

TWO CHEERS FOR JUSTICE O'CONNOR

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This essay assesses the performance of Justice Sandra Day O'Connor with respect to the constitutional rights of property owners, and argues that her property jurisprudence was an assortment of different and contradictory elements. In short, the O'Connor legacy is more complex than her vigorous dissent in *Kelo v. City of New London* (2005)¹ might suggest.

Curiously, Justice O'Connor's property rights decisions are a relatively underexplored dimension of her Supreme Court career. Even admiring studies of her work on the Court give scant attention to property-related issues.² Certainly there is much to applaud in O'Connor's record on this topic. She often joined with the majority of the Rehnquist Court as it cautiously sought to strengthen the rights of property owners. Although O'Connor helped property rights make a modest comeback in constitutional law, her overall voting pattern was somewhat ambivalent and left ample room for the regulatory state. Moreover, O'Connor's interest in property seemed to wax and wane over her years on the bench.

I consider in Part I decisions by Justice O'Connor that point toward a strengthening of the rights of property owners. In Part II I examine judicial opinions by O'Connor which cut in the opposite direction, minimizing property rights. I probe in Part III her seemingly inconsistent thinking about the "public use" limitation on the exercise of the eminent domain power.

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1. *Kelo v. City of New London*, 545 U.S. 469 (2005).

2. See, e.g., JOAN BISKUPIC, *SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* (2005); ANN CAREY MCFEATHERS, *SANDRA DAY O'CONNOR: JUSTICE IN THE BALANCE* (2005). See also NANCY MAVEETY, *QUEEN'S COURT: JUDICIAL POWER IN THE REHNQUIST ERA* (2008) (providing an analysis of O'Connor's role on the Rehnquist Court but, aside from a brief treatment of *Kelo*, ignoring her property rights jurisprudence).

I. DECISIONS SUPPORTIVE OF PROPERTY RIGHTS

A. *Takings Jurisprudence*

Over the course of American history both the contract clause and the due process clause have played important roles in protecting the rights of property owners.³ In the post–New Deal era, however, the takings clause of the Fifth Amendment has been the principal vehicle for the vindication of property rights. That Amendment provides in part: “nor shall private property be taken for public use, without just compensation.” Therefore, the bulk of Justice O’Connor’s property decisions turn upon interpretations of this language.

Many of the cases in which she participated focused on the question of what governmental actions, short of outright acquisition, amounted to a taking of property within the meaning of the Fifth Amendment ban on taking private property without just compensation. For example, early in her tenure on the Supreme Court, O’Connor was called upon to decide whether a minor but permanent physical occupation of an owner’s property under governmental authorization amounted to a taking. The Court had long viewed a physical invasion by government as a particularly serious matter.⁴ In *Loretto v. Teleprompter Manhattan CATA Corp.* (1982),⁵ Justice O’Connor joined the majority opinion which affirmed “the traditional rule that a permanent physical occupation of property is a taking,”⁶ even if only a small portion of the owner’s property was occupied. In other words, O’Connor was prepared to endorse a categorical rule governing physical incursions on land.

O’Connor’s record with respect to regulatory takings was more complicated. She supported the decision in *Nollan v. California Coastal Commission* (1987).⁷ In that case the Supreme Court, for the first time since the 1920s, invalidated a land use regulation. At issue was the practice of local governments to condition the grant of building permits to developers upon exactions, such as the

3. See, e.g., JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 59–141 (3d ed. 2008).

4. See, e.g., *Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871) (holding that permanent flooding of land constituted a taking of property).

5. 458 U.S. 419 (1982).

6. *Id.* at 441.

7. 483 U.S. 825 (1987).

dedication of land to the public or the payment of impact fees. The *Nollan* case arose when a state agency conditioned a permit to rebuild a beach house upon the owners' grant of a public easement across the beachfront. O'Connor joined with the majority to hold that the imposition of such a condition constituted a taking because the requirement was unrelated to any problem caused by the proposed development. The Court also indicated a willingness to scrutinize more carefully the connection between the purpose and the means of regulation. In *Dolan v. City of Tigard* (1994),⁸ with O'Connor's support, the Court overturned another exaction scheme. A local zoning agency approved the building plans of a store owner conditioned on the owner's dedication of part of her land to the city for a public greenbelt and a bicycle path. The Court insisted that there must be a "rough proportionality" between the imposed exactions and the burdens expected from the proposed building development. It also ruled that the local government had the burden of justifying the regulation. Because the city in *Dolan* failed to meet its burden, the Court held that the exactions amounted to a taking of private property without compensation.

Indeed, O'Connor made clear that she was prepared to place a broad reading on the *Dolan* test governing exactions. There was uncertainty among lower courts as to whether the *Dolan* test applied only to cases in which the exaction was imposed by administrative decision or also extended to legislative enactments. In *Parking Association of Georgia v. City of Atlanta* (1995),⁹ a case involving a municipal ordinance requiring parking lot owners to undertake extensive and costly landscaping, the Supreme Court declined to resolve the issue. However, O'Connor joined Justice Clarence Thomas in a dissent from the denial of certiorari. They cogently argued:

It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.¹⁰

8. 512 U.S. 374 (1994).

9. 515 U.S. 1116 (1995).

10. *Id.* at 1117–18.

As Thomas and O'Connor correctly perceived, it is difficult to see why a different standard should apply depending upon the character of the state action. The takings inquiry should instead focus on the impact of the regulation upon the property owner.

In addition to scrutinizing exactions, the Rehnquist Court demonstrated concern about land use regulations that drastically reduce the value of property. At issue in *Lucas v. South Carolina Coastal Council* (1992)¹¹ was a South Carolina total ban on beachfront development. Designed to prevent beach erosion and preserve a valuable public resource, the law prevented the owner of the last two residential lots from building any permanent structure on his land. O'Connor once again joined the majority opinion, which found that regulations denying an owner "all economically beneficial or productive use of land" amount to a per se taking, notwithstanding the public interest advanced to justify the limitation. The Court reasoned that the total deprivation of economic use is the practical equivalent of physical appropriation of land. It expressed concern that controls preventing economic use "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."¹²

Most takings cases have involved land use regulations, but a number of governmental policies have been challenged as unconstitutional takings of property. One such challenge concerned a congressional statute imposing a retroactive financial obligation on a former mining employer to bolster the solvency of a coal industry retirement and health fund. Writing for a plurality of the Court in *Eastern Enterprises v. Apfel* (1994),¹³ O'Connor determined that the statute as applied constituted an unconstitutional taking. She noted generally that an economic regulation could effect a taking. Stressing that retroactive laws are disfavored, O'Connor pointed out that the statute divested Eastern Enterprises of property and imposed a severe financial liability long after the company had ceased coal mining operations. She concluded that when a legislative remedy "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury

11. 505 U.S. 1003 (1992).

12. *Id.* at 1017.

13. 524 U.S. 498 (1998).

they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.”¹⁴ Given the splintered opinion in *Eastern Enterprises*, the importance of the decision is unclear. Still, it is noteworthy that O'Connor invoked the regulatory takings doctrine in the context of a general regulatory measure.¹⁵

In several concurring or dissension opinions, O'Connor took positions that would strengthen the constitutional protection of property owners in takings cases. In *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987),¹⁶ the Supreme Court rejected a takings challenge to a Pennsylvania statute prohibiting certain coal mining to protect surface structures from subsidence. O'Connor joined, together with two other justices, in a dissenting opinion by Chief Justice William H. Rehnquist. The dissenters maintained that the act extinguished all rights in an identifiable segment of property—millions of tons of coal—and effected a taking for which compensation was required.¹⁷

A year later O'Connor evidenced a degree of skepticism about rent control schemes. In *Pennell v. City of San Jose* (1988),¹⁸ the Court brushed aside an attack on a municipal rent control ordinance that mandated consideration of a tenant's “hardship” status in determining a reasonable rent. The Court concluded that a taking challenge was premature because there was no evidence that the hardship provision had ever been applied to reduce the amount of a rent. O'Connor, joining a dissenting opinion by Justice Antonin Scalia, insisted that the tenant hardship provision effected a taking of property. They stressed the purpose behind the takings clause was to prevent government from singling out particular individuals from bearing costs that should be placed on the public as a whole. Scalia and O'Connor charged that the city “is using the occasion of rent regulation . . . to establish a welfare program privately funded by those landlords who happen to have ‘hardship’ tenants.” They added that the prescription of the takings clause was grounded upon “the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation.”¹⁹

14. *Id.* at 537.

15. For a helpful treatment of *Eastern Enterprises*, see Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 981–89 (2000).

16. 480 U.S. 470 (1987).

17. *Id.* at 506–21.

18. 485 U.S. 1 (1998).

19. *Id.* at 23.

O'Connor also reflected property-conscious views in *Preseault v. Interstate Commerce Commission* (1990),²⁰ a case arising under congressional legislation to promote the conversion of abandoned railroad rights-of-way to recreational trails.²¹ Such conversions were challenged as a taking of the property of servient landowners. Arguably the act enlarged the burden on landowners by indefinitely delaying the termination of the railroad easement by abandonment under state law. The Supreme Court determined that, even if a taking occurred by virtue of a trails conversion, the landowners could seek compensation in the Claims Court under the Tucker Act. O'Connor authored a concurring opinion in which she emphasized that a takings claim could arise from the rails-to-trails legislation. She opined "that state law determines what property interest petitioners possess and that traditional takings doctrine will determine whether the Government must compensate petitioners for the burden imposed on any property interest they possess."²² O'Connor maintained that regulatory oversight of railroad abandonments by Congress was a distinct question from whether the exercise of such power amounted to a taking. Indeed, she went further, declaring that "the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power."²³

Of particular interest is the opinion by Scalia, in which O'Connor joined, dissenting from the denial of certiorari in *Stevens v. City of Cannon Beach* (1994).²⁴ At issue were decisions of the Supreme Court of Oregon declaring that the doctrine of custom applied to all dry-sand beaches in the state, and that the public enjoyed a customary right to use such beaches for recreational purposes. When the owner of a beachfront lot was denied a building permit for construction of a seawall, the owner brought an inverse condemnation action against the city. The owner asserted that the doctrine of custom was a new-found fiction, and that in any event the facts did not support its application to the owner's property. The Supreme Court declined

20. 494 U.S. 1 (1990).

21. For the background of the rails-to-trails controversy and the *Preseault* litigation, see JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND*, § 12:8 (2012).

22. *Preseault*, 424 U.S. at 20.

23. *Id.* at 23.

24. 510 U.S. 1207 (1994).

to review the ruling of the Oregon court dismissing the complaint. Scalia and O'Connor, however, persuasively argued that the petition for certiorari should have been granted, and in so doing broke new ground in Fifth Amendment jurisprudence.

The two justices strongly intimated that the Supreme Court of Oregon was creating a novel doctrine rather than describing an already existing doctrine. They insisted:

As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, . . . neither may it do so by invoking nonexistent rules of state substantive law. . . . No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. . . . Since opening private property to public use constitutes a taking, . . . if it cannot be fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effectuated an uncompensated taking.²⁵

This prescient opinion contemplated the possibility that a judicial decision could constitute a taking of property. Under this analysis, the invocation of novel doctrines, or the reversal of long-standing rules governing property, to defeat established rights of owners might well run afoul of the Fifth Amendment.²⁶

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2010),²⁷ a case decided after O'Connor's retirement, a plurality of the Supreme Court endorsed the concept of a judicial taking of property. Scalia, writing for the plurality, drew heavily upon his opinion with O'Connor in *Cannon Beach*. He asserted: "It would be absurd to allow a State to do by judicial

25. *Id.* at 1334.

26. The Supreme Court wrestled inconclusively with issue of judicial takings in *Muhlker v. New York and Harlem R.R. Co.*, 197 U.S. 544 (1905). For thoughtful discussions of this topic, see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) (arguing that expansion of the doctrine of custom in Oregon constitutes a judicial taking); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990) (advocating that takings protection should extend to courts as well as legislatures).

27. 130 S. Ct. 2592 (2010).

decree what the Takings Clause forbids it to do by legislative fiat.”²⁸ Scalia amplified his reasoning:

In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.²⁹

Although the concept of a judicial taking has gained traction, the doctrine raises complex issues that are outside the scope of this essay.³⁰ Suffice it to say that, on its face, the text of the Fifth Amendment draws no distinction between the branches of government in terms of legal change that affect property ownership. Therefore the basic notion seems sound, even though many issues remain to be resolved.³¹ For our purposes, it is important to recall O’Connor’s contribution to the formulation of judicial takings doctrine.

In addition, O’Connor addressed the contested role of transferable development rights in takings analysis. In *Suitum v. Tahoe Regional Planning Agency* (1997),³² the owner of an undeveloped lot near Lake Tahoe was not permitted to develop her land, but was entitled to receive allegedly valuable transferable development rights (“TDRs”) which she could sell to other owners. It was a matter of dispute whether the TDRs had any actual value in the market. The owner brought suit, claiming a regulatory taking of her property. The

28. *Id.* at 2601.

29. *Id.* at 2602.

30. See D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903 (2011).

31. See, e.g., Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL’Y 91, 106 (2011) (“Judicial takings are fundamentally similar to other takings. The fact that judges, rather than legislators or executive branch officials, enact them is irrelevant under the Constitution. No one doubts that judges are forbidden to violate other constitutional rights. Property rights protected by the Takings Clause are no different.”).

32. 520 U.S. 725 (1997).

Supreme Court found the case ripe for judicial review, and remanded the case without a decision on the merits. Scalia, joined by O'Connor and Thomas, concurred in an opinion treating TDRs. They stressed that the ability of the owner to sell TDRs was not related to the existence of a taking.³³ The three justices declared that the availability of TDRs was relevant only to the question of compensation, and did not bear on the issue of whether there had been a taking. As they framed the question, "the relevant issue is the extent to which use or development of the land has been restricted."³⁴ The existence of TDRs simply did not pertain to this issue, but could be part of the full compensation for a taking.

O'Connor's reluctance to fashion hard and fast rules in the context of regulatory takings was evident in her concurring opinion in *Palazzolo v. Rhode Island* (2001).³⁵ She agreed with the Court that a takings claimant was not necessarily barred where the claimant acquired the regulated property after the state-imposed restrictions were enacted. In her view, the timing of the regulation's enactment was simply one of a number of factors to be considered in a regulatory takings inquiry.³⁶ O'Connor indicated a preference for ad hoc factual investigations. She tellingly observed: "The temptation to adopt what amounts to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context."³⁷ Such an approach, however, leads to highly subjective decision-making and unpredictable results.

B. Remedies for a Taking

Individuals pursuing a regulatory takings claim in federal court face a virtual stone wall. Not only must they bear legal fees and transaction costs, but procedural hurdles make it almost impossible to bring such claims in federal court. Under the ripeness doctrine set forth in *Williamson County Regional Planning Commission v. Hamilton Bank* (1984),³⁸ an opinion which O'Connor joined, a claimant

33. *Id.* at 747–49.

34. *Id.* at 749.

35. 533 U.S. 606 (2001).

36. *Id.* at 632–36.

37. *Id.* at 636.

38. 473 U.S. 172 (1985).

must satisfy a two-prong test before instituting a federal court challenge to an alleged regulatory taking. Claimants must first obtain a “final decision” from the appropriate local government agency on a land use application, and must then seek and have been denied compensation in state court. As a practical matter, the *Williamson County* ripeness test has virtually shut the door on the ability of claimants to seek a remedy for a regulatory taking in federal court. In addition, the federal courts are barred by the federal full faith and credit statute from relitigating issues that have been resolved in state court actions.³⁹ Consequently, regulatory takings claimants are commonly left with no access to a federal forum. The *Williamson County* rule has long been the subject of criticism.⁴⁰ It clearly suggests the Supreme Court’s lack of interest in enforcing property rights. No other important right is treated in such a shabby manner.

In *San Remo Hotel v. City and County of San Francisco* (2005),⁴¹ the Supreme Court rejected the argument that courts should not apply the preclusion rules under the federal full faith and credit statute when a claimant was forced into state court first in order to meet the *Williamson County* ripeness test. Justice John Paul Stevens, speaking for the Court, was untroubled by the acknowledged fact that takings claimants could not present their federal claims under the Fifth Amendment in a federal forum.

Justice O’Connor, however, joined with three other justices in a concurring opinion by Chief Justice Rehnquist.⁴² He urged the Court to revisit the second prong of the *Williamson County* test, requiring takings claimants to seek state court review before bringing a federal court action. Rehnquist questioned the justification for the

39. 28 U.S.C. § 1738 (providing that “judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or custom in the courts of such State . . .”).

40. See, e.g., Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995) (discussing the implications of *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton* on ripeness and forum selection requirements); Stephen E. Abraham, *Williamson County Fifteen Years Later: When Is a Taking Claim (Ever) Ripe?*, 36 REAL PROP. PROB. & TR. J. 101, 104 (2001) (“*Williamson County* is regarded as posing formidable hurdles because of its two-part ripeness requirement, finality and compensation, that ultimately may block takings claims.”); Max Kidalov & Richard Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Litigation*, 27 HASTINGS CONST. L.Q. 1, 5 (1999) (“The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause.”).

41. 545 U.S. 323 (2005).

42. *Id.* at 348–52.

state-litigation requirement, and pointedly commented that claimants challenging land use regulations on First Amendment grounds could come directly to federal court. Rehnquist was perplexed “why federal taking claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive.”⁴³ By joining this concurring opinion, O'Connor signaled her unhappiness with the restrictive *Williamson County* test, and her willingness to enlarge the ability of takings claimants to have their cases heard in a federal forum.

II. DECISIONS DISMISSIVE OF PROPERTY RIGHTS CLAIMS

A. Takings Jurisprudence

Despite the above discussion, O'Connor was by no means supportive of all takings claims. We now turn to a consideration of those cases in which she found no property rights violation. Of course, even the most property-conscious judge would not necessarily decide every case in favor of property owners. Still, one should assess the total record in order to correctly gauge the extent of O'Connor's defense of property rights.

At issue in *Yee v. City of Escondido* (1992)⁴⁴ was the validity of a local rent control ordinance when joined with a state law severely limiting the power of property owners to terminate mobile home tenants. The ordinance prohibited any rent increase without the approval of the city council. Mobile park owners alleged that the rent control ordinance effectuated a physical occupation of their premises, and amounted to a per se taking of their property under *Loretto*.⁴⁵ They argued that the effect of the ordinance, when coupled with the state law, was to confer a right on mobile home tenants to remain indefinitely on their property at below-market rents.

O'Connor, writing for the Court, ruled that the rent control ordinance, seen in conjunction with the state law, did not compel the landowners to submit to physical occupation. She pointed out that the owners voluntarily rented their property and retained the right to change the land use and evict the tenants with notice. Revealingly,

43. *Id.* at 351.

44. 503 U.S. 519 (1992).

45. 458 U.S. 419 (1982).

O'Connor emphasized: "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."⁴⁶ Finding no compelled physical occupation of property, she ruled that the ordinance was a regulation of use and did not amount to a per se taking. O'Connor declined to pass upon a regulatory taking claim as improperly presented, but noted that states have broad authority to regulate landlord-tenant relationships.

The outcome in *Yee* was problematic. O'Connor's insistence that "no government has required any physical invasion of petitioners' property" was misleading.⁴⁷ The landowners initially invited the mobile home tenants to enter their premises for a limited time determined by a lease. But the state statute greatly limited the power of the landowners to terminate such leases, thereby in effect converting the lease term into one of indefinite duration. It is certainly arguable that the state government had indeed sanctioned a physical occupation of the landowners' property.⁴⁸ Moreover, *Yee* was the harbinger of a gradual shift in O'Connor's thinking about property rights. By the early twenty-first century she was increasingly inclined to restrict application of the regulatory takings doctrine and to uphold governmental regulations of property.

In this regard, consider O'Connor's curious role in the cases arising from the use of interest payable on lawyers' trust accounts ("IOLTAs"). Starting in the 1980s, most states established IOLTA programs under which attorneys were required to deposit nominal client funds in special bank accounts. The interest earned on such pooled IOLTA accounts was paid to legal foundations that funded legal assistance for low-income individuals. The program was challenged as a taking of property—the interest on IOLTA accounts—that rightfully belonged to the clients.⁴⁹ The threshold question was whether the interest on IOLTA accounts was private property. In

46. *Yee*, 503 U.S. at 528.

47. *Id.*

48. Nonetheless, *Yee* has remained a barrier to finding a physical taking in the context of rent control. See *Harmon v. Markus*, 2011 WL 782233 (2d Cir. 2011) (finding that tenancy of indefinite duration under rent control laws does not amount to a physical taking of property).

49. Kevin H. Douglas, *IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients' Property*, 50 VAND. L. REV. 1297, 1333 (1997) (discussing legal background of IOLTA programs, and concluding that "IOLTAs result in an unconstitutional taking of clients' property").

Phillips v. Washington Legal Foundation (1998),⁵⁰ a 5–4 majority of the Supreme Court, joined by O'Connor, declared that the existence of a property right was determined by reference to an independent source such as state law. Applying Texas law, the Court ruled that the interest earned on IOLTA accounts belonged to the lawyers' clients. It adhered to the traditional rule that "interest follows principal." The case was remanded for consideration of whether IOLTA interest has been taken by the state. The decision in *Phillips* raised doubts about the constitutionality of the IOLTA scheme.

In *Brown v. Legal Foundation of Washington* (2003),⁵¹ the Court unanimously found that IOLTA rules amounted to a physical taking of property but determined, by another 5–4 vote, that clients suffered no loss and were therefore not entitled to compensation. O'Connor now voted to reject the claim for compensation, thereby weakening *Phillips* and leaving the clients with no meaningful remedy for the conceded deprivation of their property. The decision turned upon question of how to measure just compensation. The majority's curious reasoning can only be sketched here. The majority invoked the time-honored norm that the compensation should be "measured by the property owner's loss rather than the government's gain."⁵² In other words, the government must pay the fair market value of the property taken, and not for whatever advantage the acquisition might bring to the government. Although IOLTAs generated substantial funds for the state, the Court remarkably concluded that the owners of the principal had suffered no loss.⁵³ The salient point for our purpose is that O'Connor joined an opinion that seemed more concerned to sustain IOLTA programs than to vindicate the right of property owners. At the very least there is substantial tension between her positions in the two IOLTA cases. The owners of the principal were left with little more than lip service about their private property rights.

The same pattern—backing away from earlier actions in defense of property rights—was apparent when O'Connor joined the majority in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning*

50. 524 U.S. 156 (1998).

51. 538 U.S. 216 (2003).

52. *Id.* at 235–36.

53. Ronald D. Rotunda, *Found Money: IOLTA*, *Brown v. Legal Foundation of Washington, and the Taking of Property Without the Payment of Compensation*, 2002–2003 CATO SUP. CT. REV. 245 (sharply criticizing the Court's reasoning with regard to determining the owner's loss).

Agency (2002).⁵⁴ At issue was a thirty-two-month moratorium imposed on all land development in the Lake Tahoe basin while a regulatory agency fashioned a land use program. The moratorium was challenged as a deprivation of all economically viable use and thus a per se taking of property under *Lucas v. South Carolina Coastal Council*. The majority concluded that the categorical *Lucas* rule was inappropriate to resolve whether a temporary ban on development constituted a taking of property. Instead, the Court looked to the ad hoc balancing test of *Penn Central Transportation Co. v. City of New York* (1978)⁵⁵ as the most suitable framework to determine the existence of a taking. It reasoned that regulations temporarily denying all use of property might not constitute a taking if the delay was part of a state plan to enact safety or zoning laws. Moreover, the Court insisted that property could not be divided into temporal segments when considering the impact of a temporary regulation. With a temporary regulation, the property would always have future value.

The dissenters in *Tahoe-Sierra* disputed whether there was a meaningful distinction between a temporary and permanent prohibition on development.⁵⁶ They pointed out that the claimants were forced to leave their property economically idle for years. The dissenters maintained that the *Lucas* rule should govern, and that the moratorium was the practical equivalent of a forced lease to the government. Here again O'Connor joined in a decision that weakened the protection afforded property owners and underscored her growing preference for ad hoc examination of facts instead of clear rules. Her vote was also seemingly at odds with the *Lucas* opinion, which she had joined a decade earlier.

O'Connor further narrowed the regulatory takings doctrine in *Lingle v. Chevron, U.S.A., Inc.* (2005).⁵⁷ Some background may be helpful in placing the *Lingle* litigation in context. In *Agins v. City of Tiburon* (1980),⁵⁸ the Supreme Court ruled that a land use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."⁵⁹ This language was repeated in a number of later

54. 535 U.S. 302 (2002).

55. 438 U.S. 104 (1978).

56. *Tahoe-Sierra*, 535 U.S. at 343–54.

57. 544 U.S. 528 (2005).

58. 447 U.S. 255 (1980).

59. *Id.* at 260.

takings decisions by the Court, and was invoked by lower federal courts to invalidate local rent control ordinances.⁶⁰

At issue in *Lingle* was a Hawaii statute that imposed ceilings on the rent that gasoline companies could charge dealers who leased company-owned service stations. The expressed legislative purpose behind this measure was to reduce gasoline prices. Yet Chevron retained the right to raise wholesale gasoline prices to offset any loss arising from the rent regulation, and did not challenge the statute on grounds that the company could not earn a reasonable return on investment. Rather, the company argued that Hawaii's law did not "substantially advance" its purpose of reducing gasoline prices and thus constituted a regulatory taking. Upholding this contention, lower federal courts held that the act would not lower gasoline prices for consumers and amounted to a taking.

Speaking for the Supreme Court in a troublesome opinion, Justice O'Connor reversed. Reasoning that the efficacy of a regulation had nothing to do with the burden that it placed on property owners, she jettisoned the "substantially advances" formula as not germane to a regulatory takings analysis. O'Connor maintained that a regulatory takings inquiry

aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.⁶¹

She added: "the notion that such a regulation nevertheless 'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable."⁶² In short, O'Connor restated and limited takings jurisprudence. While regulatory takings analysis should concentrate on the severity of the imposed burden, the irrationality of a regulation might be relevant to the degree of burden.⁶³

60. See, e.g., *Tahoe-Sierra*, 535 U.S. at 334; *Cashman v. City of Cotati*, 374 F.3d 892–93, 896 (9th Cir. 2004).

61. *Lingle*, 544 U.S. at 539.

62. *Id.* at 543.

63. See R. S. Radford, *Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 *FORDHAM ENVTL. L. REV.* 353 (2004).

Unfortunately, the *Lingle* opinion contained some dubious history and perpetuated the second class status of property rights in constitutional law. O'Connor repeated the erroneous proposition that until the landmark opinion in *Pennsylvania Coal v. Mahon* (1922),⁶⁴ it was thought that the takings clause did not cover regulations at all. In fact, commentators and jurists had long considered whether regulations might be so severe as to have the practical effect of a physical taking.⁶⁵ The modern regulatory takings began to take shape in the late nineteenth century. In 1888, for instance, John Lewis, the author of a treatise on eminent domain, stated that when a person was deprived of the possession, use, or disposition, "he is to that extent deprived of his property, and, hence . . . his property may be taken in the constitutional sense, though his title and possession remain undisturbed."⁶⁶ Clearly the regulatory takings doctrine did not originate in 1922.

Having rejected Chevron's takings claim, O'Connor suggested that an attack on an arguably irrational statute should be heard under the due process clause of the Fourteenth Amendment. But this is almost certainly a dead end. The Supreme Court has not struck down an economic regulation as a violation of due process since 1937.⁶⁷ Her notion that Chevron could secure meaningful consideration of a due process claim is fanciful as federal courts do not provide even cursory review of property rights claims under due process. Indeed, O'Connor emphasized judicial deference and maintained that courts "are not well suited" to scrutinize economic regulations.⁶⁸ She added that "we have long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation."⁶⁹ She never explained why courts are suited to resolve a wide variety of other value-laded individual rights claims

64. 260 U.S. 393 (1922) (Holmes, J.).

65. David J. Brewer, *Protection to Private Property from Public Attack*, 55 NEW ENGLANDER AND YALE REV. 97, 102–05 (1891). See also *Bent v. Emery*, 137 Mass. 495, 496, 53 N.E. 910, 911 (1899) (Holmes, J.) ("It would be open to argument at least that an owner might be stripped of his rights so far as to amount to a taking without any physical interference with his land."); CARMAN F. RANDOLPH, *THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* 24–26 (1894).

66. JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN* 40–46 (1888).

67. James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, in *THE BILL OF RIGHTS IN MODERN AMERICA* 110–12 (David J. Bodenhamer & James W. Ely, Jr., eds., rev. ed. 2008).

68. *Lingle*, 544 U.S. at 544.

69. *Id.* at 545.

under the heading of due process. O'Connor's *Lingle* opinion demonstrates the continuing impact of New Deal constitutionalism, which fashioned a dichotomy between the rights of property owners and other personal rights. Property rights were reduced to secondary status, and were thus entitled to little judicial solicitude.⁷⁰ This development served the political needs of the New Deal by facilitating the extension of governmental controls. O'Connor even cited *Ferguson v. Skrupa* (1963),⁷¹ a notorious expression of New Deal constitutionalism. In that case the Supreme Court upheld a blatant special interest law and virtually abdicated any judicial review of economic legislation under the due process norm. Absent a signal change in the law, O'Connor's suggestion that Chevron seek due process review is simply not credible.

Finally, in *Lingle*, O'Connor made it plain that in most situations the standard for determining whether a taking has occurred continues to be the multifactor balancing test set forth in *Penn Central*. This is regrettable because the *Penn Central* test is fraught with problems.⁷² Not only are the various factors—i.e., “economic impact of the regulation,” interference with “distinct investment-backed expectations,” “the character of the governmental action”—vague, but there is no indication of how each factor is to be weighed or how they related to each other. Much depends on the weight one subjectively assigns to the different factors to be balanced.⁷³ As O'Connor herself has pointed out, the *Penn Central* factors have “given rise to vexing subsidiary questions.”⁷⁴ Yet she made no attempt to clarify the confusion. Consequently, we are left with a uncertain and malleable test that can be manipulated to justify almost any outcome but is most commonly utilized to favor the government over individual

70. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); ELY, *supra* note 3, at 139–41.

71. 372 U.S. 726 (1963). At issue in *Williamson* was a state law barring an optician from fitting or duplicating eyeglass lenses into new frames without a prescription from an optometrist. It was a classic example of a law enacted to serve the interests of a narrow group at the expense of the general public.

72. Gideon Kanner, *Making Law and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679 (2005).

73. Anthony B. Sanders, *Of All Things Made in America Why Are We Exporting the Penn Central Test?*, 30 NW. J. INT'L L. & BUS. 339, 354 (2010) (observing that under the *Penn Central* approach “courts are free to range just about as widely as they please in determining whether the government has taken property without providing just compensation”).

74. *Lingle*, 544 U.S. at 539.

owners. Speaking of *Penn Central*, Stuart Banner has correctly noted: “The only clear implication was that victories for property owners adversely affected by regulation would be very rare indeed.”⁷⁵ The *Lingle* opinion demonstrates O’Connor’s preference for ad hoc decision-making on a case by case basis, rather than the articulation of a general norm.

B. Remedies for a Taking

Just as her analysis in takings cases was uneven, so O’Connor sometimes took a crabbed view of the remedies available for individuals whose property was taken. She dissented in two cases where the Court majority enhanced the means of enforcing property rights. In neither case did O’Connor manifest a robust commitment to property rights.

In *First English Evangelical Lutheran Church v. County of Los Angeles* (1987),⁷⁶ the Court majority ruled that property owners may be entitled to compensation for the temporary loss of land use when the governmental controls are later invalidated. The mere invalidation of the restriction was not deemed a sufficient remedy for the period during which the temporary taking was in effect. O’Connor joined the three dissenters in an opinion that questioned whether the temporary deprivation of all use amounted to a taking, and which stressed deference to state interest in controlling land development.⁷⁷

Similarly, O’Connor dissented in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999),⁷⁸ the first case in which the Supreme Court sustained an award of monetary damages for a regulatory taking. Of greater significance, the Court majority found that the question of liability on a regulatory claim under section 1983 was properly submitted to a jury. It ruled that a landowner had a constitutional right for a jury trial to determine whether he or she had been deprived of all economically viable use of property. O’Connor, however, joined a dissenting opinion which insisted that there was no right to a jury trial in an inverse condemnation action.⁷⁹

75. STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY AND WHAT WE OWN* 267 (2011).

76. 482 U.S. 304 (1987).

77. *Id.* at 322–41.

78. 526 U.S. 687 (1999).

79. *Id.* at 733–55.

C. Contract Clause

Article 1, section 10 of the Constitution provides in part: “no state shall . . . pass any . . . Law impairing the Obligation of Contracts.” During the nineteenth century, the contract clause was among the most litigated provisions in the Constitution, and was the principal limitation on state authority.⁸⁰ The clause, for example, was central to the jurisprudence of the Marshall Court.⁸¹ The contract clause, however, steadily declined in importance in the twentieth century. This process cannot be traced in detail here.⁸² The provision received a near-fatal blow in *Home Building & Loan Association v. Blaisdell* (1934),⁸³ which became the basis for modern understanding of the contract clause. This highly controversial decision upheld a two-year moratorium, enacted during the Great Depression, on the foreclosure of mortgages. Although susceptible of a narrow reading that restricted valid impairments of contracts to emergency situations, the Court opinion also suggested that, under its police power, a state’s interest in economic regulations could justify interference with contractual arrangements. The triumph of New Deal constitutionalism, with its stress on judicial deference to legislative judgments about economic matters, virtually eviscerated the once-mighty contract clause.

In the 1970s, the Supreme Court showed a fleeting interest in reinvigorating the contract clause, sparking speculation that the provision might regain some of its former importance.⁸⁴ In practice, however, the contract clause is usually subordinated to the Court’s deference to legislative policy. In *United States Trust v. New Jersey* (1977),⁸⁵ a case in which the Court actually found a contract clause violation,

80. BENJAMIN FLETCHER WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* xiii (1938).

81. CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 72–110 (1996); James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1029–47 (2000).

82. See James W. Ely, Jr., *Whatever Happened to the Contract Clause?*, 4 CHARLESTON L. REV. 371 (2010).

83. 290 U.S. 398 (1934). For sharp criticism of *Blaisdell*, see Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 541–44 (1987); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 735–38 (1984).

84. ELY, *supra* note 3, at 153–55.

85. 431 U.S. 1 (1977).

the justices nonetheless declared that usually “[s]tates must possess broad powers to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.”⁸⁶ Thereafter, the Court has adhered to a sort of balancing approach which defers heavily to a state’s determination of when legislation impairing contracts is reasonable. Such a minimal test is at odds with the language and purpose of the contract clause, but goes far to explain the emaciated nature of the provision in current constitutional law.

In fairness, then, it is apparent that the contract clause had been drained of much vitality before O’Connor joined the bench in 1981. Nonetheless, she never demonstrated much interest in the provision, and even joined opinions that made contract clause doctrine still worse. For example, O’Connor voted in *Exxon Corp. v. Eagerton* (1983)⁸⁷ to reject an attack on an Alabama statute that prohibited the pass-through of a severance tax to consumers, notwithstanding contractual provisions permitting producers to do so. The *Eagerton* Court adopted an understanding of the police power so broad as to uphold any type of state economic regulation affecting contracts. Similarly, in *Energy Reserves Group v. Kansas Power & Light Company* (1983),⁸⁸ O’Connor and her colleagues upheld a state law that imposed a ceiling on the contractual right of natural gas suppliers to increase prices.

O’Connor’s one contract clause opinion for the Court added little to the virtual collapse of the clause as a meaningful restraint on state authority to rearrange contractual obligations. At issue in *General Motors Corp. v. Romein* (1992)⁸⁹ was a change in state law requiring employers to refund workers’ compensation benefits previously withheld. The company challenged the statute mandating retroactive payments on contract clause grounds. It argued that the workers’ compensation law was an implied term of a collective bargaining agreement, and that a retroactive requirement to pay the benefits impaired the obligation of contract. O’Connor began her opinion by affirming the long-standing rule that the existence of a contract was a question for the independent judgment of federal courts and was

86. *Id.* at 22.

87. 463 U.S. 176 (1983).

88. 459 U.S. 400 (1983).

89. 503 U.S. 181 (1992).

not determined by state law. She then found that there was no contractual arrangement regarding workers' compensation benefits, and hence no violation of the contract clause. O'Connor maintained that state laws were implied into private contracts only when such measures affect the enforcement of agreements. A change in state law affecting the remedies that make contracts enforceable, she noted, is subject to contract clause analysis because a change in remedies may weaken the binding force of agreements. But the clause does not bar all changes in law, O'Connor observed, because such a construction "would severely limit the ability of state legislatures to amend their regulatory legislation."⁹⁰

III. THE "PUBLIC USE" IMBROGLIO

Eminent domain is among the most intrusive powers of government because it compels owners to transfer their property to the government or government-sponsored enterprises. The framers of the Fifth Amendment curtailed the exercise of eminent domain by imposing conditions that private property could be acquired for "public use" and upon payment of "just compensation." Yet in the twentieth century the Supreme Court has largely deferred to legislative determinations of "public use," and has been unwilling to reign in the increasingly aggressive exercise of eminent domain by state and local governments.⁹¹ The prevailing interpretation of the "public use" requirement has been guided by the leading case of *Berman v. Parker* (1954).⁹² Property owners challenged the taking of their land under a comprehensive urban renewal project in the District of Columbia for redevelopment by a private agency. They argued that property could not be taken from one owner and transferred to another for private use. Dismissing this contention, the Supreme Court declared that "[t]he role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely narrow one."⁹³ The Court not only equated the concept of "public use" with the broader notion of "public purpose,"

90. *Id.* at 190.

91. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 161–81 (1985); Comment, *The Public Use Limitation of Eminent Domain: An Advance Requiem*, 58 YALE L. J. 599 (1949).

92. 348 U.S. 26 (1954).

93. *Id.* at 32.

but likened eminent domain to the very different police power to protect public health, safety, and morals. Finding that the “concept of the public welfare is broad and inclusive,”⁹⁴ it stressed judicial deference to legislative judgments about the need for eminent domain. *Berman* signaled the almost complete abandonment by the federal courts of the public use clause as a meaningful constraint on governmental authority to acquire private property.

In the first of her two Court opinions addressing the “public use” requirement, O’Connor followed in the footsteps of *Berman*, and upheld the far-reaching exercise of eminent domain in sweeping terms. At issue in *Hawaii Housing Authority v. Midkiff* (1984)⁹⁵ was a land redistribution scheme that entailed the transfer of the fee simple title of family residences from landowners to tenants under long-term leases in order to overcome the perceived problem of concentrated land ownership. The legislature entertained the fanciful hope that conversion of leaseholds into freeholds would somehow decrease housing costs.⁹⁶ This program was assailed as an illegitimate use of eminent domain to take land from one private party and immediately turn it over to other private hands. Writing for the Court, O’Connor reaffirmed the policy of judicial deference to legislative determinations regarding “public use.” She did not mention that the targeted landowners were charitable trusts who operated to assist native Hawaiians. Brushing aside the objection that the land redistribution scheme essentially employed eminent domain to serve private interests, O’Connor repeated the dubious proposition that the “public use” requirement was “coterminous” with the police power.⁹⁷ In an attempt to demonstrate some historical support for the Hawaii land redistribution program, O’Connor made an inapposite reference

94. *Id.* at 33.

95. 467 U.S. 229 (1984).

96. The plan was fatally flawed from the outset. See Debra Pogrud Stark, *How Do You Solve a Problem Like in Kelo?*, 40 J. MARSHALL L. REV. 609, 624–30 (2007) (stressing that the beneficiaries of the takings in *Midkiff* were wealthy tenants and speculators, and that the land redistribution scheme at issue did not reduce the cost of buying homes); Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to “Fulfill Their Unique Role”? A Response to Professor Dyal-Chand*, 31 U. HAW. L. REV. 423, 429–33, 456 (2009) (pointing out that *Midkiff* “resulted in a dramatic escalation of home prices in Hawai’i, contrary to its stated goal of housing cost reduction”). An astute jurist early realized that the likely effect of the statute was to aggravate the shortage of fee simple residential land and inflate land prices. *Midkiff v. Tom*, 702 F.2d 788, 805–06 (9th Cir. 1983) (Poole, J., concurring).

97. *Midkiff*, 467 U.S. at 240.

to Revolutionary-era statutes abolishing quitrents.⁹⁸ These measures are of questionable value in sustaining her opinion. Quitrents were paid to the crown or a colonial proprietor and are best understood as a form of taxation.⁹⁹ O'Connor's invocation of statutes eliminating quitrents was in the nature of an historical fig leaf.

O'Connor concluded that the Court would sustain any exercise of eminent domain "rationally related to a conceivable public purpose."¹⁰⁰ What exercise of the condemnation power would not meet such a relaxed standard? This needlessly expansive language would come back to haunt O'Connor a few years later. In the wake of *Berman* and *Midkiff*, many observers felt that, as a practical matter, the Supreme Court had eliminated "public use" as a check on when government can take property.

Justice O'Connor's next opinion addressing "public use" suggested a dramatic change of heart on her part. In the highly controversial case of *Kelo v. City of New London* (2005),¹⁰¹ a 5 to 4 majority of the Court upheld the exercise of eminent domain for purposes of economic development by private enterprise. Not surprisingly, in reaching this result the majority relied heavily on *Berman* and *Midkiff*.¹⁰²

O'Connor would have none of it, authoring a blistering dissent. She now sought to carve out some room for judicial review of "public use." "Under the banner of economic development," O'Connor insisted, "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded. . . ."¹⁰³ She argued that if incidental public benefits arising from economic development amounted to "public use," then the majority had in effect removed "the words 'for public use'

98. *Id.* at 241, n. 5.

99. See ALVIN RABUSHKA, *TAXATION IN COLONIAL AMERICA* 24–25 (2008). The colonists greatly resisted the payment of quitrents, and they were collected only with difficulty. Hence, the abolition of the quitrent system may well have been of more symbolic than practical significance. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 24–25 (3d ed. 2005). In any event, the elimination of quitrents did not entail a massive transfer of title to land, but actually strengthened the legal position of the current owners.

100. *Midkiff*, 467 U.S. at 241. O'Connor further asserted: "Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligarchy is a rational exercise of the eminent domain power." *Id.* at 243.

101. *Kelo*, 545 U.S. at 469.

102. For my assessment of *Kelo*, see James W. Ely, Jr. "Poor Relation" *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39, 53–65.

103. *Kelo*, 545 U.S. at 494.

from the Takings Clause of the Fifth Amendment.”¹⁰⁴ According to O’Connor, the “public use” and “just compensation” requirements put distinct limits on the taking of property in order to “ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power—particularly by those owners who, for whatever reason, may be unable to protect themselves in the political process against the majority’s will.”¹⁰⁵ She expressed concern that the majority opinion “significantly expands the meaning of public use” and imposes no restraint on eminent domain.¹⁰⁶ Of particular interest was O’Connor’s sharp critique of the “errant language” both in *Berman* and her own *Midkiff* opinion that equated “public use” with the scope of the police power.¹⁰⁷ In much-quoted language, she asserted: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”¹⁰⁸ O’Connor concluded by noting that the majority opinion would likely benefit the powerful at the expense of the weak. “The beneficiaries,” she noted, “are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”¹⁰⁹

O’Connor’s powerful dissent in *Kelo* cheered property rights advocates and surely helped to spark the negative public reaction to the decision. The outpouring of state laws to curb the taking of property for economic development purposes, coupled with state court rulings that reject the majority’s reasoning, strongly suggest that O’Connor was closer to prevailing public opinion than was the majority.¹¹⁰ But

104. *Id.*

105. *Id.* at 496.

106. *Id.* at 501.

107. *Id.* There is room to question, however, whether the sweeping language to which O’Connor belatedly objected was included in her *Midkiff* opinion by mistake. See D. Benjamin Barros, *Nothing ‘Errant’ About It: The Berman and Midkiff Conference Notes and How the Supreme Court Got to Kelo with Its Eyes Wide Open*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 57–74 (Robin Paul Malloy ed. 2008) (arguing that the justices in *Midkiff*, including O’Connor, were “aware of the risks of a broadly-written decision”). This evidence supports the view that O’Connor in fact changed her mind about the appropriateness of such language.

108. *Kelo*, 545 U.S. at 503.

109. *Id.* at 505.

110. See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1880 (2007) (noting “unprecedented public opposition to the idea of taking of

the question remains: can the *Kelo* dissent be squared with the *Midkiff* opinion?

O'Connor sought to distinguish *Midkiff* by identifying three categories of takings that satisfied the "public use" norm: transfers of private property to public ownership, as for roads or military bases; transfers of private property to private parties, such as common carriers or public utilities, which have special duties to serve the public; transfers to private parties in unusual circumstances where "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society."¹¹¹ In her mind, *Berman* upheld eminent domain to eliminate urban blight, and *Midkiff* sustained the taking of property to eliminate an oligopoly in land ownership. Thus, both fit into her third category.

Yet O'Connor's efforts to distinguish *Midkiff* are unconvincing. First, there is no clear line between the elimination of blight and commercial development. Given the open-ended understanding of what constitutes blight in many jurisdictions, blight takings could be utilized to achieve economic development purposes.¹¹² Indeed, blight condemnations are often part of a redevelopment program. The difference that O'Connor saw between blight takings and economic development takings is elusive and likely untenable. She might more profitably have revisited the question of whether the elimination of blight constitutes "public use."¹¹³ Second, one could argue that the land redistribution scheme in *Midkiff* was a greater threat to the security of private property than the economic development taking in *Kelo*. It contemplated an overhaul of landownership in the entire state, a move without precedent in American history.

On the other hand, the facts of the two cases are distinguishable. The outcome in *Kelo* clearly moved beyond the factual basis for

private property for economic development," and concluding that "we can take the anti-*Kelo* position to be a more accurate statement of general sentiment about property rights than the opposite position"; Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T L. REV. 1, 23 (2011) (discussing a 2009 survey which showed that a large majority of Americans continued to oppose economic development takings). For the legislative and judicial response to *Kelo* at the state level, see James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127 (2009) [hereinafter Ely, *Post-Kelo Reform*]; Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

111. *Kelo*, 545 U.S. at 497–500.

112. Ely, *Post-Kelo Reform*, *supra* note 110, at 134–36 (discussing elusive definitions of "blight," and noting that the distinction between "blight" and economic development is fuzzy).

113. Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833 (2007).

Midkiff because the condemned homes in New London were not blighted and did not, by any stretch of the imagination, constitute an oligopoly. Moreover, the taking in *Kelo* obviously conferred immediate benefits on powerful private interests, while any gains for the public were indirect and speculative.

Perhaps O'Connor reconsidered the impact of free-wheeling eminent domain and at least partially changed her mind. She may well have been influenced by the trend among state supreme courts to tighten the definition of "public use" even before the *Kelo* decision.¹¹⁴ In particular, the decision by the Supreme Court of Michigan in *County of Wayne v. Hathcock* (2004) overruling a prior decision and emphatically rejecting the economic development rationale for the condemnation of land received widespread publicity.¹¹⁵ O'Connor cited *Hathcock* in her dissent, and quite likely the increasing judicial skepticism about an open-ended understanding of "public use" caused her to rethink the question. She may also have become more attentive to the actual impact of eminent domain upon communities. Her comment about eminent domain serving the interests of the powerful and politically connected point in this direction. Or perhaps, given her penchant for ad hoc inquiry in takings cases, O'Connor was simply more sympathetic to the middle class homeowners in New London than she was to the large landlords in Hawaii. She backed away from some aspects of *Midkiff*, expressly repudiating her previous linking of "public use" and the police power. But she also insisted that *Midkiff* was "true to the principles underlying the Public Use Clause."¹¹⁶ The result is a high degree of intellectual confusion flowing from her tendency to eschew legal doctrine in favor of ad hoc decisions. A takings jurisprudence that rests upon personal preference in particular cases is unlikely to produce either consistent or workable rules. Ultimately O'Connor's thinking remains a puzzlement.¹¹⁷

114. A number of state courts invalidated the exercise of eminent domain for economic development purposes by private parties prior to the *Kelo* decision. *See, e.g.*, *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (Ct. App. 2003); *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 Ill. 2d 225, 768 N.E.2d 1 (2002), *cert. denied*, 537 U.S. 880 (2002); *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 727 A.2d 102 (1998); *Karesh v. City of Charleston*, 271 S.C. 339, 247 S.E.2d 342 (1978).

115. *County of Wayne v. Hathcock*, 471 Mich. 445, 648 N.W.2d 765 (2004) (overruling *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981)).

116. *Kelo*, 545 U.S. at 500.

117. For an insightful comparison of O'Connor's opinions in *Midkiff* and *Kelo*, see Gideon

CONCLUSION

For decades following the political triumph of the New Deal, the Supreme Court generally ignored issues pertaining to the rights of property owners. Critics charged that the Court had virtually deleted property rights from the Constitution. As the political and intellectual ascendancy of the New Deal disintegrated, however, the Court gradually expressed renewed interest in the subject.¹¹⁸ In the 1980s, and especially after Rehnquist became chief justice in 1986, the Supreme Court became more solicitous of the rights of property owners than at any time since the pre–New Deal Court of the 1930s.

O'Connor contributed significantly to this development. Certainly she did much to help restore property rights to the constitutional agenda. But her achievements were mixed, and fell short of what her early opinions portended or what property rights advocates hoped. O'Connor never formulated a consistent or muscular property rights approach, and often sustained governmental power. Her pragmatic jurisprudence—as in other areas of constitutional law—did not lend itself to the fashioning of clear rules or providing guidance for the future. In this regard, her abiding support for the mushy *Penn Central* test for regulatory takings is revealing.

Still, a comparative look might be helpful to gain a perspective on O'Connor's property jurisprudence. For example, contrast Justice O'Connor's property decisions with those of Justice John Paul Stevens, the author of the majority opinions in *Kelo* and *San Remo Hotel*. Stevens compiled a very consistent record of hostility to meaningful protection of property rights. Reflecting the continuing influence of statist liberalism emanating from the New Deal, Stevens almost invariably rejected or minimized claims advanced by property owners. He made clear his skepticism about the doctrine of regulatory takings.¹¹⁹ He repeatedly expressed great—some might say

Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 356–57 (2006) ("Justice O'Connor's intellectual misadventure thus demonstrates that she who lived by ad hocery dies by it.")

118. ELY, *supra* note 3, at 142–43.

119. *Dolan*, 512 U.S. at 406–07 (Stevens, J., dissenting). Stevens likened regulatory takings to due process cases such as *Lochner v. New York*, 198 U.S. 45 (1905). Stevens appears to harbor a dated image of *Lochner* fashioned by the Progressives to serve their political and legal goals. For a sharp attack on the conventional treatment of this case, see DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

naïve—confidence in local land use regulators. Indeed, in his *Kelo* opinion Stevens seemed virtually mesmerized by the City of New London’s supposedly comprehensive development plan,¹²⁰ which, in spite of his enthusiasm, turned out to be a failure. Thus, he was prepared to allow local officials wide discretion over the rights of owners.¹²¹ Fortunately, O’Connor did not always follow this supine path.

In 1994, in an opinion joined by O’Connor, Chief Justice Rehnquist proclaimed: “We see no reason why the Takings Clause, as much a part of the Bill of Rights as the First Amendment, should be relegated to the status of a poor relation.”¹²² By this measure both the Rehnquist Court and O’Connor fell short. Despite its conservative reputation, the Rehnquist Court never had a firm majority prepared to uphold the rights of property owners in the face of governmental regulations. The justices, including O’Connor, were unable to break free of statist thinking about property.¹²³ This is not to deny that there were some positive steps to strengthen property as a constitutional right. By O’Connor’s retirement, property owners enjoyed somewhat more protection from government than they had in prior decades. How much more protection, however, was a subject for debate. But thanks to O’Connor and her colleagues both scholars and the general public were talking more about property rights than they had done in a generation. The full implications of this are yet to unfold, and so a final assessment of O’Connor’s checkered property jurisprudence is premature.

120. See Nicole Stelle Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443, 444 (2007) (noting the frequency with which the Stevens opinion in *Kelo* invoked the terms “plan” or “planning”).

121. It is revealing that in his reminiscences about his tenure on the Court Justice Stevens did not even comment on cases dealing with property and contractual rights. See JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* (2011).

122. *Dolan*, 512 U.S. at 392.

123. Eric A. Claeyes, *Takings and Private Property on the Rehnquist Court*, 99 *NW. U. L. REV.* 127 (2005). See also TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 101–26 (2000).