principles.[307] When the Court wisely follows what Bickel famously called the "passive virtues" of avoiding avoidable conflict, it insulates itself from controversial political decisions and allows other, more directly accountable branches to assume the responsibility for resolving them.[308] The judiciary's specific institutional competence, then, is to articulate and passively enforce impersonal and enduring principles that would resolve, more through persuasion and education than through coercion, the problem that judicial review of the democratically elected political branches is distinctly counter-majoritarian.[309]

One final insight from legal process theory (although not unique to it[310]) will prove helpful in understanding the Court's takings jurisprudence—the institutional decision to rely upon rules or standards in creating general directive arrangements.[311] In order to bind itself and other institutions that follow its directives, a court (or any institution that issues commands) may place different degrees of definiteness in the form those directives take. It may decide to issue an authoritative rule whose command is triggered upon the determination of facts; or it may decide to grant a future decision-maker broader discretion though a standard that requires not only the determination of facts, but also the appraisal of consequences, moral justifications, and human experience.[312] More likely, the institution will choose some point along a continuum between these two poles, or it may include both rules and standards in its legal arrangements.[313] The choice of rules and standards is itself a decision based on considerations of institutional competence—with what specificity, a drafter inquires, can I predict the regularity of disputes and the correct resolution to them, or to what extent should I delegate determinations to a future decision-maker?[314]

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304 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 24-27 (1962). On Bickel and the explicit extension of legal process to constitutional issues in response to the rise of the Warren Court, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 35-42 (1996).

305 *See* Paul Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 545-51 (1951); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of National Government*, 54 COLUM. L. REV. 543, 578 (1954).

306 This revision of legal process to focus on political process occurred most explicitly in John Hart Ely's DEMOCRACY AND DISTRUST 73-179 (1980) and Jesse Choper's JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4-59 (1980).

307 BICKEL, *supra* note 304, at 26, 29-33.

308 *See* BICKEL, *supra* note 304, at 164-66, 197-98.

309 *See id*. at 16-28.

310 *See generally* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382-83 (1985) (citing a variety of sources to define and summarize the rule/standard distinction); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56-66 (1992) (same).

311 *See* HART & SACKS, *supra* note 11, at 138.

312 *See* HART & SACKS, *supra* note 11, at 138-40.

313 *Id*. at 140-41.

314 *Id*. at 140.

Concerned with governing institutions rather than politics, and with procedures rather than substance, legal process sought to preserve the status quo of post-war liberal consensus.[315] Despite—and perhaps because of—its prominence, the approach has faced significant criticism and revision, especially over the past two decades. Critics from both the critical left and the utilitarian middle and right have challenged many of the legal process advocates' most bedrock concepts, including its assumptions that law could be divorced from policy, that the political branches and regulatory agencies could operate free from capture by powerful interest groups, and that the judiciary could formulate and follow an objective, external standard based solely upon reason and prudence.[316] Legal process's vision of institutions in particular no longer reflects the complicated operations of the contemporary federal, state, and local administrative agency as an institution implementing public law programs in an advanced capitalist state, nor does it compare well with more sophisticated theoretical approaches to understanding agency structures and operations.[317] In other words, critics have argued, legal process assumed too much of institutions and procedures, and knew or predicted too little about the advancement of—and frustrations with—the modern, postwar state.

Liberal and conservative proponents of civil liberties and rights have also asserted that legal process was blind to enumerated constitutional rights, including the Takings Clause, and as such embraced structure and process over rights.[318] This criticism, too, focuses on the avoidance of substantive issues in legal process—although it appears to view law as an instrumental means to reach a primary goal of substantive ends, legal process remained fixed on process with such obsession that the correct legal process emerged as an end in itself.[319] As Morton Horwitz declared, legal process abandoned the doctrinal formalism of the pre-legal realist era in favor of an "institutional formalism" that fetishized abstract principles of governance rather than abstract legal rules.[320] No less than doctrinal formalism, which constituted a dominant underlying jurisprudential and ideological structure shaping the doctrinal development of late 19th and early 20th century constitutional law,[321] so legal process remains, fifty years after its emergence, a key logic in the Court's takings law.

B. The Legal Process of Takings Law

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315 *See* Eskridge & Frickey, *Introduction*, *supra* note 279, at cxi; Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1183-85 (1985). *See generally* Duxbury, *supra* note , at 642-53 (contextualizing legal process within broader academic conceptions of postwar consensus and the primacy of democratic procedures).

316 A useful summary, with citation to the numerous critiques lodged by critical legal studies and law and economics critics, appears in Eskridge & Frickey, *Introduction*, *supra* note 279, at cxviii-cxxv; and Edward L. Rubin, *The New Legal Process: The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393,1398 -1402 (1996).

317 *See* Eskridge & Peller, *supra* note 278, at 710; Rubin, *supra* note 316, at 1424-33.

318 *See* EPSTEIN, *supra* note , at 214; Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theory*, 89 YALE L.J. 1063, 1065, 1067 (1980).

319 *See* Tribe, *supra* note 318, at 1071.

320 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 254 (1992); *see also* RICHARD A. POSNER, OVERCOMING LAW 75-77 (1995) (associating legal process school with classical legal formalism); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 895 (1987) (noting analogous approach of early twentieth century formalism with Wechsler's use of legal process theory to critique the Warren Court).

321 *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); HORWITZ, *supra* note 320, at 9-31; *but see* EDWARD G. WHITE, THE CONSTITUTION AND THE NEW DEAL 167-70 (2000) (complicating the "Formalist/ Realist debate" of the early 20th century).

Rather than ushering in a rollback of the regulatory state,[322] the federal constitutional Takings Clause has now become suffused with legal process conceptions of passive judicial review and deference to the decisions of other branches of government. Each of the 2005 decisions described or assumed the existence of a complicated set of institutions involved in the land use regulatory process, each with its own significant role to play in reaching and implementing important decisions, as well as in checking the authority of other institutions. And each decision presented judicial review as a process of faithfully following precedent, fully elaborating and explaining doctrine, and, ultimately, deferring to elected officials except in narrowly defined instances when the government has clearly violated a well-articulated rule. The Court conjured up the specter of property rights in its ritualistic invocation of fairness principles and its concept of "functional equivalence," but ultimately presented a judicial posture and set of doctrines that place the Takings Clause squarely within the well-worn confines of legal process.

1. The Institutions of Land Use Regulation and Takings Litigation

The 2005 decisions display a great faith in settled allocations of decision-making, in the relative competencies of the institutions in charge of land use controls, and in the institutional system through which property owners challenge those controls. The majority in *Kelo*, for example, described a local government that had relied upon a state statute for authority to engage in comprehensive planning. The city "carefully formulated" and deliberated over an economic development plan, and devised a redevelopment that sought to coordinate multiple uses of an area that incidentally included petitioners' homes.[323] Unhappy citizens and property owners could seek changes to these processes through the state legislatures and state constitution,[324] as well as in city elections. The institutions were well-settled and the procedures they used appeared careful and trustworthy. Accordingly, they were constitutionally valid.

In *San Remo*, in addition to acknowledging Congress's role in limiting its authority to re-consider state court decisions that settle federal constitutional claims,[325] the majority described a functional federal system in which state and federal courts share responsibility for judicial review of constitutional claims, and in which the system's individual parts operate in a complimentary, efficient way to resolve disputes. It is a systemic strength rather than a constitutional flaw that a plaintiff who follows the dictates of *Williamson County* files her initial state claims in state court may never have a federal court consider her federal constitutional claims.[326] The Court's assumption that "the weighty interests in finality and comity" outweigh whatever advantages that takings' plaintiffs might gain from the chance to argue their claims before an additional court itself assumed thatthe institutional structure the court affirmed offered significant advantages.[327] First, the system's parts are interchangeable—it should make no

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322 *See supra* note 5 and accompanying text.

323 *Kelo*, 125 S.Ct. at 2665.

324 *Id*. at 2668.

325 *See San Remo*, 125 S.Ct. at 2500-01, 2505-06 (upholding the Ninth Circuit's refusal to reconsider petitioners' constitutional claims on the grounds that Congress has not excepted takings claims from the Full Faith & Credit Statute's command to respect the decisions of state courts). *Cf. id*. at 2507 (Rehnquist, C.J., concurring in the judgment) (agreeing that the Full Faith and Credit Statute precludes relitigation, but questioning the *Williamson County* rule that requires claims to be filed in state court first).

326 *See supra* notes 69-74 (discussing *Williamson County*, 473 U.S. 172 (1985)).

327 *San Remo*, 125 S.Ct. at 2505.

difference, for the purpose of constitutional adjudication, that a plaintiff begins in state or federal court. Second, the administrative and judicial exhaustion requirement enables the best decision-maker, a state court, to conduct the initial adjudication of a matter that is based on state substantive and administrative law. Third, the importance of preserving the system's functionality and efficiency supersedes any efforts to protect an individual property owner from state court adjudication that might allow her to bypass the system's settled process. And fourth, the system offers sufficient safeguards by allowing lower federal courts to consider federal constitutional issues when the state constitution's analogous provisions are not equivalent to the federal constitution, and by assuring property owners that they can appeal adverse state court judgments under federal constitutional law to the U.S. Supreme Court.

Lingle, too, invoked the institutional settlement of land use controls. Recall that the *Agins* "substantial advancement" test made three fundamental errors: it mistook a substantive due process test for a takings test; it reviewed the wrong end of a regulatory transaction by considering the government's purpose and actions rather than the regulation's effects on a property owner; and it invited a court to substitute its judgment for that of the government.[328] The latter two errors—which follow from the first, doctrinal one—assumed that certain questions regarding regulatory *purpose* and *mechanics* are for the judiciary to decide. This is exactly backwards—under the Takings Clause, the judiciary only considers the regulatory *effects* on the property owner.[329]

Obviously, deference is not a new concept to takings law. Courts have long recognized that every extension of a constitutional right for compensation against a government's use of its police powers, and every extension of the public use requirement on eminent domain, is also a limitation on long-settled and significant institutional authority that intrudes on legislative prerogative over social policy,[330] and that may cripple the government's regulatory authority and willingness to exercise it.[331] But considered together as a comprehensive overview of the Court's approach to substantive and procedural takings doctrines, the 2005 decisions signal that the Court's primary focus is on administrative and judicial process rather than on the extent of substantive property rights protections.

2. The Limits of Judicial Competency and Judicial Review

The 2005 decisions exemplify a modest approach to judicial review in two ways: they faithfully followed and elaborated upon precedent, and they upheld mostly open-ended standards

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328 *See supra* text accompanying notes 49-52 (summarizing *Lingle*, 125 S.Ct. at 2083-85).

329 *See supra* note 66 and accompanying text (summarizing *Lingle*, 125 S.Ct. at 2081-82).

330 *See, e.g.*, *Penn Central*, 438 U.S. at 133 n.30 (regulations that are "reasonably related to the implementation of a policy . . . [that is] expected to produce a widespread public benefit and applicable to all similarly situated property" does not effect a taking); Berman v. Parker, 348 U.S. 26, 31 (1954) ("Subject to specific constitutional limitations, 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, whether it be Congress legislating concerning the District of Columbia ... or the States legislating concerning local affairs."); United States ex rel. TVA v. Welch, 327 U.S. 546, 551 (1946) ("[I]t is the function of Congress to decide what type of taking is for a public use."); Miller v. Schoene, 276, U.S. 272, 280 (1928) (refusing to find violation of Takings Clause where the government is forced to make a choice that is unavoidable and its considerations of social policy "are not unreasonable").

331 *See, e.g. Mahon*, 260 U.S. at 413 (government "could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law")

that require lower courts to defer to the regulatory and eminent domain decisions of local governments. In terms of precedent, both the *San Remo* majority and Chief Justice Rehnquist's *San Remo* concurrence explained that they were bound by *Williamson County*'s exhaustion requirement to uphold the Ninth Circuit's decision, although the four-justice concurrence indicated an interest in reconsidering the litigation exhaustion requirement.[332] *Lingle* restated and stitched all of the significant regulatory takings decisions of the Rehnquist and Burger Courts together into a coherent whole—although it did so to overrule a stray part of one longstanding decision.[333]

To understand *Kelo*'s fidelity to *Berman* and *Midkiff*, recall that Justice Thomas's dissent conceded that ruling against the government defendant would require overruling a century of precedent interpreting the Public Use Clause.[334] Justice O'Connor's dissent attempted to find a middle ground that would keep *Berman* and *Midkiff*'s deferential posture but excise the "errant language" in those decisions that confused eminent domain authority with the police power.[335] But even if the language to which Justice O'Connor objected were removed, the core of the Court's settled deference to legislative determinations under the Public Use Clause would still stand—and, significantly, the*Kelo* majority did not rely upon or even cite either the "errant language" or the police power. As the majority noted, Justice O'Connor's proposed reading of public use precedent departed considerably both from the factual predicate of those decisions, which did not require harmful uses in order to authorize the taking, and from those decisions' examination only of the legislature's purpose in the taking rather than the land's future uses.[336]

All three decisions also provided fulsome explanations of the principles upon which they relied—*Kelo*, in affirming the need to defer to well-formulated, authorized decisions of local governments,[337] *San Remo*, in affirming the need to respect state court judgments and authority to decide federal constitutional claims,[338] and *Lingle*, in explicating the regulatory takings doctrine.[339] *Lingle* is especially telling in this regard. Recall that *Lingle* performed two significant moves: it found an unbroken narrative in the messy development of regulatory takings doctrine, and it discerned a basic principle that explained a complicated set of default standards and exceptional rules.[340] Due both to its unanimity and its effort to restate and justify the universe of takings tests, *Lingle* is the most authoritative regulatory takings decision since *Penn Central*, notwithstanding the fact that the question presented to the Court merely required it to explain and justify a stray doctrine that had never been enforced by the Supreme Court.

Doing so, *Lingle* also exemplified the 2005 decisions' effort to match the proper legal form to the degree of deference that the lower courts should give the decisions of political and administrative agencies. *Lingle* explained that outside of the "two relatively narrow categories"

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332 *See San Remo*, 125 S.Ct. at 2504, 2506; *id*. at 2507-09 (Rehnquist, C.J., concurring in the judgment).

333 *See supra* text accompanying notes 53-63.

334 *See Kelo*, 125 S.Ct. at 2678, 2683 (Thomas, J., dissenting).

335 *Id*. at 2674-75 (O'Connor, J., dissenting) (quoting *Midkiff*, 467 U.S. at 204, and *Berman*, 348 U.S. at 32-33).

336 *See Kelo*, 125 S.Ct. at 2666 n.16; *see also id*. at 2663-64 (summarizing *Midkiff* and *Berman*).

337 *Kelo*, 125 S.Ct. at 2664-67.

338 *San Remo*, 125 S.Ct. at 2504-07.

339 *See Lingle*, 125 S.Ct. at 2080-82.

340 *See* text *supra* accompanying notes 53-68.

of "per se" takings and the "special application" of the unconstitutional conditions doctrine for certain types of development conditions, courts should apply the multi-factor *Penn Central* standard.[341] To the former, narrowly-defined set of regulations, courts must apply the heightened scrutiny of strong rules; to the latter, much larger category courts must apply the more deferential standard. *Kelo* similarly directed lower courts through legal form, refusing to adopt any "rigid formulas and intensive scrutiny" and choosing instead to defer to the legislative determination of public use.[342] The Court rejected both a strict "use by the public" rule, which would limit the legislature's authority to respond to the "always evolving needs of society,"[343] and Justice O'Connor's suggestion of a middle ground between a narrow, bright-line rule and a deferential standard,[344] arguing that any test other than a deferential one would lead courts to review the wisdom of the legislature's determination and would ultimately cause legislative and regulatory uncertainty and delays in the planning and redevelopment process.[345] The Court thus offered a legal standard so open-ended and deferential that it left open the question of when, short of clear evidence of corruption, a taking for economic development purposes is sufficiently suspect to warrant invalidation.[346]

For the 2005 decisions, judicial competency extended to the question of decisional allocation and to the legal form of those decisions—with the assumption that the form will likely be some type of deferential standard—but not to the substantive matter of property rights. And thus the legal process of takings includes not only judicial competency but also the presumed competency of political and regulatory institutions as well as the system within which all of the relevant institutions have their place. The Court has shifted its focus from the protection of an individual's constitutional property rights from interference by the regulatory state to the decisional authority and processes of the regulatory state itself.

Conclusion: The Satisfactions and Frustrations of Takings Process

When courts adhere to the legal process approach, they resolve disputes conservatively—that is, in a jurisprudential, rather than political, sense. Legal process constrains judicial efforts to overturn precedent, especially when the motives reflect ideological reasons—although in doing so, of course, the legal process approach has the ideological effect of protecting the status quo and stabilizing constitutional common law.[347] In addition, legal process pushes courts to accept and affirm an existing system of governance and existing distributions of entitlements, rather than risk judicial legitimacy by imposing counter-majoritarian judgments against the will

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341 *See Lingle*, 125 S.Ct. at 2081-82, 2086-87.

342 *Id*. at 2663-64.

343 *Kelo*, 125 S.Ct. at 2662; *see also id*. at n.8 (noting that state courts had frequently circumvented or abandoned the "use by the public test" during times of significant economic development).

344 *See Kelo*, 125 S.Ct. at 2674-75 (O'Connor, J., dissenting) (asserting that economic development takings violate Public Use Clause, but allowing that takings resulting in privately owned property would be valid if the former use "inflicted affirmative harm on society").

345 *Id*. at 2667-68.

346 *Id*. at 2667.

347 *Cf*. Frank B. Cross, *Legal Process, Legal Realism and the Strategic Political Effects of Procedural Rules* (U. Tex. Law Sch. Pub, Law Research Paper No. 81, 2005), available at http://ssrn.com/abstract=837665 (empirical study of the precedential value of procedural doctrines demonstrating that although procedure appears non-ideological in character, it has ideological effects).

of politically accountable institutions.[348] And legal process counsels courts to avoid substantive legal issues that concern significant social and political problems, and focustheir attention instead on procedural and institutional issues.[349] Legal process, in short, is a theory of judicial restraint that, when adopted, constrains courts that might otherwise depart from existing legal and political arrangements.

This Article has proposed that the predominance of a legal process approach to takings explains the very different approach taken in the Court's 2005 decisions, when government defendants won in *Kelo*, *Lingle*, and *San Remo*, from that taken in the 1986 Term, when government defendants lost in three of the four decisions.[350] Two decades ago, the Court flirted with an active jurisprudence that found the existence of institutional failure that resulted in constitutionally suspect regulation; now, I have argued, the Court has fallen back to the "passive virtue" of deference to political institutions and a focus on process, and as a result has found constitutionally sufficient procedures that resulted in losing plaintiffs neither receiving compensation nor enjoining government actions.

The advantage of the latter, present approach is that it avoids conflicts with other branches of government—and especially, in the case of the application of the Takings Clause to land use controls, with the several states and their subsidiary agencies. And as with the somewhat ironic result that it is the liberal, pro-regulatory justices that embrace federalist rhetoric in takings decisions, so it is that the same justices also embrace a deferential, restrained approach to judicial review in the takings context when they may be less willing to do so in other substantive areas of law.[351] Richard Lazarus has complained that conservative Supreme Court justices, whether because of their apathy or antipathy towards environmental law, treat environmental statutes as merely another branch of administrative law and defer to the political branches whenever statutory language allows the Court to do so.[352] In takings law, it is liberal justices who treat the open-ended language of the Fifth Amendment as a type of administrative law that requires deference to political branches utilizing their police and eminent domain powers. But leaving aside whatever instrumentally ideological objectives the justices may harbor, legal process teaches that it is inherently satisfactory and downright virtuous to resolve a difficult question by deferring to the decision another branch of government, which is itself part of a well-considered complex of administrative institutions and procedures.

But it can also be a frustrating way to resolve constitutional disputes,, especially when the public that wants a better, more understandable explanation. Judicial passivity and institutional settlement may seem the logical choice to many judges and jurisprudes, but they sound unduly technocratic and mistaken, if not outrageous, in the context of an "ownership society" and a

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348 Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1712 (1998).

349 *See* Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMMENT. 557, 571-72 (1995).

350 *See supra* note 3.

351 *See generally* Peller, *supra* note 288 (characterizing the mainstream liberalism of legal process theory as a bulwark against social and legal change).

352 *See* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 737-41 (2000).

culture committed to the single family home.[353] If nothing else, the response to *Kelo* demonstrates the disjuncture between the quasi-scientific observations of legal process and the populist sentiments of the public and the anti-*Kelo* coalition.[354] Taking their cue from the majority decision,[355] political officials and property rights advocates have responded with a plethora of constitutional and legislative proposals at the federal and state level to limit economic development takings.[356] Although their actions are consistent with the tenets of legal process that would encourage political actors rather than judges to make significant, controversial political decisions, the fact that judicial passivity is deemed actively offensive by a broad segment of the public is more than a little ironic.

Legal process is also a frustrating approach for academics who would prefer a more candid, rigorous effort to defend or penalize government efforts to control land use. How does the Court know that the institutions it presumes are competent, which use procedures it also presumes are competent, in fact produce decisions that benefit the public and do not place an excessive burden on individual property owners? The answer in *Kelo* is unclear, because the Court refused to enunciate a test;[357] the answer in *Lingle* is based on over- and under-inclusive proxy tests for onerous regulatory burdens;[358] and the answer in *San Remo* is that a frustrated plaintiff who loses in state court may still file a petition for certiorari and hope for Supreme Court review.[359] Although legal process concepts such as institutional settlement and competency certainly have both normative and rhetorical appeal as principles that suggest offering judicial deference to other governmental bodies, they suffer as concepts of governance is their presumptive nature, as the Court's largely procedural answers to substantive questions demonstrate.

The legal process of the 2005 decisions rests on heroic assumptions about an agency's structural, rather than actual, competence.[360] It makes minimal effort to perform the difficult empirical task of comparative institutional analysis to identify which institutions more effectively perform certain tasks—the answer for which may not rest at all on the institution's structural position or procedures.[361] Accordingly, the 2005 decisions appear like thin gruel to

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353 For definitions and a critique of the "ownership society," see Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American "Ownership Society,"* 79 S. CAL. L. REV. 45 (2005); for details on homeownership rates, and especially on the unrepresentative nature of ownership patterns, see Lee Ann Fennell, *Homes Rule*, 112 YALE L.J. 617, 626-29 (2002) (reviewing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS (2001) [hereinafter FISCHEL, HOMEVOTER HYPOTHESIS]).

354 For a summary of the public response, see Daniel H. Cole, *Why Kelo is Not Good News for Local Planners and Developers*, __ Georgia State University Law Review ___ (forthcoming), available at http://ssrn.com/abstract=880149.

355 *See* Kelo, 125 S.Ct at 2668.

356 *See* Memorandum from Larry Morandi, Group Dir., Env't, Energy & Transp., Nat'l Conference of State Legislatures to State Legislators Interested in Eminent Domain Issues (Nov. 30, 2005), available at http://www.ncsl.org/programs/natres/EmindomainMemo.htm.

357 *See Kelo*, 125 S.Ct. at 2667 (refusing to articulate a test for whether an economic development taking is for private purposes as opposed to public purposes.

358 *See supra* text accompanying notes 166-170.

359 *See San Remo*. 125 S.Ct. at 2506.

360 *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886-88 (2003).

361 *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS 3-13, 271 (1994).

government advocates as well, given the Court's unwillingness to actively affirm the state action under review.[362] In this regard, *Kelo* pales considerably in comparison to *Village of Euclid v. Ambler Realty Co.*,[363] which almost eighty years earlier had upheld against constitutional challenge an early zoning ordinance in part because of the Court's confidence in the comprehensiveness, "painstaking consideration," and overall wisdom of the expert commissions that engaged in land use planning.[364] In *Kelo*, the majority appeared less confident of the wisdom of the city's actions, considering it sufficient that New London's procedures met a process-oriented constitutional baseline.

Merely rejecting or ignoring legal process insights may be no less frustrating, however. Imagine if the doubts expressed in the *San Remo* concurrence about the wisdom of requiring plaintiffs to exhaust state court remedies, as well as state administrative remedies, bore fruit and that aspect of *Williamson County* was overturned.[365] Would the lower federal courts do a fairer, more effective job of resolving land use disputes? A number of federal judges emphatically think not.[366]

More dramatically, imagine if the Roberts Court decided to overturn or limit the majority decision in *Kelo* and impose a stricter, rule-like limit under the Public Use Clause on eminent domain actions that result in the taken property ending up in private hands. The Court's institutional settlement of its regulatory takings doctrine in *Lingle* demonstrates the hurdles facing that effort. After more than a generation of experimentation with heightened judicial scrutiny of regulatory actions under the Takings Clause, the Court has decided, ultimately, to "eat crow" and scale back its regulatory takings jurisprudence.[367] Any effort to re-invigorate constitutional property rights protections under the Takings Clause faces a difficult choice. It could abandon the Rehnquist Court's ultimate commitment to legal process theory, and consider some other jurisprudential approach to constitutional challenges under the Takings Clause; or, if

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362 *See* Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court:* Kelo v. City of New London, 7 VT. J. ENVTL. L. 41, 42 (2005), available at http://www.vjel.org/takings/mihaly_article.pdf. This was made even clearer when, after *Kelo* was issued Justice Stevens announced in a public speech that he disagreed with New London's redevelopment project as a matter of policy, but felt duty-bound to uphold it in his position as a justice. *See* Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A-1.

363 *Id*. at 2665 n.12 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

364 *Euclid*, 272 U.S. at 394-95.

365 *See San Remo*, 125 S.Ct. at 2509-10 (Rehnquist, C.J., concurring in the judgment).

366 *See, e.g.*, River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994) (Easterbrook, J.) ("Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; none has ever prevailed in this circuit. . . ."); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (Posner, J.) (in affirming a district court's dismissal of a substantive due process claim, exclaiming that if the panel were to hold otherwise, "we cannot imagine what zoning dispute could not be shoehorned into federal court in this way, there to displace or postpone consideration of some worthier object of federal judicial solicitude. Something more is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case."). Judges affiliated with the University of Chicago Law School do not hold a monopoly on such sentiment—or on its sarcastic articulation. *See, e.g.*, Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989) ("The Supreme Court has erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards."). And this judicial preference dates back more than a century. *See* Kansas ex rel. Tufts v. Ziebold, (D. Kan.), affirmed, Mugler v. Kansas, 123 U.S. 623 (1887) (reprinted in *Mugler*, 8 S.Ct. 273, 277).

367 *See supra* text accompanying note 1.

it decides to remain within the comforting confines of legal process, it will face the same doctrinal and adjudicatory challenge of defining the extent of substantive constitutional property rights and the limits of governmental actions that produced the wondrous complexity of the regulatory takings doctrine. We could end up a decade hence with a muddled Public Use Clause doctrine, and all of the attendant judicial confusion and law review commentary. In other words, the Roberts Court would be required to walk a difficult tightrope between the passively virtuous respect for political institutions that legal process prescribes and the substantive intervention into the work those institutions perform that more fulsome property rights protection would demand.

The 2005 decisions have placed this dilemma in the foreground. They may have put to rest the major issues arising out of Takings Clause, but they do not do so satisfactorily. The fact that they do so at all, however, is an accomplishment attributable in no small part to the continuing salience of legal process.