WHAT IS KELO AND WHAT DOES IT HAVE TO DO WITH ENVIRONMENTAL LAW?

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University of Hawaii School of Law Environmental Law Program
Fall Colloquia Series

September 22, 2005
12:30 – 1:30 p.m.

This session will detail recent developments in the “public use” issue in eminent domain, focusing on the U.S. Supreme Court decision in Kelo v. City of New London. Kelo and its companion case on regulatory takings, Lingle v. Chevron USA, are important cases for environmental lawyers to understand, even though they are not, strictly speaking, classic “environmental law” cases. This session will explain why. We will conclude with questions and answers.

I. Takings Law Background
II. Kelo – “Public Use” Update
III. Lingle – Regulatory takings
IV. Brief Amicus Curiae (Kelo v. City of New London)
V. Brief Amicus Curiae (Lingle v. Chevron, USA)
VI. An Offer You Can’t Refuse – Land, Home Ownership, is Worth Protecting and Fighting For (Honolulu Advertiser, July 3, 2005)

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Mr. Thomas received his LLM, with honors, from Columbia Law School where he was a Harlan Fiske Stone Scholar, and his JD from the University of Hawaii where he was an editor of the Law Review. Mr. Thomas has also taught law at the University of Santa Clara School of Law, and was an exam grader and screener for the California Committee of Bar Examiners. His latest article (with his co-authors Ken Kupchak and Greg Kugle) is Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawaii (forthcoming in volume 27 of the U. Haw. L. Rev.).

Mr. Thomas filed briefs amicus curiae in Kelo and Lingle, addressed this topic at the National Association of Counties Annual Conference on July 18, 2005, at land use conferences in California, and was the featured speaker at a national teleconference on eminent domain on September 20, 2005.

Materials and cases discussed today are available online at www.inversecondemnation.com. Contact him at rht@hawaiilawyer.com. The views expressed in this outline and during the seminar are entirely those of the author.
I. Takings Law Background

A. The reasonable use of property is a fundamental constitutional right, and may be limited but not prohibited by government

1. U.S. Constitution
   a. Fourteenth Amendment – due process, procedural and substantive
   b. Fifth Amendment – due process, takings

   “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.” U.S. Const. amend. V.

   Purpose: “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Armstrong v. United States, 364 U.S. 40 (1960)

   c. Tenth Amendment – governments of limited powers; those not enumerated are reserved to the people

2. State Constitutions
   a. Due process
   b. Takings

   1. “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.” Cal. Const. art. I, § 19

   2. “Private property shall not be taken or damaged for public use without just compensation.” Haw. Const. art. I, § 20

3. Federal statutes may also impact local exercises of eminent domain, e.g., Uniform Relocation Assistance Act, 42 U.S.C. § 4601, et seq.

4. State statutes, zoning enabling acts, and local charters and ordinances may contain limitations on the eminent domain and the
police power.

a. e.g., Cal. Health & Safety Code § 33030, et seq. (blight requirements in eminent domain)

b. e.g., Honolulu, Haw., Rev. Ord. ch. 38 (repealed 2005) (taking of condominium leases and selling to lessees)

B. Relationship Between Federal and State Constitutional Protections

1. U.S. Constitution is floor, not ceiling; state law may provide more protection, but not less

2. Michigan courts allow more protection under Michigan Constitution’s public use clause than under U.S. Const.

   a. e.g., County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (Poletown overruled – economic development takings must pass three-part test to be valid under state public use clause)

3. Concurrent jurisdiction to hear federal or state claims in either federal or state court – but beware of Williamson County and Rooker-Feldman in regulatory takings claims

C. “Private Property”

1. Property is a fundamental Constitutional right –

   a. “The right to build on one’s own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a ‘governmental benefit.’” Nollan v. California Coastal Comm’n, 483 U.S. 825, 833 n.2 (1987)

   b. “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.” Dolan v. City of Tigard, 512 U.S. 374 (1992)

   c. “the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no
less than the right to speak or the right to travel, is in truth a ‘personal’ right, whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.” *Lynch v. Household Fin. Corp.*, 405 US 538, 552 (1972)

d. Litmus test: substitute “speech” for “property” in the Court’s rationale – is there a principled distinction that can be made justifying different results?

2. “Property” not defined by federal law, but by reasonable expectations under state (common and statutory) law


b. Blackacre is property?

c. “background principles” and the Blackstonian search for common law

**D. The Power (Not The Right) To Take Property For Public Use**


2. U.S. and most state constitutions do not contain affirmative grants of the power of eminent domain

3. Power of eminent domain is inherent in sovereignty – a power inherited by the federal government (and presumably held in trust for the states as admitted to the Union) from the English Crown
E. Regulatory Takings aka “inverse condemnation”

1. When the regulatory state “goes too far” – “Regulatory” takings

   a. “A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922).

   b. competing interest – “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”

   c. “police power” has no constitutional definition, except exercises of government authority that do not violate due process or require compensation (negative definition)

2. Compare “Inverse Condemnation”

3. Only two types of regulatory takings – “per se” and “ad hoc”

   a. “Per se” takings – when regulation either:

      (1) “Fails to substantially advance a legitimate state interest” – After Lingle, limited to exactions/unconstitutional conditions cases in takings claims:

         (a) Nollan – means tied to ends

         (b) Dolan – government must show that development exactions have an “essential nexus” to a legitimate government interest and that the exactions bear a “rough proportionality” in nature and extent to the impact of the proposed development (an individualized determination, but not mathematically precise)
(2) Deprives owner of beneficial use


b. If not “per se,” then *Penn Central* ad hoc factors –

(1) Regulation’s economic impact on owner

(2) Extent to which regulation interferes with “distinct, investment-backed expectations”

(3) The “character of the government action”


F. Remedies

1. Just compensation = fair market value on the date of the taking (aka highest and best use)

just compensation owed for the time invalid regulation clouded property)

2. Public use problems = injunction or declaration of invalidity

3. Substantially advance = strike down/declaration of invalidity

II. Kelo – “Public Use” Update

A. The Offer You Can’t Refuse – Kelo v. City of New London

1. Purpose of Public Use Clause – prevent abuse, insure that power not exercised for private gain

2. Contrast “private use” –

   a. Taking “from A to give it to B” = private use – Calder v. Bull, 3 U.S. 386 (1798)

   b. Evolving standards of “public use” – from public use to public purpose


3. What’s left after Kelo?
a. Eminent domain equated with Euclidean zoning process – must be comprehensive

(1) Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding comprehensive zoning against due process challenge)


c. State constitutions and courts should provide greater protection

d. State law and local ordinance are independent limitations, especially in initiative-intensive states such as California

e. Federal statutory limitations on projects with federal money?

4. What to make of Justice O’Connor – writing for the majority in Lingle, but dissenting in Kelo?

B. Singing The Poletown Blues: County of Wayne v. Hathcock


1. Taking must be justified by “public necessity of the extreme sort otherwise impracticable” – e.g., highways, roads, canals, and other instrumentalities of commerce; to overcome true “holdouts”

2. Valid only if the new owner “remains accountable to the public in its use of the property,” e.g., new private owner of the property agreed that the state public utility commission would direct its use of a pipeline
3. If “the selection of the land to be condemned is itself based upon public concern,” or “facts of independent public significance” i.e., primary goal of the taking must be traditional police power purposes; putting private property in another private owner’s hands is only “incidental” to public goal

b. Other states’ approaches – legislative and judicial

C. What’s Next?

1. Takings from A to B for the same or less intense use or purpose

2. Airing out of Justice Kennedy’s “smoke-filled room”

3. Touching the third rail of judicial review: *Lochner* revisited?

III. *Lingle* – Regulatory Takings


2. “Substantially advance” was not much of a takings test to start with

a. mostly limited to rent control cases

b. very few instances where property owners prevailed, see, e.g., *Tandy Corp. v. City of Livonia*, 81 F. Supp. 2d 800 (E.D. Mich. 1999) (regulation did not advance proffered government interest)
3. “Substantially advance” standard now is a test of due process, not takings

4. What to make of Justice O’Connor – writing for the majority in *Lingle*, but dissenting in *Kelo*?
IV. Brief *amicus curiae* (*Kelo v. City of New London*)
In The
Supreme Court of the United States

SUSETTE KELO, et al.,

Petitioners,

vs.

CITY OF NEW LONDON, et al.,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Connecticut

BRIEF AMICI CURIAE OF ROBERT NIGEL RICHARDS, CHARLES WILLIAM COUPE, JOAN ELIZABETH COUPE, AND JOAN COUPE SUPPORTING PETITIONERS

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QUESTION PRESENTED

What protection does the Fifth Amendment’s public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of “economic development” that will perhaps increase tax revenues and improve the local economy?
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INTEREST OF AMICI CURIAE

Amici curiae Robert Nigel Richards, Charles William Coupe, Joan Elizabeth Coupe, and Joan Coupe (Richards Family) respectfully submit this brief in accordance with Supreme Court Rule 37. The Richards Family is the owner of private real property situated on the western slope of Hualalai, an active 8,200 foot volcano on the island of Hawaii. Their property is not blighted. Like Petitioners, the Richards Family’s property, which has been in their family for generations, has been threatened with the exercise of eminent domain to benefit private developers. In County of Hawaii v. Robert Nigel Richards, et al., Civ. No. 00-1-0181K (Haw. 3d Cir. filed Oct. 9, 2000), the County of Hawaii at the sole discretion of a private developer, is attempting to condemn portions of the Richards Family’s property to site a road without which a neighboring Pebble Beach-style project could not be developed. In order to obtain its land use approvals, the developer must construct an access highway from the main road to its project site. The developer chose a route though the Richards Family’s property that cleaves their parcel in two.

The County has relinquished to the developer the responsibility of selecting and acquiring the Richards Family’s property for its highway. The developer and the

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1 The parties consented to the filing of amici curiae briefs, and copies of the parties’ written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than amici curiae and counsel made a monetary contribution toward the preparation or submission of this brief.

2 The developer is not an agency of government or a public utility authorized by law to exercise the power of eminent domain. See Haw. (Continued on following page)
County entered into a development agreement under which, at the demand and sole discretion of the developer, the County must exercise its power of eminent domain to take the Richard Family’s property for the developer’s highway. The developer, not the County, is required to pay the costs and expenses associated with the condemnation of the property. The Richards Family was not a party to the development agreement, and did not receive personal notice or an opportunity to provide input or comment prior to its execution. The court is currently considering the Richards Family’s objections to the taking of their property, including challenges under the public use clauses of the Fifth Amendment and the Hawaii Constitution.

Hawaii property owners understand the impact of harsh application of eminent domain, having lived for more than thirty-five years under the Land Reform Act at issue in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). The Richards Family has borne entirely the cost of preparing this brief, as they believe the issue before the Court is of vital importance to their family and other private property owners nationwide who find themselves on the business end of eminent domain abuse, threatened with having their property taken away for the benefit of

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Perhaps sensing that The Land Reform Act’s oligopoly-busting public use rationale is no longer applicable and that some exercises of eminent domain have gone “too far,” Honolulu has given preliminary approval to repeal its version of the Act. Honolulu Revised Ordinances chapter 38 permits condominium lessees to petition the city to seize their leases from the lessors and turn them over to the lessees upon payment of just compensation. The city council has voted 7-2 to repeal and final approval is pending. *See* Gordon Y.K. Pang, *Council Favor End to Condo Law*, The Honolulu Advertiser (Aug. 12, 2004).
another private party who has promised the government that they will make “better” use of it.

SUMMARY OF ARGUMENT

In undertaking the review of public use issues reserved to the judiciary in *Midkiff*, 467 U.S. at 240, this Court should adopt the same heightened scrutiny for exercises of the eminent domain power justified by promises of a better economy as it has established for suspect regulatory takings: a taking justified only by economic development is invalid if it fails to substantially advance a legitimate state interest. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002) (regulation is an illegal taking if it “fails to substantially advance a legitimate state interest”).

Under the Fifth Amendment’s Takings Clause, the affirmative exercise of eminent domain to take private property is valid only if it is for “public use” and just compensation is provided. U.S. Const. amend. V. In regulatory takings jurisprudence, a regulation has the same effect as an exercise of eminent domain when it either fails to substantially advance a legitimate state interest, or deprives an owner of beneficial use of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). A regulation substantially advances a legitimate state interest when there is a nexus between the regulation and a legitimate aim of government, and the regulation is tailored to achieve its end. *Nollan v. California Coastal Comm’n*, 482 U.S. 825, 834 (1987) (nexus required); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“rough proportionality” between goal and means used to achieve it).
Amici suggest this takings standard is applicable in this case. The “substantially advance” test is a restatement of the public use requirement and should govern affirmative takings as well as regulatory takings. There is no principled distinction between eminent domain and regulatory takings, and this case presents the Court with an opportunity to clarify the public use requirement and hold that unless the government shows that taking the property will substantially further the goal of an improved economy or increased tax revenue, it is invalid under the Public Use Clause.

ARGUMENT

I. UNSHACKLED FROM MEANINGFUL JUDICIAL REVIEW OF PUBLIC USE, TAKINGS JUSTIFIED ONLY BY PROMISES OF “MORE” OR “BETTER” ARE BECOMING MORE COMMONPLACE

Next to the power to prosecute criminals, eminent domain – government’s power to confiscate private property against the will of the owner – is perhaps the most formidable power wielded by government against individuals. See Vanhorne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (use of eminent domain to take property from one private owner and vest it in another is “despotic”). With eminent domain, completely innocent families can be forced from their homes and established businesses shut down against their will, and the property owners are nearly powerless to prevent it.

Because eminent domain is too easily subject to abuse, the Fifth Amendment and the constitutions of all fifty states permit the government to take private property
only if the owner is justly compensated and only if the property is taken for “public use.” See, e.g., U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”); Haw. Const. art. I, § 20 (“Private property shall not be taken or damaged for public use without just compensation.”).

The government has wide latitude in defining the public objectives of exercises of eminent domain, but use of the power solely to confiscate one owner’s property and turn it over to another is barred. See Vanhorne’s Lessee, 2 U.S. (2 Dall.) at 310 (legislature has “no authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation.”); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (“law that takes property from A and gives it to B” is “against all reason and justice.”).

This Court has upheld the exercise of eminent domain to remedy what amounted to public nuisances by taking severely blighted property and turning it over to a redeveloper. Berman v. Parker, 348 U.S. 26 (1954). Other courts, however, stretched that rationale to take non-blighted property, allowing government to use eminent domain to condemn perfectly good property and vest it in others who promised to make “better” use of it. These takings could not be justified by urban renewal, only a “better” economy. For more than twenty years until recently overruled, the seminal case permitting such “economic development” takings was Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), overruled, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). In Poletown, an entire Detroit neighborhood was condemned for a new plant for General Motors. There was nothing wrong with the neighborhood and it was not
blighted, so the public use advanced was that the sprawling 450+ acre auto plant would pump up the city’s declining tax base. The citizens whose 1,400 homes, businesses, and churches stood in the way of this “progress,” however, had a different view. Their neighborhood was hardly a slum – it was a vibrant working-class community, and they didn’t want to leave. The Michigan Supreme Court, however, permitted the taking. **Poletown** was the first case in which a court upheld the “economic development” rationale, and the case served as the model for other governments around the country when they began flexing their eminent domain muscle.\(^4\)

Not surprisingly, governments facing declining tax revenues, stagnant economies, and strained infrastructure have become more and more aggressive in their use of eminent domain to appease private interests that promise to alleviate these problems, straying from traditional uses to more and more outlandish exercises, such as selling zoning along with eminent domain power. Thus, Costcos were slated to replace churches (non-profits don’t pay property taxes and big box retailers emphatically do). **Cottonwood Christian Center v. Cypress Redevelop. Agency,\(^4\)**

\(^4\) Condemning agencies have also been emboldened by **Hawaii Hous. Auth. v. Midkiff**, 467 U.S. 229 (1984). In that case, the Court held that pronouncements of public use by the legislature deserve deference, but reminded that “[t]here is . . . a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use,” even if it is a narrow one. *Id.* at 240. Even though the Court acknowledged that the question of public use remained a judicial one, many view *Midkiff* as a free pass, mistakenly assuming that virtually any use declared by the condemning agency will be considered public by the courts. See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61 (1986) (“most observers today think the public use limitation is a dead letter”).
218 F. Supp. 2d 1203 (C.D. Cal. 2002). In Atlantic City, a casino attempted to evict a widow from her home to build a parking lot for limousines. Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Sup. Ct. Law. Div. 1998). In Las Vegas, a 72-year old homeowner vainly fought attempts to take her home for a parking lot to service off-Strip casinos. City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003), cert. denied, 124 S. Ct. 1603 (2004). All of these uses were considered “public” by the government. And the actual list of owners like Petitioners and Amici whose properties are targeted and who must turn to the courts for protection is much longer. See Dana Berliner, Public Power, Private Gain – A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain (2003). Whatever protection the Public Use Clause offers against eminent domain over-reaching is in danger of very nearly disappearing altogether.

II. THE RIGHT TO KEEP YOUR HOME IS FUNDAMENTAL AND DESERVES THE HIGHEST PROTECTION

Pervading this case is the undeniable fact that Petitioners are making lawful, non-noxious use of their property, and the only reason it is being targeted for acquisition is that someone else has convinced the condemning agency that they will make better use of it and that the public will consequently benefit. However, it is the function of the market, not the government, to make value judgments of lawful private uses of property, and to select among them, particularly when someone’s home is involved.
This principle of reasonable use of property is enshrined as one of the great trinity of rights acknowledged in both the Fifth and Fourteenth Amendments, on par with life and liberty. Property and one’s home are explicitly protected in the Third, Fourth, Fifth, and Fourteenth Amendments, and impliedly in the penumbra of the First, Second, Ninth, and Tenth Amendments. See U.S. Const. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”); U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”); U.S. Const. amend. V (“nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); U.S. Const. amend. XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law.”); Lawrence v. Texas, 539 U.S. 558, 562 (2003) (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.”); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992) (right to use property for non-noxious uses is a fundamental “stick” in the property rights bundle).5

5 Highlighting the fundamental nature of private property, even the People’s Republic of China is amending its constitution:

The state has the right to expropriate or collect private property in line with laws in the public interest, but has to compensate owners, under the draft amendment.

(Continued on following page)
An individual's right of property is not different from other fundamental Constitutional and human rights and deserves utmost protection when threatened. *Lynch v. Household Finance Corp.*, 504 U.S. 538, 552 (1972) (“The dichotomy between personal liberties and property rights is a false one.”). Property is “sacrosanct,” *Hathcock*, 684 N.W.2d at 769, and an individual has a right “to own property and use it as he pleases.” *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003).

The Constitutional acknowledgment and protection of property and the home are founded upon Lockean principles that property rights, as a source of individual liberty, cannot be subject to absolute state control. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (the state cannot simply wipe out property rights by prospective legislation); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (the government cannot defeat property rights and permit a taking simply by declaring that

Tang said the draft amendment set up a critical rule to curb public power and guarantee private owners compensation if they suffer losses in the public interest.

The proposed amendment is hailed not only by the wealthy elite, but also ordinary citizens who feel they have suffered injustices.

“We are not always so confident in representing private clients as sometimes judges lean towards the public party,” said Liu Weiping, a Shanghai-based real estate lawyer, who has represented individuals in cases of illegal demolition of homes by local governments and developers.

“With the constitutional guarantee of private property, local governments and real estate developers won't recklessly level private residences as if it is in the nature of things,” he said.

*Amendment to Private Property Hailed*, China View (Jan. 1, 2004).
the property never existed at all); Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (the state may not, “by ipse dixit” transform private property into public property). See also Lucas, 505 U.S. at 1014 (government’s ability to redefine the range of interests included in the ownership of property is limited by the Constitution).

III. TAKINGS ANALYSIS HAS LONG REQUIRED A SUBSTANTIAL NEXUS BETWEEN THE GOVERNMENT’S PROFFERED GOAL AND THE MEANS USED TO ACHIEVE IT

This Court’s modern takings jurisprudence since its inception in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), has followed a heightened scrutiny test for actions alleged to be de facto takings of property by inquiring whether an action is “substantially related” to a legitimate public purpose, and even if so, whether the regulation devalues property to such a degree that it is no different than a taking of title by eminent domain. Penn Central Trans. Co. v. New York City, 438 U.S. 104, 127 (1978). In Penn Central, the Court held that a regulation is an enjoinable taking unless it serves “a substantial public purpose.” Penn Central, 438 U.S. at 127 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)). The Court held it is:

implicit in Goldblatt that a use restriction on real property may constitute a “taking” if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner’s use of the property.

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6 In Chevron USA v. Lingle, 363 F.3d 846 (9th Cir.), cert. granted, 125 S. Ct. 314 (No. 04-163, Oct. 12, 2004), the Court is reviewing the State of Hawaii’s challenge to the long-standing “substantially advance” takings standard in a case where the Hawaii Legislature responded to the perceived high price of gasoline by capping the rent oil companies may charge dealers who lease company-owned gas stations. The District Court concluded that the rent control law was a taking because it did not substantially advance the legitimate interest of controlling gas prices since rather than decreasing prices, the legislation would actually have the opposite effect of raising them.
Although never explicitly articulated, the two-part regulatory takings standard is plainly based on the text of the Takings Clause, and the “substantially advance” test is a restatement of the public use requirement.7

_Nollan_ explained when an action advances a legitimate state interest. The coastal commission had conditioned permission to build a beachfront home on the owner’s assent to provide public access across his property. The Court held that before the public could be invited to use private property, the government must demonstrate a legitimate interest in doing so, and that an “essential nexus” exists between the interest and the means used to achieve it. _Nollan_, 482 U.S. at 837. The Court accepted the determination that public views of the beach was a legitimate goal of government, and acknowledged that the agency could have prohibited the building of the house if it blocked such views, or could have allowed the building of the house with conditions designed to protect public views. Thus, the agency could have required the property owner “provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.” _Id._ at 836-37. The coastal commission had not done so, however, but conditioned its development approval on the exaction of public access that in no way furthered its stated goal of protecting views.

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7 The test of whether a regulation “denies all economically beneficial or productive use of land,” _Lucas_, 505 U.S. at 1015, is based upon the Just Compensation Clause – “nor shall private property be taken . . . without just compensation.” The “substantially advance” test is a restatement of the Public Use Clause. The remedies available also track the language of the Takings Clause: compensation for denial of all beneficial use, and invalidation for failure to substantially advance a legitimate state interest.
The “constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.” Id. at 837 (emphasis added). Lacking a substantial nexus to the legitimate goal, the condition was invalidated. In Dolan, the Court further explained:

We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Dolan, 512 U.S. at 390.8

Heightened scrutiny is designed to insure that suspect actions requiring the surrender of property for public use are in fact for public use and not “an out-and-out plan of extortion.” Nollan, 482 U.S. at 837; Dolan, 512 U.S. at 387. Eminent domain supported solely by “Field of Dreams” promises of economic development without some showing that the takings will achieve that result presents the same threat — see Kelo, 843 A.2d at 581-82, 602 (Zarella, J., concurring in part and dissenting in part) — that the

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8 The nexus test has thus far been limited to cases in which the government effects a per se taking by requiring dedication of property to the public, but the instant case presents a much more egregious example of a per se taking, as there is the threat of a total takeover by another of title not simply a government invitation to public trespass. Also, unlike the typical exaction situation, in eminent domain the property owner is not presented a “take it or leave it” deal. An owner facing an eminent domain action has no right to refuse compensation and keep her property.
condemning authority, rather than representing the consent of the governed, has been captured by special interests or has an ulterior motive. Laura Mansnerus, Note, Public Use, Private Use, and Judicial Review in Eminent Domain, 58 N.Y.U. L. Rev. 409, 432 (1983). It also is subject to the danger that it may be more efficient for private parties who desire to acquire another’s property to “invest” in eminent domain action through the condemning agency than it is to attempt to purchase the property on the open market. Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 Tex. Rev. L. & Pol. 49, 52 (1998).9

9 Midkiff’s rationale is not readily adaptable to economic development takings because its conclusion that pronouncements of public use are coterminous with the police power is dependent upon the expectation that a property owner subject to eminent domain has sufficient political capital to participate meaningfully in the legislative process, and the courts should not interfere in such areas where representative bodies have more institutional competence to balance questions of public policy. See, e.g., United States v. Carolene Products Co., 304 U.S. 144 (1938). That assumption is severely undermined, however, in economic development takings where the targeted property owners are often in a class of one and unable to organize with others with similar interests to object because there are no others being targeted. The reality is also that the owners of the types of property generally targeted by economic development takings lack the wherewithal to compete in a survival of the wealthiest contest with well-financed special interests bent on acquisition. See Stephen J. Jones, Note, Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment, 50 Syracuse L. Rev. 285, 302 (2000) (citing Laura Mansnerus, Note, Public Use, Private Use, and Judicial Review in Eminent Domain, 58 N.Y.U. L. Rev. 409, 436 (1983)). In such cases, no judicial deference is due a condemning authority’s determination since “the results of a manipulated political process are no more legitimate than those of the unelected judiciary.” Jones, supra (citing Richard E. Levy, Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C. L. Rev. 329, 362-63 (1995)).
This Court has also long recognized that physical takings, regulatory takings, and affirmative exercises of the eminent domain power are not different in kind, especially from the position of the property owner who is either dispossessed of his property, or left with little of value:

It would be a very curious and unsatisfactory result if in construing [the Takings Clause] it shall be held that if the government refrains from absolute conversion of real property to the use of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.

*Pumpelly v. Green Bay Co.*, 80 U.S. 166, 176-78 (1871).

Having the same textual foundation, eminent domain and regulatory takings jurisprudence cannot be consistently separated, particularly from the property owner’s perspective since it matters little that in one instance the government is affirmatively confiscating his property, while in the other the confiscation is de facto rather than de jure. *See, e.g.*, *Rukab v. City of Jacksonville*, 811 So.2d 727, 733 (Fla. Dist. Ct. App. 2002) (“We see no reason to treat a direct condemnation action differently from an inverse condemnation claim in this context. In both cases, property owners are asserting their constitutional rights not to have the government take their property without just compensation.”).

Maintaining a less rigorous public use standard for affirmative takings would result in the anomalous situation of the individual whose property is taken by regulation
having both invalidation and just compensation remedies available, while the owner whose property is taken by eminent domain would have only the ability to obtain compensation. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (Takings Clause requires both invalidation and just compensation remedies for regulatory takings). As the Richards Family is arguing in its case, the government's choice of illegitimate means to accomplish its goals should not be ignored simply because it may be willing to provide compensation.

IV. TAKINGS SUPPORTED ONLY BY “ECONOMIC DEVELOPMENT” MERIT HEIGHTENED JUDICIAL SCRUTINY

Amici suggest this Court adopt a heightened standard of review for exercises of the eminent domain power supported only by promises of "economic development." Such takings are invalid under the Public Use Clause unless the condemning agency shows the taking substantially advances a legitimate state interest and the requisite proportional nexus. The dissenting Justice in the court below recognized a similar standard. After acknowledging that betterment of the economy is a valid goal, he noted:

In my view, the development plan as a whole cannot be considered apart from the condemnations because the constitutionality of condemnations undertaken for the purpose of private economic development depends not only on the professed goals of the development plan, but also on the prospect of their achievement. Accordingly, the taking party must assume the burden of proving, by clear and convincing evidence, that the anticipated public benefit will be realized.
The determination of whether the taking party has met this burden of proof involves an independent evaluation of the evidence by the court, with no deference granted to the local legislative authority. In the present case, the evidence fails to establish that the foregoing burden has been met.

*Kelo*, 843 A.2d at 597 (Zarella, J., concurring in part and dissenting in part) (emphasis added).

The question of public use has always been a judicial one, *Midkiff*, 467 U.S. at 240, and heightened scrutiny will not result in unwarranted judicial usurpation of a legislative function. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995) (“we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact”). Instead, heightened review will be useful to “smoke out” illegitimate criteria when the condemning authority is using the “suspect tool” of eminent domain supported only by promises of economic development. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Heightened scrutiny will also not disturb established public use doctrine nor will it initiate a deluge of public use challenges to ordinary eminent domain actions. For example, the takings in *Berman* and *Midkiff* would manifestly satisfy this test. In *Berman*, the taking was designed to improve severely blighted property in Washington, D.C. *Berman*, 348 U.S. at 30. In *Midkiff*, the Hawaii Land Reform Act was enacted to remedy the ills perceived to be caused by concentrated land ownership. *Midkiff*, 467 U.S. at 232-33, 241-42. Eliminating blight and the breakup of land oligopolies are legitimate government goals, and using eminent domain was clearly directed in those cases to accomplish those goals. The property taken was the
property causing the problem: taking blighted property and putting it into the hands of a redeveloper alleviates the blight; exercising eminent domain and vesting individual owners with title diversifies ownership.

Improving the economy is a legitimate goal of government. But when the condemning authority need merely set forth tenuous "butterfly effect" connections between that legitimate goal and the means used to achieve it, no substantive limits remain in the public use requirement. To avoid this, the targeted property owner must be allowed the opportunity to challenge the government’s assertion that the exercise of eminent domain to take their property will further that goal, and the condemning authority must demonstrate the nexus between the taking and the betterment of the economy before an individual is casually deprived of her property and home.

If all that is required of the government in economic development takings is to invoke grandiose promises of a “better economy,” with no examination of whether there is any substance to that assertion, there is no limit to the government’s ability to take property and put it into the hands of another, for more economically intensive uses of any property can always be imagined.

And how often do the promises of a “better economy” materialize? If the subsequent history of Poletown is any example, not always:

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10 See James Gleick, Chaos: Making a New Science 8 (1987) (discussing the parable of the flapping of a butterfly's wings that creates a minor air current in China, that adds to the accumulative effect in global wind systems, that ends with a hurricane in the Caribbean).
condemnations that transfer property to private businesses usually don’t even provide the economic benefits their advocates promise. General Motors and Detroit Mayor Coleman Young promised that the new factory would create more than 6,000 jobs. In reality, the plant employed less than half that many workers; possibly, more jobs were lost from the destruction of Poletown than were created by the factory. This result is typical.

Ilya Somin, *Poletown Decision Did Not Create Desired Benefits; New Ruling Protects Weak from Government Abuses*, The Detroit News (Aug. 8, 2004). Courts are understandably reluctant to examine closely an agency’s predictive ability, but property owners should have the opportunity to challenge such pronouncements when their homes and fundamental property rights are threatened.

Cursory judicial review of economic development takings augurs a return to outdated republican norms that presumed that “takings that advanced the interests of one citizen could be regarded as advancing the interests of all.” Nathan A. Sales, Note, *Classical Republicanism and the Fifth Amendment’s “Public Use” Requirement*, 49 Duke L. J. 339, 380 (1999). These notions have been superceded by the more pragmatic realization that all people – even legislators – are subject to acting in their own self-interest. See The Federalist No. 10 (J. Madison) <http://www.yale.edu/lawweb/avalon/federal/fed10.htm>. The danger of total judicial deference to public use pronouncements is plain: without it, condemning authorities would have no reason to refrain from taking private property and turning it over to those who claim that they would make “better” use of it. The public use requirement is supposed to insure that takings are in fact for the public good and not for private gain, and Amici suggest the Court should undertake
careful review of bare assertions of public use in economic development takings. When the government has the ability to take private property from one owner and put it into the hands of another, with the only justification necessary that the economy may be benefitted by the transfer of property because the new owner might make “better” use of it, the public use requirement has lost all meaning.


While state courts are free to set their own high standards under their state public use requirements, in the absence of definitive guidance from this Court establishing minimum standards, property owners like Petitioners and Amici will continue to live in the crosshairs.
See Hathcock, 684 N.W.2d at 786 ("Poletown’s economic benefit rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity.") (emphasis original).

The standard for economic development takings adopted by the court below ignores the separate purposes served by the Public Use Clause and the Just Compensation Clause. The purpose of the public use requirement is to insure that the private property owner is not being unfairly forced to contribute his or her property to someone else’s private use and that the government’s purported use of the property is real before an individual’s fundamental rights are interfered with.

The purpose of the Just Compensation requirement is to insure that the cost of public benefits are not concentrated in a few but spread across the beneficiaries, and that an owner whose property is targeted for public use is at least provided fair market value as a result of the forced sale. Armstrong v. United States, 364 U.S. 40, 48-49 (1960) ("since the acquisition was for public use . . . [t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Both parts of the Takings Clause should be acknowledged.

CONCLUSION

If the public use requirement is to continue to have significance, then a condemning authority’s conclusory assertions that taking private property and vesting it in
another will boost the economy does not satisfy the Takings Clause. The Constitution requires public use, not just “better” use. Affirming the Connecticut Supreme Court’s decision in this case would write out of the Constitution the last measure of protection property owners have to keep their homes and defend their “sacrosanct right” of property.

Property owners who bear the burden of these experiments in Darwinian economics may be able to obtain monetary compensation, but the intangible loss of home, neighborhood, and community is never “just.” The only check on eminent domain abuse is the public use requirement, an agency’s ability to self-police, and meaningful judicial review when it fails to do so. Although compensation may be provided for illegitimate exercises of eminent domain for purely private uses, receiving money is bitter justice if the government is forcibly evicting the owner from the family homestead or a life’s work, for the enrichment of another.

In the end this case is reduced to this vital fact: the Constitution contains the Takings Clause, not just the Just Compensation Clause.

Respectfully submitted,

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In the
Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF
THE STATE OF HAWAII, ET AL.,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICI CURIAE OF CHARLES W. COUPE,
ROBERT NIGEL RICHARDS,
JOAN ELIZABETH COUPE, AND JOAN COUPE
IN SUPPORT OF RESPONDENT

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2. Does the substantially advance legitimate state interests criterion require scrutiny beyond minimum rationality?
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INTEREST OF AMICI CURIAE

Amici curiae Charles W. Coupe, Robert Nigel Richards, Joan Elizabeth Coupe, and Joan Coupe (Richards Family) respectfully submit this brief in accordance with Supreme Court Rule 37.¹

The Richards Family has for generations owned private real property on the Big Island of Hawaii that now is being threatened with eminent domain to benefit private developers. The Richards Family filed a brief amici curiae in *Kelo v. City of New London*, No. 04-108 – which is scheduled for oral argument on the same day as the present case – explaining why the exercise of eminent domain in that case must substantially advance a legitimate state interest in order to satisfy the Public Use requirement of the Fifth Amendment. The Richards Family appears as amici in the present case because it represents the other half of that analysis: the “substantially advance” standard is a test of Public Use governing regulatory takings, and enforcing regulations that do not substantially advance a legitimate state interest is no different than allowing the government to abuse eminent domain power.

The Richards Family has borne the cost of preparing this brief because this case is of overwhelming importance to them and other property owners nationwide who suffer

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¹ The parties consented to the filing of amici curiae briefs, and copies of the parties’ written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than amici curiae and counsel made a monetary contribution toward the preparation or submission of this brief.
takings of property by illegitimate exercises of government power, whether by eminent domain or by regulation.

Amici are also consumers of gasoline, and would be directly affected by Act 257, Haw. Rev. Stat. § 486H-10-4 (1997), the State’s feckless attempt to lower consumer gas prices in Hawaii – a geographically distant market with few suppliers – by enacting a law capping the rent gas company lessors may charge their tenants for renting service stations.

As the courts below determined, if Act 257 is not invalidated, Hawaii consumers such as the Richards Family will pay the price by actually paying higher – not lower – prices at the pump. Amici respectfully urge this Court to affirm the courts below.

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SUMMARY OF ARGUMENT

Regulations that fail to “substantially advance legitimate state interests” violate the Public Use requirement of the Fifth Amendment.

This conclusion results from an examination of the text of the Takings Clause itself, which contains two substantive limitations: (1) the taking must be for public use and (2) just compensation must be provided. Dual remedies give effect to these limitations: if an action is not for public use it is void, and if just compensation has not been provided, a property owner may compel payment. Review of what uses are “public,” and what compensation is “just” is reserved for the courts.

The Fifth Amendment limits more than overt exercises of eminent domain. It is a settled element of this
Court’s jurisprudence that a regulation – even one branded as “economic” – violates the Takings Clause if it (1) fails to substantially advance legitimate state interests, or (2) deprives an owner of beneficial use of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). This regulatory takings standard’s two-part foundation parallels the Takings Clause’s dual requirements of Public Use and Just Compensation.

The “substantially advance” standard is a test of public use.

This brief sets forth why the “substantially advance” test is a Takings Clause standard and why heightened scrutiny should continue to be utilized to review regulatory actions alleged to violate the Fifth Amendment. Regulatory takings jurisprudence has long recognized the intermediate scrutiny of the substantially advance test requires more than the minimum rationality of due process.

This case presents the Court with the opportunity to clarify that the Public Use Clause limits all government actions impacting private property. Amici urge the Court to reaffirm that unless the government shows that a regulation substantially advances legitimate state interests, it is invalid as an act beyond the limited scope of government’s power, in violation of the Takings Clause. The Court of Appeals should be affirmed.
ARGUMENT

I. “SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS” IS A TEST OF PUBLIC USE

A. The Fifth Amendment’s Takings Clause Requires Public Use As Well As Just Compensation

The Takings Clause contains two distinct limitations on government action, requiring both “public use” and “just compensation” –

... nor shall private property be taken for public use, without just compensation.


The Constitution contains neither a grant of eminent domain power, nor of “police power,” only limitations on their exercise, with the proviso that any powers not expressly delegated to the national or state governments “are reserved ... to the People.” U.S. Const. amend. X. Consequently, this Court has long held that an action that takes property is beyond the power of government if it is not for public use. See Vanhorne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (legislature has “no authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation.”); Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937) (public use is an explicit limit on the power of government to take private property even if justly compensated).

A taking that is not for public use is therefore illegitimate and void. See, e.g., Hawaii Hous. Authority v. Midkiff, 467 U.S. 229, 245 (1984) (action that fails public use
requirement serves no legitimate purpose of government and is void).

Determination of whether an action violates the Public Use Clause is a judicial function, and even if review is limited in scope, it is never absolutely immune from judicial scrutiny. Id. at 240 (“There is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use . . .”); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999) (“To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles.”).

Requiring public use insures that private property owners are not being unfairly forced to contribute their property to someone else’s private use, that the public is benefitted, and that the government’s purported need for the property is genuine before an individual’s fundamental rights are disturbed.

Thus, the Just Compensation Clause alone may not, as the State’s Questions Presented posit, authorize a court to invalidate regulation that takes property. The Just Compensation Clause, however, as the text of the Fifth Amendment plainly reveals, is only half of the takings calculus. The Public Use Clause is the textual support for invalidation of regulatory actions that go “too far.”

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2 Petitioners frame the Questions Presented to suggest this case implicates only the Just Compensation Clause. Respondent, however, did not challenge Act 257 simply for failing to provide just compensation, it sought to invalidate the Act as violation of the Takings Clause.
B. Regulatory Takings Doctrine Recognizes The Fifth Amendment Restrains More Than Government’s Overt Eminent Domain Power

All exercises of government power, and not only overt exercises of eminent domain, are limited by the public use and Just Compensation requirements. See, e.g., Brown, 538 U.S. at 232 (interest on lawyer’s trust account regulatory scheme took property but takings satisfied public use requirement); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (Fifth Amendment requires both invalidation and just compensation remedies for police power regulations that violate Takings Clause); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982) (regulation served legitimate public purpose).

“Regulatory taking” is an expression of the notion that government’s power to rearrange private property rights operates on a continuum, and when it crosses a line – goes “too far” – either in rationale or effect – it matters not what label the legislature attaches to the exercise of power, what matters is the impact of such action on the fundamental right of property. See First English, 482 U.S. at 316 (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (Kohler Act enacted pursuant to state’s police power went “too far”); Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979) (imposition of a navigational servitude pursuant to the federal commerce power would be an invalid taking); Babbitt v. Youpee, 519 U.S.
234, 242-45 (1997) (striking down exercise of federal power to regulate Indian trust lands for violating Takings Clause); Andrus v. Allard, 444 U.S. 51, 64 & n.21 (1979) (federal power to protect endangered species measured against Takings Clause; “there is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate”).

Thus, the Takings Clause is violated when the government restricts property to such an extent that it has effectively attempted to exercise eminent domain, the only differences being the government does not formally invoke the power of eminent domain and does not recognize an obligation to provide compensation.

A regulation fails this Court’s two-part Takings Clause test when it either (1) does not substantially advance legitimate state interests, or (2) deprives the owner of all beneficial use of property. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

C. Invalidation For Lack Of Public Use In Eminent Domain Is The Same Remedy For A Regulation That Fails To Substantially Advance Legitimate State Interests

Remedies available under the two tests for a taking by regulation are the same as those available to an owner.

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3 Similar analysis is applied to other limitations on government power that protect fundamental rights, and these limitations do not depend on the power the government claims to be exercising. For example, police power regulations are reviewed with strict scrutiny if the regulation is alleged to impact free speech rights, even if the regulation is not affirmative government censorship. See, e.g., Boos v. Barry, 485 U.S. 312 (1988) (invalidating law restricting placement of signs within 500 feet of embassy because it was not narrowly tailored).
resisting a taking by eminent domain because the owner of private property facing eminent domain stands in the same position as the owner who asserts that regulation has the same effect. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) (from landowner’s point of view overregulation is the same as appropriation).

If a taking is not for public use, it is invalid. See, e.g., *Midkiff*, 467 U.S. at 234-35 (property owner sought injunction and invalidation of state legislation alleged to be in violation of Public Use Clause); *Berman v. Parker*, 348 U.S. 26, 28 (1954) (property owner sought injunction and invalidation of federal legislation alleged to violate Public Use Clause).

Similarly, if a regulation does not substantially advance legitimate state interests, it is invalid and may be enjoined. See, e.g., *Nollan v. California Coastal Comm’n*, 482 U.S. 825, 828-29 (1987) (property owner sought writ of administrative mandamus to invalidate action for violation of Takings Clause); *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (owner sought to compel issuance of permit without unconstitutional conditions attached).\(^4\)

\(^4\) The compensation remedies for eminent domain and regulatory takings are also the same. If property is taken by eminent domain but the compensation provided is not adequate, the owner is entitled to a judicial determination of the just amount. See, e.g., *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 573 (1898) (Constitution requires full and adequate compensation); *United States v. 56.564 Acres of Land*, 441 U.S. 506, 513-14 (1979) (fair market value, not replacement cost, measures just compensation). If the owner is denied beneficial use of property by a regulation, she is entitled to just compensation in an action in inverse condemnation and the court establishes the amount due. See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting) (“The phrase ‘inverse (Continued on following page)
D. It Matters Little Whether Property Is Taken By Eminent Domain Or Regulation

Having the same textual foundation, eminent domain and regulatory takings jurisprudence cannot be logically or practically separated, particularly since from the property owner’s perspective it matters little that in one instance the government is threatening to affirmatively confiscate his property by illegitimate means with compensation, while in the other the threatened confiscation is de facto rather than de jure and no compensation is provided. See, e.g., Lucas, 505 U.S. at 1017 (taking by overregulation is the same as appropriation); Rukab v. City of Jacksonville, 811 So.2d 727, 733 (Fla. Dist. Ct. App. 2002) (“We see no reason to treat a direct condemnation action differently from an inverse condemnation claim in this context.

This Court has long recognized that regulatory takings are not different in effect from affirmative exercises of the eminent domain power when a property owner is either dispossessed of property for improper reasons, or left with little of value:

condemnation generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a ‘taking’ of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign’s power of eminent domain have not been instituted by the government entity.”); Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001) (property owner sought compensation alleging denial of beneficial use); Lucas, 505 U.S. at 1009 (owner conceded regulation was valid and sought only compensation); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 689 (1999) (property owner sought damages under 42 U.S.C. § 1983 for just compensation for deprivation of beneficial use).
It would be a very curious and unsatisfactory result if in construing [the Takings Clause] it shall be held that if the government refrains from absolute conversion of real property to the use of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.

*Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 176-78 (1871).

II. “SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS” REQUIRES SCRUTINY BEYOND MINIMUM RATIONALITY

A. Takings Clause Analysis Has Long Required More Than Minimum Rationality When Reviewing Regulation Impacting Property

Requiring that regulations “substantially advance legitimate state interests” plainly calls for more scrutiny than minimum rationality to determine whether regulation has gone “too far.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922):

> [O]ur opinions do not establish that these standards are the same as those applied to due process and equal protection claims.

*Nollan*, 482 U.S. at 834 n.3. *See also Dolan*, 512 U.S. at 391. Heightened scrutiny is required. *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 127 (1978). In *Penn Central*, the Court held that a regulation is a not taking when it serves “a substantial public purpose.” *Id.* at 127
implicit in Goldblatt that a use restriction on real property may constitute a “taking” if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner’s use of the property.

Penn Central, 438 U.S. at 127 (emphasis added) (citing Nectow v. City of Cambridge, 277 U.S. 183 (1928); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (Stevens, J., concurring)). Thus, courts may examine the means used to accomplish important government ends, and the use of “substantial public purpose” rather than “legitimate state interest” is telling, for it demonstrates the textual connection between Agins’ formulation of the standard and the Public Use Clause.  

This Court has continued to examine regulation under this standard for over three-quarters of a century. First English, 482 U.S. at 316 (“It has also been established doctrine at least since Justice Holmes’ opinion for the Court in [Mahon] that ‘[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’” (quoting Mahon, 260 U.S. at 415). See also R.S. Radford, Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a

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5 The Court sometimes uses the language “character of the government action” to examine the means used. See Kaiser Aetna, 444 U.S. at 175 (imposition of navigational servitude would violate Takings Clause) (quoting Penn Central, 438 U.S. at 124).

Subsequent decisions of this Court repeatedly confirmed the continuing validity of the standard, most recently in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 333-34 (2002). Between Penn Central and Tahoe, the Court invoked the substantially advance test many times. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992) (“As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests’”); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999) (“requirement that a regulation substantially advance legitimate public interests”); Agins, 447 U.S. at 260 (same).

In Nollan and Dolan, the substantially advance standard provided the rule of decision, and the Court scrutinized the government’s method even though the owner

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6 Unless Petitioners establish an irresistible reason to abandon the substantially advance test, the principle of stare decisis compels affirmation, as property owners have relied on the limited protection the test has offered for years. See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (stare decisis promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)). Stare decisis concerns are “at their acme in cases involving property and contract rights.” State Oil, 522 U.S. at 20 (citing Payne, 501 U.S. at 828). The repeated affirmations of the substantially advance standard by the Court mean something and should not be lightly brushed aside. Cf. United States v. Gaudin, 515 U.S. 506, 521 (1995) (stare decisis may yield where a prior decision’s “underpinnings [have been] eroded, by subsequent decisions of this Court”).
retained some beneficial use of the property that was alleged to have been taken. See Nollan, 482 U.S. at 834 (when regulatory means did not have essential nexus to legitimate goals, there is a danger that government is leveraging police power in an “out-and-out plan of extortion”); Dolan, 512 U.S. at 387 (classifying the coastal commission’s attempt to obtain the Nollan easement as “gimmickry”).

Petitioners dismiss this long line of precedent as a “mistaken transposition of substantive due process doctrine into takings law,” Brief for Petitioners at 23, insisting that courts cannot inquire whether regulation substantially advances legitimate state interests if the legislature labels its regulation “economic.” According to Petitioners, once branded “economic,” regulations are virtually immune from challenge, even where – as here – it is undisputed the regulation does not come close to advancing the goal the legislature established, and in fact has the opposite effect.

**B. Regulation Is Not Insulated From Review Simply Because It Is Labeled “Economic”**

A government action is not immune from public use review simply because it is labeled an “economic” regulation:

But simply denominating a governmental measure as a “business regulation” does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights.

\[\ldots\]

We see no reasons why the Takings Clause of the Fifth Amendment, as much a part of the Bill of
Rights and the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.


It is dangerous to rely on legislative labels, rather than effect, because even clear expressions of the purpose of legislation are often ignored or recast after-the-fact by advocates advancing “plausible” rationales to support the regulation when challenged. See, e.g., *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 855-56 (9th Cir. 2004) (during litigation the State attempted to change its reason for enacting Act 257 from lowering consumer gas prices to protecting dealers). Creative lawyering, not actual effect, would carry the day and completely swallow up the public use requirement and the regulatory takings doctrine. *Cf. Nollan*, 483 U.S. at 841 (“We view the Fifth Amendment’s Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.”).

One clear example from the case at bar is the State’s changing posture on Act 257: as the legislative history reveals, the rent control measure was very plainly enacted in order to lower consumer gas prices. The Hawaii Legislature expressly said so. However, when confronted with the fact that the Act would have the opposite effect, the State altered its supporting rationale, instead arguing it is designed to protect service station lessees from a gas
company oligopoly. *See, e.g.*, Brief for Petitioners at 1-2 (“This case involves a challenge to legislation enacted by the State of Hawaii to forestall the evils of oligopolistic concentration in the retail market for gasoline in this State.”).

Now, the State is seeking to dispense addressing such inconsistencies altogether, asking the Court to insulate regulatory actions from any meaningful public use inquiry.

C. Dismissing The Substantially Advance Standard As A Due Process Test Writes Out The Public Use Requirement From The Fifth Amendment

In takings where the property owner alleges the regulation is beyond the power of government, the Public Use Clause calls for the heightened scrutiny of the substantially advance test. *See Nollan*, 483 U.S. at 834-35; *Dolan*, 512 U.S. at 396.

Petitioners assert that the validity of regulation may only be challenged under “substantive” due process standards. *See Brief for Petitioners at 23-36*. This assertion, however, virtually ignores the Public Use Clause and strikes it out of the Fifth Amendment when it is invoked as a limitation on the police power. As the Court reminded in *Dolan*, however, both the Takings Clause as well as the Due Process Clause restrict government power. *Dolan*, 512 U.S. at 384 n.5. Ever since the Court recognized that regulations could violate the Takings Clause, it has applied the substantially advance standard to review the public use of regulation. *Penn Central*, 438 U.S. at 127 (regulation is a “‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose”). The Public Use Clause empowers courts to inquire into the
government’s choice of illegitimate means to accomplish its goals. *Midkiff*, 467 U.S. at 240.

Regulation, like exercises of eminent domain, is subject to public use requirement. *See, e.g., Brown*, 538 U.S. at 232 (regulation satisfied public use requirement). The public use requirement cannot be ignored merely because it is regulation that is effecting the taking and not eminent domain.

Thus, the question in the case at bar is whether it would be a public use for the State to have attempted to exercise eminent domain to condemn the rent premium and turn it over to its lessees in order to reduce consumer gas prices. It is beyond doubt that if this question arose in the context of an eminent domain action, the court would be entitled to make that public use inquiry even if compensation were being provided.

**D. Courts May Review The Means Used To Achieve Government’s Goals**

A strikingly similar scheme is being reviewed by this Court in *Kelo v. City of New London*, No. 04-108, the case set for oral argument on the same day as the case at bar.\(^7\)

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In *Kelo*, the property owners are asserting that the government violates the Public Use Clause when it exercises eminent domain to take their property and turn it over to another private user supported only by promises the new owner will make more productive use of it. The public use advanced in that case by the government is that a better economy will result. However, the government has not established that seizing that Mrs. Kelo's home will better the economy.

This Court’s public use jurisprudence holds that the requirement is “coterminous with the scope of the sovereign’s police powers.” *Midkiff*, 467 U.S. at 240. This formulation of public use is less instructive in regulatory takings, however, since “police power” is defined as any regulation not effecting a taking. Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 70 (1986) (“[T]he outer limit of the police power has traditionally marked the line between non-compensable regulation and compensable takings of property... Legitimately exercised, the police power requires no compensation.”).

In undertaking this public use review, courts should not defer to the means used. *Nollan*, 483 U.S. at 834-35 (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest[,]’ [but] they have made clear... that a broad range of governmental purposes and regulations satisfy these requirements.”); *Dolan*, 512 U.S. at 396 (goals established by government were “commendable”). See also *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 706 (“the jury was instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests”); *Hodel v. Irving*, 481 U.S. 704, 712 (1987) (“We agree with
the Government that encouraging the consolidation of Indian lands is a public purpose of high order.”).

_Nollan_ and _Dolan_ represent two instances where the Court held that a regulation did not substantially advance a legitimate state interest and therefore violated the Takings Clause. In neither case, however, did the Court question the validity of the goal advanced by the government, only the means used to accomplish it. See, e.g., _Dolan_, 512 U.S. at 396 (“The city’s goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, _but there are outer limits to how this may be done._”) (emphasis added).

Here, when the means the State chose to lower gas prices will not result in lower gas prices, but would instead raise them, an owner who is being forced to turn over its property to another for illegitimate reasons must be allowed the opportunity to challenge the regulation and not simply be limited to just compensation. The courts are obligated to scrutinize such actions for more than a minimum of rationality.

Public use criteria restricts regulation to public purposes. If the regulation impacts an individual’s fundamental property rights, heightened scrutiny is merited to insure that the democratic process has not broken down and the government has not resorted to improper means to achieve proper goals. See, e.g., _Yee v. City of Escondido_, 503 U.S. 519, 530 (1992) (rent premium triggers heightened scrutiny of government’s means); _Nollan_, 482 U.S. at 837 (when no compensation provided and regulation has no
The State’s gas station rent control measure is very similar to *Kelo*’s “economic development” taking, and both exercises of government power should be measured against the public use requirement under the same standard. Thus, in *Kelo*, heightened scrutiny will be useful to “smoke out” illegitimate criteria when the condemning authority is using the “suspect tool” of eminent domain.

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8 Amici suggest that *Berman* requires first instance deference only to the government’s advanced goals, because the means used in that case – condemnation of blighted property with payment of compensation – were substantially related to the interest of alleviating blight. However, even if *Berman* and *Midkiff* involve deference to the means used as well as the goal, that does not undercut the application of heightened scrutiny in regulatory takings. In eminent domain, the just compensation requirement acts as a limitation on the exercise of the power, making the government less likely to choose illegitimate means. Any unwarranted benefits to the government are negated by the compensation it must provide, theoretically resulting in a net gain of zero to both the government and the property owner. But where no compensation is provided, this dynamic vanishes, heightening the danger that the purpose advanced is pretextual, and the government has “forgotten that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Mahon*, 260 U.S. at 416. Those cases in which the Court invalidated regulation as a taking for failure to pay just compensation can best be understood as cases in which the public use requirement also was not satisfied because the legitimate government interest was not advanced substantially by a confiscation of property without just compensation. *See, e.g., Loretto*, 458 U.S. at 424 (property owner sought injunctive relief for regulatory taking); *Kaiser Aetna*, 444 U.S. at 176 (“But this is not a case in which the Government recognizes any obligation whatever to condemn ‘fast lands’ and pay just compensation . . . ”); *Nollan*, 482 U.S. at 841-42 (state is free to use power of eminent domain to accomplish the public purpose it attempted to advance by regulation).

A similar rationale supports application of the substantially advance test in the present case. When it attempts to redefine property rights, a legislature not constrained by the just compensation obligation may not choose to accomplish its goal by means having the least profound impact on private property rights, but may target certain individuals unfairly to bear more than their share by effectively confiscating their property with no attendant public benefit. *See Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (state should take path that lessens burdens on constitutionally protected activity).

This case illustrates this danger. The State is taking Respondent's property and giving it to its lessees in an attempt to lower consumer gas prices. As the lower courts found, this goal will not be accomplished by the regulation. Thus, the “average reciprocity of advantage” rationale that supports the uncompensated exercise of police power does not exist. Chevron is deprived of its property, the lessees are the only parties enriched, and the public sees no benefit at all, and may even be worse off. A regulation loses its public character when it is patently unable to accomplish its purported goal.

E. *“Substantive” Due Process Protects Different Interests Than The Takings Clause, And Reaffirmation Of The Substantially Advance Standard Is Not A Return To Lochner*

Dismissing the substantially advance standard as an orphaned due process test also ignores the different
interests protected by the Takings Clause and the Due Process Clause.

“Substantive” due process protects the right to avoid regulation that intrudes upon extra-textual “liberty” interests. See, e.g., Poe v. Ullman, 367 U.S. 497, 516-17 (1961) (Douglas, J., dissenting) (in addition to fair procedures, due process includes the right to travel, the right to marry, and the right to privacy). The Takings Clause protects private property from de jure or de facto appropriation, and requires that any taking be for public use and that compensation is provided. This does not call for a guarantee of “economic liberty” protected under the now discredited Lochner v. New York, 198 U.S. 45 (1905) and its progeny. A regulatory takings plaintiff must allege and prove that she has a legitimate claim of entitlement to property, see Board of Regents v. Roth, 408 U.S. 564 (1972), not merely that she has some unrealized economic expectations that have been thwarted by regulation.

In the eighty-plus years of its existence, judicial scrutiny under the substantially advance standard has not resulted in unwarranted intrusion into legislative functions, or presaged a return to Lochner’s theory of economic liberty.

First, heightened scrutiny, as Nollan and Dolan make clear, applies to the means used by government to achieve its goals. The Court has never hesitated to review police power regulations that impact fundamental constitutional rights with heightened scrutiny. See, e.g., Ladue v. Gilleo, 512 U.S. 43 (1994) (invalidating under the First Amendment municipal regulation of residential signs as not closely tailored). Property is a fundamental right. See Lynch v. Household Finance Corp., 504 U.S. 538,
552 (1972) (“The dichotomy between personal liberties and property rights is a false one.”); Dolan, 512 U.S. at 392 (all fundamental rights deserve constitutional scrutiny).

Second, some regulations will pass even strict scrutiny, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995) (“we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact”), so there is no reason to suspect that the intermediate substantially advance level of scrutiny will result in wholesale invalidation of legislation. For example, the regulatory schemes in Berman and Midkiff would pass substantially advance scrutiny.\(^9\)

Third, the Court addressed the concern of judicial “second-guessing” in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999). In that case, a jury found the government’s repeated permit denials did not substantially advance a legitimate state interest. Id. at 703-04. The city asserted that jury instructions should not have permitted the jury to review its land use determinations. Id. at 704 (“[T]he city maintains that the Court of Appeals adopted a legal standard for regulatory takings

\(^9\) The government actions in Berman and Midkiff pass intermediate scrutiny, because the means chosen by the government – eminent domain with the payment of just compensation – were substantially related to the advanced goals. In Berman, the regulation was designed to improve severely blighted property in Washington, D.C. Berman, 348 U.S. at 30. In Midkiff, the Hawaii Land Reform Act was enacted to remedy the ills perceived to be caused by concentrated land ownership. Midkiff, 467 U.S. at 232-33, 241-42. The Court did not question that eliminating blight and the breakup of land oligopolies are legitimate government goals. The means used in the cases substantially advanced those ends: taking blighted property by eminent domain and putting it into the hands of a redeveloper alleviated the blight; exercising eminent domain to vest individual owners with title diversified ownership.
liability that allows juries to second-guess public land-use policy.”). The Court noted first that the jury charge was “consistent with our previous general discussions of regulatory takings liability,” id., then rejected the city’s argument that the substantially advance standard opened up legislative determinations to judicial scrutiny.

CONCLUSION

Textually rooted in the Public Use Clause, the “substantially advance” takings requirement cannot be lightly brushed aside or simply subsumed within “substantive” due process analysis. The Fifth Amendment contains independent limitations on government power, which requires that regulations satisfy public use standards, not simply that the government provide compensation if the regulation impacts property’s value.

In the end this case, like Kelo, is reduced to this vital fact: the Constitution contains the Public Use Clause, not just the Just Compensation Clause.

The Court of Appeals should be affirmed.

Respectfully submitted,

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VI. An Offer You Can’t Refuse – Land, Home Ownership, is Worth Protecting and Fighting For
The Offer You Can’t Refuse

By ROBERT H. THOMAS

Do you mean to tell me, Katie Scarlett O’Hara, that Tara, that land, doesn't mean anything to you? Why, land is the only thing in the world worth working for, worth fighting for, worth dying for, because it's the only thing that lasts!

– “Gone With the Wind”

Maybe not. In June, the U.S. Supreme Court approved the radically un-American notion that you own your property only as long as someone more influential doesn’t want it.

In *Kelo v. New London*, the Court allowed a Connecticut redevelopment agency to use eminent domain to seize perfectly good homes in a working-class neighborhood and turn them over to a private developer. The homes will be demolished, replaced by a fashionable hotel, health club and marina to support a neighboring facility for the pharmaceutical company, Pfizer.

Eminent domain is the government’s power to confiscate private property against the will of the property owner. Using eminent domain, completely innocent families can be forced from their homesteads and established businesses shut down against their will. Incredibly, a property owner is nearly powerless to prevent it. It is, quite literally, the “offer you can’t refuse,” and it is most often the elderly, the poor, minorities, and others who lack money and political pull whose property ends up targeted for eminent domain.

This power is exercised not only by elected officials, but also by those who have no incentive to listen to the voice of the voters, such as redevelopment agencies, utility companies, and even private developers. Once they set their sights on property, the mere threat of eminent domain is usually enough to make an unwilling owner accept a “Godfather” offer – agree to our fire sale terms or we’ll have the government take your land.

Scarlett O’Hara thankfully never met Don Corleone.

To limit this potential for abuse, the U.S. Constitution’s Fifth Amendment permits eminent domain only if the owner receives “just compensation” and only if the property is taken for “public use.”

Common sense and tradition tell us that “public” uses are schools, roads, parks, and military bases, while hotels, health clubs and corporate parks are private uses.

But in the *Kelo* case, the redevelopment agency hypothesized that even though the homeowners’ property ended up in a developer’s hands, evicting the homeowners and upscaling the neighborhood would increase the city’s tax revenues and “create jobs.” And the mere promise of incidental public benefit, the Court agreed, is all the U.S. Constitution requires for “public use.”

If economically modest but still viable homes and small businesses can be bulldozed whenever politicians and their friends can put your property to more grandiose use, is it now open season on property owners?
Not quite, and state and county bureaucrats and those eyeing property still must exercise restraint for two reasons.

First, the Court left open the possibility that a taking of property which results from a bogus process will not pass “public use” scrutiny. Property owners remain free to show where claims of “public use” have been unduly influenced by private interests. “A court . . . should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.” Backroom deals to take another’s property are not in the public interest.

Second, *Kelo* at best only reduces federal involvement in the equation. The U.S. Constitution sets minimum standards, and state constitutions and the state courts which enforce them, remain free to provide greater protection to homeowners and others threatened with eminent domain.

And many do just that. Six states have already recognized their citizens have more rights under their constitutions. Last year, for example, the Michigan Supreme Court struck down an attempted taking justified by economic development. Property owners in Michigan have more rights than property owners in Connecticut.

So *Kelo* simply shifts the focus away from federal law and federal courts. State constitutions and state courts are now the primary forums to protect property rights from eminent domain abuse.

The stage is already set. Hawaii’s Constitution requires “public use,” and when applying that restriction, Hawaii state courts are not bound by restrictive federal interpretations of the U.S. Constitution. The U.S. Supreme Court’s failure in *Kelo* presents Hawaii courts with the opportunity to join Michigan, Arizona, Washington, and other states and enforce our own “public use” requirement in the manner plainly intended.

But individual rights such as property should not be dependent upon a court’s interpretation, and the ultimate power to prevent eminent domain abuse remains with the people. Local officials must understand that the type of action taken by New London’s redevelopment agency is not acceptable to the people of Hawaii. And if officials do not respond, the people have the power to clarify our state constitution to expressly prohibit eminent domain from being used to take private property from one owner and give it to another.

Home ownership, and the ability to protect your property from forced sale to the highest bidder under government cover is an issue that everyone – regardless of means or political persuasion – can and should get behind.

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ABOUT THE WRITER

Robert H. Thomas practices land use and eminent domain at Damon Key Leong Kupchak Hastert in Honolulu, Hawaii and Berkeley, California. Ken Kupchak and Robert filed an amicus brief supporting the homeowners in *Kelo v. New London*. An earlier version of this article was published in the *Honolulu Advertiser*. 