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Kelo, Lingle, and San Remo Hotel: Takings Law Now Belongs to the States

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KEYNOTE ADDRESS

KELO, LINGLE, AND SAN REMO HOTEL: TAKINGS LAW NOW BELONGS TO THE STATES

William A. Fletcher*

I. INTRODUCTION

Thank you for inviting me to speak to you this morning to open this timely symposium and to join so many talented and knowledgeable panelists. I am flattered to have been invited and am delighted to be here. In your program I am listed as having taught Federal Courts, Civil Procedure, and Constitutional Law. That is true, but I have a dirty little secret: for the first ten years of my career at Boalt, I also taught Property. I am happy to be back in this familiar and interesting part of the legal world.

Last term, the Supreme Court decided three extremely important takings cases. Even one of them would have been an event. The cases are *Kelo v. City of New London*,¹ *Lingle v. Chevron U.S.A., Inc.*,² and *San Remo Hotel v. City & County of San Francisco*.³ *Kelo* will be the focus for most of the rest of the day, so I will try not to let it take too much of my time. *Lingle* and *San Remo Hotel* are not front and center for the rest of today's symposium, but I will give them equal time in my opening remarks. Not only are these two cases important in their own right, but they also tell us some quite

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1. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).
2. *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005).
3. *San Remo Hotel v. City & County of San Francisco*, 125 S. Ct. 2491 (2005).

remarkable things when considered in combination with *Kelo*.

II. *KELO V. CITY OF NEW LONDON*

First, *Kelo*, a true takings case. The City of New London, Connecticut, is a blue-collar town on the coast of eastern Connecticut at the mouth of the Thames River.⁴ The Coast Guard Academy is just upriver. Connecticut College, formerly Connecticut College for Women, is just outside of town. The Electric Boat division of General Dynamics, which manufactures nuclear submarines, is just across the river in Groton, Connecticut. A United States Navy submarine base is upriver from New London, on the Groton side of the river. The base had been on a recent list of recommended base closures, but has been saved, at least for now.⁵

New London, like a number of formerly prosperous towns in Connecticut, has been economically depressed for some years.⁶ The New London Development Corporation, a private nonprofit entity, was reactivated in the late 1990s to help plan for economic development.⁷ Two bond issues were authorized to assist in planning for an area near Fort Trumbull, a waterfront site just downriver from downtown that had been recently abandoned by the Navy.⁸ In February 1998, the pharmaceutical company Pfizer announced plans to build a \$300 million research facility near Fort Trumbull.⁹ After about a year of planning, the city council authorized the Development Corporation to purchase approximately ninety acres near the anticipated Pfizer facility and Fort Trumbull by private negotiation, if possible, or by eminent domain, if necessary.¹⁰ The ninety acres were intended to be used for a conference hotel, an office building, a riverwalk, office space, retail shops, a Coast Guard museum, and about eighty new private residences.¹¹

Some property owners in the ninety-acre area refused to

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

5. Jesse Hamilton, *Navy Releases Construction Funds; Groton Sub Base to Get \$54 Million*, HARTFORD COURANT, Aug. 30, 2005, at B7.

6. *Kelo*, 125 S. Ct. at 2658.

7. *Id.* at 2659.

8. *Id.*

9. *Id.*

10. *Id.* at 2659-60.

11. *Id.* at 2659.

sell and brought suit, claiming that the condemnation of their properties would violate the “public use” requirement of the Fifth Amendment.¹² Some of the plaintiffs were sympathetic representatives of white, middle America.¹³ For example, plaintiff Wilhelmina Dery was born in her house.¹⁴ She and her husband had lived there since their marriage sixty years earlier.¹⁵ By a vote of five to four, the United States Supreme Court upheld the condemnation, holding that the uses to which the ninety acres were to be put were “public” within the meaning of the Fifth Amendment.¹⁶

Justice Stevens wrote the majority opinion. Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented. Justice Stevens relied primarily on two cases in which the Court had held that the challenged projects came within the “public use” requirement. First, he relied on *Berman v. Parker*,¹⁷ in which the Court upheld a “slum clearance” project in an extremely poor, 97.5% black neighborhood in southwest Washington, D.C.¹⁸ Second, he relied on *Hawaii Housing Authority v. Midkiff*,¹⁹ in which the Court upheld a Hawaii statute under which private landowners were obliged to sell their properties in fee simple at fair market value to their lessees.²⁰

As Justice O’Connor pointed out in her vigorous dissent, both *Berman* and *Midkiff* could be distinguished from *Kelo* as dealing with severe problems posed by existing land uses.²¹ In *Berman*, the problem was that the condemned area was, in the jargon of land-use planning, severely “blighted.”²² In *Midkiff*, the problem was that land ownership was concentrated in very few hands.²³ The state and federal government owned 49% of the land in Hawaii, and only

12. *Kelo*, 125 S. Ct. at 2660.

13. *See id.*

14. *See id.*

15. *Id.*

16. *Id.* at 2668.

17. *Berman v. Parker*, 348 U.S. 26 (1954).

18. *Id.* at 36; *see also Kelo*, 125 S. Ct. at 2663, 2665 (discussing *Berman*, 348 U.S. at 30).

19. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

20. *Kelo*, 125 S. Ct. at 2663-64.

21. *Id.* at 2674 (O’Connor, J., dissenting).

22. *Id.* at 2673 (O’Connor, J., dissenting).

23. *Midkiff*, 467 U.S. at 232, 245; *see also Kelo*, 125 S. Ct. at 2674 (O’Connor, J., dissenting) (discussing *Midkiff*, 467 U.S. 229).

seventy-two private landowners owned an additional 47%.²⁴ On Oahu, the most populated island, only twenty-two landowners owned 72.5% of the fee simple private land.²⁵ Justice Stevens stated forthrightly that the ninety-acre parcel in New London was not “blighted” and that there was no problem concerning concentration of land ownership.²⁶ But the *Kelo* majority nonetheless held that the condemnation in New London came within the principle established by *Berman* and *Midkiff*.²⁷

III. *LINGLE V. CHEVRON U.S.A., INC.*

Second, *Lingle*,²⁸ a so-called regulatory takings case. Concerned about the high retail price of gasoline, the State of Hawaii passed a statute controlling rents charged by gasoline refiners and wholesalers to retail gasoline dealers who leased their stations from the refiners and wholesalers.²⁹ The stated purpose of the statute was to lower retail gasoline prices by lowering the dealers’ costs.³⁰

The Ninth Circuit held that the statute was a “regulatory taking” if it did not “substantially advance a legitimate state interest.”³¹ In other words, if the rent control statute did not “substantially advance” the purpose of lowering the retail price of gasoline, it was invalid. I was on that Ninth Circuit panel and disagreed with my colleagues. I contended that the only means-end test that should be applied was the “reasonableness” standard applied to ordinary price-control legislation under the Due Process Clause.³²

On remand from the Ninth Circuit, the district court held a hearing in which two economists testified. One concluded that the rent control statute “substantially advanced” the purpose of lowering retail gasoline prices,³³ and the other

24. *Kelo*, 125 S. Ct. at 2674 (O’Connor, J., dissenting).

25. *Id.* (O’Connor, J., dissenting) (citing *Midkiff*, 467 U.S. at 232).

26. *See id.* at 2664-65.

27. *See id.* at 2665.

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

29. *Id.* at 2078.

30. *Id.*

31. *See Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d 1030, 1033-37 (9th Cir. 2000), *rev’d sub nom. Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005).

32. *Id.* at 1043, 1048-49 (W. Fletcher, J., concurring).

33. *See Chevron U.S.A., Inc. v. Cayetano*, 198 F. Supp. 2d 1182, 1888 (D. Haw. 2002) (testimony of Professor Keith Leffler).

concluded the opposite.³⁴ The district court found, as a matter of fact, after considering the substance of the economists' testimony, as well as their demeanor (!), that the rent control statute did not substantially advance the purpose of lowering retail gasoline prices.³⁵ The district court therefore struck down the rent control statute as an uncompensated taking.³⁶ On appeal to the Ninth Circuit, the panel again split.³⁷ Two judges affirmed the district court's factual finding as not clearly erroneous.³⁸ I dissented, again contending that the proper test was the reasonableness test.³⁹

The "substantially advances a legitimate state purpose test" was first articulated by the Supreme Court in a land use case, *Agins v. City of Tiburon*.⁴⁰ In that case, the Court held that an open space zoning ordinance in Marin County, California, constituted an unlawful taking if it (1) did not substantially advance a legitimate state interest,⁴¹ or (2) denied a landowner all economically viable use of his land.⁴² As articulated in *Agins*, the two parts of the test were independent: a zoning ordinance was an unconstitutional regulatory taking if *either* of the two criteria were met.⁴³

In a remarkable turnabout, the Supreme Court in *Lingle* unanimously disavowed the "substantially advances" test in all regulatory takings cases, including zoning cases.⁴⁴ Now, after the Court's decision in *Lingle*, a regulation is a taking only if it effectively denies the landowner all economically viable use of his or her land, as, for example, in *Lucas v. South Carolina Coastal Council*.⁴⁵ The "substantially

34. See *id.* at 1187-88 (testimony of Professor John Umbeck).

35. *Id.* at 1188-89, 1191-92.

36. *Id.* at 1193.

37. See *Chevron U.S.A., Inc. v. Lingle*, 363 F.3d 846 (9th Cir. 2004), *rev'd sub nom.* *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005).

38. See *id.* at 848-58.

39. See *id.* at 858-61 (W. Fletcher, J., dissenting).

40. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

41. *Id.* at 260 (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

42. *Id.* (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978)).

43. *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2082 (2005) ("Because this statement is phrased in the disjunctive, *Agins*' 'substantially advances' language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test.").

44. See *id.* at 2087.

45. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

advances” test survives only in such cases as *Nollan v. California Coastal Commission*⁴⁶ and *Dolan v. City of Tigard*,⁴⁷ where the regulatory authority exacts some kind of concession—such as an easement—in return for granting permission to build on or otherwise use property. As a result of *Lingle*, state and local authorities can now regulate land use to their hearts’ content, except in exaction cases such as *Nollan* and *Dolan*, free from any takings liability as long as they do not deprive the landowner of all economically viable use of the land.

I have to say that I was surprised by the decisiveness with which the Court rejected the *Agins* “substantially advances” test. I had assumed that the *Agins* test was valid in challenges to zoning regulations and had dissented only on the ground that it should not be extended to rent control.⁴⁸ I entirely agree with the Court’s decision to abandon *Agins*, but I had not argued for it in my dissent, and I hardly expected it.⁴⁹

IV. *SAN REMO HOTEL V. CITY & COUNTY OF SAN FRANCISCO*

Third, *San Remo Hotel*,⁵⁰ another regulatory takings case. The San Remo Hotel is a sixty-two-unit, three-story hotel near Fisherman’s Wharf in San Francisco.⁵¹ About twenty-five years ago, San Francisco became concerned about the conversion of residential hotels into tourist hotels on the ground that the shortage of residential hotel rooms contributes to homelessness.⁵² In 1990, the hotel applied to San Francisco for permission to convert the hotel from a mixed use to an exclusively tourist use.⁵³ The city allowed the conversion, but only on the condition that the hotel pay a so-

46. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

47. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

48. See *Chevron U.S.A., Inc. v. Lingle*, 363 F.3d 846, 858-61 (9th Cir. 2004) (W. Fletcher, J., dissenting), *rev’d sub nom.* *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005).

49. See *id.*

50. *San Remo Hotel v. City & County of San Francisco*, 125 S. Ct. 2491 (2005).

51. *Id.* at 2495.

52. See *San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 125-28 (Cal. 2002).

53. *San Remo Hotel*, 125 S. Ct. at 2496.

called “in lieu” fee of \$567,000.⁵⁴

The hotel challenged this fee in state court under various provisions of state law, but the action was stayed by agreement of the parties while the hotel pursued a federal takings suit in federal court.⁵⁵ The Ninth Circuit, however, held that the district court should abstain under *Railroad Commission of Texas v. Pullman Co.*⁵⁶ to allow the state court to rule on all questions of state law presented in the case in the hope that the state court decision would allow the federal court to avoid ruling on the federal takings question.⁵⁷ The Ninth Circuit noted that under *England v. Louisiana State Board of Medical Examiners*,⁵⁸ the hotel could reserve any federal questions for later decision by the federal district court.⁵⁹

The hotel then reactivated its state court suit, but explicitly reserved its federal takings claim under *England* for later decision by the federal court.⁶⁰ The state court proceeded to rule against the hotel on its state-law takings claim, noting that California and federal takings law were the same on the relevant issues presented in the case.⁶¹

After the state court decision became final, the hotel came back to federal court to litigate the federal takings claim it thought it had reserved.⁶² But the hotel was now met by a defense of issue preclusion, given that the state court had already decided the takings issue under state law, and given that state and federal takings law were the same in relevant part.⁶³ The preclusion argument was based on 28 U.S.C. § 1738, which requires a federal court to give the same preclusive effect to a state court judgment as the courts of that state would give that judgment.⁶⁴

54. *Id.*

55. *Id.*

56. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

57. *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1105 (9th Cir. 1998), *aff'd*, 125 S. Ct. 2491 (2005).

58. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964).

59. *San Remo Hotel*, 145 F.3d at 1106 n.7.

60. *San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 91 n.1 (Cal. 2002).

61. *Id.* at 109.

62. *See San Remo Hotel v. City & County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004).

63. *Id.* at 1090.

64. *San Remo Hotel v. City & County of San Francisco*, 125 S. Ct. 2491,

In a five to four decision, the Supreme Court held that, despite the hotel's effort to reserve its federal takings question under *England*, § 1738 required that preclusive effect be given to the state court judgment in accordance with California's law of issue preclusion.⁶⁵ Just on these facts, *San Remo Hotel* is interesting enough. But Justice Stevens, writing for the majority, went on to discuss more generally the interrelationship between § 1738 and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.⁶⁶

In *Williamson County*, the Court had held that a federal regulatory takings claim is not ripe for decision by a federal court until a landowner has obtained a final determination from the state—including a decision from the state courts—as to what the state will actually do, and whether the landowner will be compensated.⁶⁷ *Williamson County* means that all state-law aspects of regulatory takings claims must first be litigated in state court. Only when state court litigation is finished and the state court has ruled against the landowner may that landowner come into federal court with a takings claim based on federal law. On its facts, *San Remo Hotel* holds that issue preclusion applies under § 1738—that is, preclusion applies to issues actually litigated and decided in the state court.⁶⁸

But Justice Stevens's discussion in *San Remo Hotel* of *Williamson County* and § 1738 appears to extend to claim preclusion as well.⁶⁹ I conclude from his discussion that the most likely reading of *San Remo Hotel* is that a federal court must apply both forms of res judicata: issue preclusion and claim preclusion. All states have some version of use-it-or-lose-it claim preclusion, requiring a litigant to raise all related claims in the same proceeding on pain of not being

2500 (2005); 28 U.S.C. § 1738 (2000) ("Such Acts, records and judicial proceedings or copies thereof, so authenticated, 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, Territory or Possession from which they are taken.").

65. *San Remo Hotel*, 125 S. Ct. at 2503.

66. *See id.* at 2504-06.

67. *Williamson County v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985).

68. *See San Remo Hotel*, 125 S. Ct. at 2501-02.

69. *See id.* at 2500-07.

able to raise them in a later proceeding. California's version is a little less expansive than that of some other states,⁷⁰ but even in California this requirement has real bite.

If I am right that this is how *San Remo Hotel* should be read—and I am pretty sure that I am—the practical effect of the Court's decision is that there can be no regulatory takings litigation challenging state and local land use regulation in federal district court. That is, *Williamson County* requires that suits involving potential federal regulatory takings claims first be litigated in state court. Only after the landowner has lost in state court does she have a ripe federal takings claim. But once the landowner has lost in state court, there is a Catch-22. She may have a federal takings claim, but § 1738 prevents her from litigating it in federal court.

If the landowner presented her federal takings claim to the state court along with her state takings claim, or if the state and federal law of takings is the same in that state, the landowner will be precluded from relitigating the issues in that federal claim in federal court by § 1738 and the state law of issue preclusion. That is the direct holding of *San Remo Hotel*.

If, on the other hand, the landowner did not present a federal takings claim to the state court—presenting only state-law takings claim to the state court—she will be precluded by claim preclusion from litigating the federal claim in federal court, for under state preclusion law she almost certainly would have been required to bring that related federal takings claim in state court along with her state-law claim. This is not the direct holding of *San Remo Hotel*, but it is by far the most likely reading of the Court's discussion of the interrelationship between *Williamson County* and § 1738.

Four of the nine justices in *San Remo Hotel* did not concur in Justice Stevens's opinion, but rather merely concurred in the judgment. Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, agreed with the majority that the combination of *Williamson County* and §

70. See generally Walter M. Meiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559 (1998) (discussing California's claim preclusion doctrine).

1738 required the result reached by the majority.⁷¹ But they argued that *Williamson County* was a mistake and should be reconsidered.⁷² Chief Justice Rehnquist admitted that he had joined the Court's opinion in *Williamson County*, but suggested that it should be cut back such that a federal takings claim should be considered ripe as soon as all state administrative procedures have been exhausted.⁷³ In his view, there should be no requirement that state judicial procedures be exhausted.⁷⁴ The reason for his proposed revision of *Williamson County* is precisely the reading of *San Remo Hotel* that I have just suggested—that the combination of *Williamson County* (in its current form) and § 1738 effectively relegates all litigation regarding federal takings challenges to state and local land use regulations to the state courts. The federal-law aspects of state court decisions may be reviewed on certiorari by the United States Supreme Court, but an occasional policy-setting decision by the Supreme Court is far different from retail, case-by-case litigation in federal district court.

V. THE FUTURE OF TAKINGS JURISPRUDENCE AFTER *KELO*, *LINGLE*, AND *CHEVRON*

So where do these three decisions leave us? The takings problem—both true takings and regulatory takings—is notoriously intractable. The problem, and its resolution, are easy to state in general terms: a single person or an identifiable small group of people should not have to bear a burden that in fairness should be borne by the public at large. But the precise meaning of the “shoulds” in the previous sentence has been a matter of considerable debate, challenging some of the best judicial and academic minds over the past century.

Taken together, these three decisions represent a substantial change—entirely in the direction of relegating takings issues to the political and legal judgments of the states. In *Kelo*, the Supreme Court endorsed a broad reading of the “public use” requirement. *Kelo* effectively gives the

71. See *San Remo Hotel*, 125 S. Ct. at 2507-08.

72. See *id.* at 2507-10.

73. See *id.* at 2509-10.

74. See *id.* at 2507-10.

green light to state and local redevelopment projects as long as there is a sufficient degree of planning by the redevelopment authority and as long as that authority can avoid the “stupid staffer” problem⁷⁵ of admitting that purely private gain, rather than public use, is intended by the project.

The defenders of New London’s redevelopment project argued on two grounds that *Kelo* made no new law. First, they argued that various analogues to redevelopment projects have been endorsed under the “public use” heading almost from the beginning of the Republic.⁷⁶ Second, they stressed that *Berman* and *Midkiff* have reaffirmed this principle in this century.⁷⁷ I will not pause to argue nineteenth-century precedents, but I will point out that, for the reasons given by Justice O’Connor in her dissent, the redevelopment project approved in *Kelo* is substantially different from those in *Berman* and *Midkiff*. Even if the Court’s decision in *Kelo* is not, in fact, a substantial broadening of prior law, it can plausibly be seen as such.

In *Lingle*, the Court eliminated the “substantially advances” test from the regulatory takings analysis, significantly broadening the regulatory power of state and local authorities in land use cases.⁷⁸ After *Lingle*, the only regulatory takings test is whether the regulation effectively takes away all economically viable use of the property.

Finally, in *San Remo Hotel*, the Court held that the combination of *Williamson County* and § 1738 effectively requires that all regulatory takings claims against state and local authorities be presented to state courts.⁷⁹ After *San Remo Hotel*, it will be impossible to bring a regulatory takings challenge in federal district court. With the exception of the

75. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (“In Justice Blackmun’s [dissenting] view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.”).

76. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2662-63 & nn.7 & 9 (2005).

77. See *id.* at 2662-64.

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

79. *San Remo Hotel v. City & County of San Francisco*, 125 S. Ct. 2491, 2492 (2005).

Supreme Court's certiorari jurisdiction, the state courts are now the exclusive protectors of private property owners against takings effected by state and local authorities.

Kelo and *Lingle* represent broad delegations of land use decisions to the political bodies of state and local governments. After *Kelo*, the "public use" test under federal law will be easily satisfied for virtually all redevelopment projects authorized by state or local redevelopment agencies. After *Lingle*, a regulatory taking will be found under federal law only when the regulation has made the property effectively worthless. Local redevelopment agencies, as well as local zoning boards, have thus been given enormous leeway under federal law that they arguably did not have before *Kelo*, and certainly did not have before *Lingle*.

As a complement to *Kelo* and *Lingle*, *San Remo Hotel* represents a complete delegation of land-use regulatory takings challenges to state judicial bodies. Not only is federal regulatory takings law substantially less restrictive on state and local political bodies under *Kelo* and *Lingle*, but now, under *San Remo Hotel*, what restrictions are left will be enforceable only in state court.

It may be heresy to suggest, so soon after these decisions have come down, that two of them may not endure. *Kelo* has aroused enormous popular opposition.⁸⁰ Its practical impact will almost certainly be blunted by various state and local legislative initiatives,⁸¹ as indeed Justice Stevens suggested it might be.⁸² But I also think it is possible that the Supreme Court may eventually overrule it, following the example of the Michigan Supreme Court in the infamous *Poletown* case,⁸³ finding a more restrictive "public use" requirement than it

80. *Kelo* and the opposition it aroused were frequently discussed during the confirmation hearings for Chief Justice Roberts. See *On Eminent Domain, Supreme Court Workload, End of Life and Consistency*, N.Y. TIMES, Sept. 15, 2005, at A28.

81. Bills to limit condemnation powers have been introduced in at least thirty-one states. See, e.g., Terry Pristin, *Eminent Domain Revisited: A Minnesota Case*, N.Y. TIMES, Oct. 5, 2005, at C9.

82. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

83. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). The Michigan Supreme Court recently recognized the error of *Poletown* in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), but also identified circumstances where the transfer of condemned private property to private entities could nevertheless be constitutional. See *id.* at 474-76.

was willing to find in *Kelo*.⁸⁴

Unlike *Kelo*, *San Remo Hotel* has gone essentially unremarked in the popular press (and, to a remarkable degree, in the academic and professional press). In practical terms, however, *San Remo Hotel* may be a far more important case than *Kelo*. Jurisdiction stripping statutes, which deprive the federal courts of authority to decide cases, have often been suggested by political actors who wish to avoid the consequences of substantive decisions by the United States Supreme Court in certain controversial areas of the law. For the most part, such statutes have not been enacted into law, and those few that have been enacted have been interpreted narrowly by the Supreme Court. But in *San Remo Hotel*, the jurisdiction stripping has been accomplished by the Court itself.

Both *Kelo* and *San Remo Hotel* were decided by five to four votes, and both were decided before the appointments of Chief Justice Roberts and Justice Alito. But the mere change of personnel will not result in the reversal of these decisions, for Chief Justice Rehnquist and Justice O'Connor disagreed with the majority in both cases. In *Kelo*, they were in dissent; in *San Remo Hotel*, they merely concurred in the judgment. Consequently, if either of these two decisions is to be cut back or reversed, this will have to result from a change of mind rather than a change of Justices. But as we have just seen in *Lingle*, where the Justices changed their mind about *Agins* decided twenty-five years before, this can happen. Perhaps when the *Santa Clara Law Review* convenes a property law symposium in 2030, we will be discussing the Supreme Court's repudiation of *Kelo* and *San Remo Hotel*.

84. *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting) (quoting *Poletown* dissenting judges, 304 N.W.2d at 464, 465).
