

THE PROPERTY RIGHTS DECISIONS OF JUSTICE
SANDRA DAY O’CONNOR: WHEN PRAGMATIC
BALANCING IS NOT ENOUGH

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INTRODUCTION: O’CONNOR’S FIDELITY TO TRADITION

Any search for two words to characterize Justice Sandra Day O’Connor’s judicial work over her distinguished twenty-five-year Supreme Court career would quickly hone in on “pragmatism” and “balancing.” Justice O’Connor is “pragmatic” not because she displays any trace of personal opportunism, but because of her deep institutional commitment to do what she can to promote the long-term stability of American political institutions under law. She believes in “balancing” because of her strong conviction that constant attention to the particular facts and circumstances of each individual case help restrain a Justice from pushing legal doctrine too far in one direction or another—again, in ways that might destabilize the legal system. So constrained, Justice O’Connor does not give pride of place to overarching theories in working out her particular decisions. It would, however, be a serious mistake to treat her as a constitutional “minimalist” who wants to situate every case on its own bottom,¹ for she does have a consistent philosophy. Instead, her primary concern is to preserve continuity with existing legal doctrinal structures, which requires more fidelity to the past than any strong minimalist view of constitutional law would require. The best way to think of her work is as an effort to nudge the received judicial wisdom in her preferred direction, without attacking the intellectual foundations

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1. For a discussion of this view, see, for example, CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001).

of the system as a whole. Put otherwise, she is comfortable—too comfortable, in my view—with the United States’ modern social democratic state that relies on a firm public/private alliance that simultaneously works for both sustained economic growth and a fair distribution of wealth. Her frame of mind represents an updated judicial version of Pax Eisenhower, with its winning campaign slogan of “Peace, Prosperity, and Progress.”²

There is much to be said for adopting this model. Its key trade-off is to write off any large gains from major judicial intervention in order to prevent major institutional shipwrecks borne of hasty and irresponsible judicial intervention on matters in which courts have, at most, imperfect knowledge. A former legislator, Justice O’Connor is generally sympathetic to legislative schemes that memorialize compromise settlements to complex problems. Her affection for balancing tests is like a gyroscope that prevents the ship of state from lurching too far in one direction or the other. Put otherwise, Justice O’Connor worked comfortably within the dominant tradition, without seeking to overturn it. That view carries over to her work in property law, which for these purposes, I construe to cover the law of takings and the collateral doctrines dealing with deprivations of due process and impairment of contracts. The question is how to evaluate her performance.

The inquiry merits a split decision. Armed with this general approach, she has produced, without question, some of the strongest and most thoughtful Supreme Court decisions in the past decade. Her decision in *FDA v. Brown & Williamson Tobacco Corp.*³ offers as careful a demolition of aggressive administrative action as one could hope to read. Her decision in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*⁴ offers one of the best defenses of the flat tax in the context of the First Amendment, which easily could be generalized to cover all systems of taxation on all forms of property.⁵ And her analysis of federalism in *Gregory*

2. See DWIGHT EISENHOWER, MANDATE FOR CHANGE: 1953–1956, 484–85 (Doubleday, 1963) (“The slogan ‘Peace, Prosperity, and Progress,’ which was applied to the first-term years, and was used in the campaign of 1956 . . .”).

3. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

4. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983).

5. I attempt the latter in RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 283–305 (1985).

*v. Ashcroft*⁶ offers perhaps the most thoughtful judicial commentary on matters of federalism. Her thoughtful opinion in *New York v. United States*⁷ breathed some much needed rigor into the vexed relationship between the national and state sovereignty. That decision followed her powerful dissent in *South Dakota v. Dole*,⁸ which turned on the distinction between encouragement and coercion in the law of unconstitutional conditions and is a beacon of sense relative to the opinion for the Court prepared by Chief Justice Rehnquist.⁹

There are two common threads that link all these diverse opinions together. At first look, they may seem to be unrelated, but in fact they are closely connected. The first point is that in her strongest opinions Justice O'Connor was prepared to *strike something down*. That simple task sharpens the intellect and allows her to use her thinking cap. The reason these decisions work so well is that the basic tradition in which she wrote calls for some higher level of scrutiny which allows her to turn her analytical powers to the hard questions put before her, without having to rock the Supreme Court's constitutional boat.

The second point is that she tends to use that power on those issues for which she cares about as a constitutional matter. That point seems more or less true with respect to her First Amendment decisions, where she cares about the role of political speech in society, and it is equally true in her administrative law opinions, where she has some concern with the excess aggrandizement of administrative power. It is also evident in her federalism opinion, where her history as a state legislator (who rose to be speaker of the Arizona assembly) made her acutely aware of the dangers of the federal overreach with respect to matters that she thought rightly lay within the control of the state, and which inspired some of her most incisive and influential writing.

Yet exactly the opposite predilections are at work in the property cases, where she tended (at least until *Kelo*) to give a large berth to state and local government officials to regulate all aspects of local land use law. Here the desire to respect these decisions of state and

6. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

7. *New York v. United States*, 505 U.S. 144 (1992).

8. *South Dakota v. Dole*, 483 U.S. 203 (1987).

9. I stoutly defend her federalism decisions in *Judicial Engagement with the Affordable Care Act: Why Rational Basis Analysis Falls Short*, 19 *GEORGE MASON L. REV.* 931 (2012).

local government officials leads her to embrace a world view in which balancing is done in accordance with the rational basis test, where the slightest state interest can resist the strongest private claims. In this regard, Justice O'Connor's fidelity to tradition often does more harm than good. In making this statement, I am well aware that on some key issues, she has aligned herself with what might be called the conservative majority on the court. She has sided with Justice Antonin Scalia and Chief Justice William H. Rehnquist in their joint effort to put some constitutional limitations on the common practice of state local governments to demand exactions as the price for permitting new projects. For example, she concurred in Justice Scalia's decision in *Nollan v. California Coastal Commission*,¹⁰ which introduced the doctrine of unconstitutional conditions into the law of takings, and joined Chief Justice Rehnquist's effort in *Dolan v. City of Tigard*¹¹ to place proportionality limitations on these exactions in such a way as to limit their insidious scope.¹²

Yet in the end, both of these efforts to constrain the machinations of state and local governments proved to be failures as lower courts have deployed a variety of devices to water down *Nollan* and *Dolan*, so that today state and local governments routinely impose exactions with little fear of judicial invalidation.¹³ The same is true with respect to her decision to join Chief Justice Rehnquist in *First English Evangelical Lutheran Church v. County of Los Angeles*,¹⁴ where his efforts to limit the scope of permanent partial takings did little or nothing to tie the hands of local governments that sought to impose strong delays on the development of property rights. Indeed, the rule was largely eviscerated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.¹⁵ There, it seems likely that

10. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). For a generally supportive view of *Nollan*, see Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731 (1988).

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

12. For my discussion, see Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 479 (1995).

13. See, e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (upholding financial exaction to be paid for additional public amenities). And on the procedural side, see *Williamson v. Hamilton Bank*, 473 U.S. 172 (1985).

14. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

15. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (sustaining a succession of temporary land use ordinances against a *First English*

Justice O'Connor joined the majority because the claimants raised the bar so high as to say that any moratorium—no matter how short—constituted a temporal taking for which compensation was required.¹⁶ The simple truth is that unless and until the Supreme Court revisits and reaffirms these decisions, lower courts will remain highly deferential to state and local governments on all land use issues. And that level of commitment on these issues is just not there.

This capsule summary helps identify the two systematic weaknesses of Justice O'Connor's pragmatic balancing. First, that approach guarantees that she has no fire in the belly. Until her flawed-but-inspired valedictory in *Kelo v. City of New London*,¹⁷ no property rights case attracted her passion at the same level brought by the Supreme Court in cases of racial segregation and police brutality between, say, the New Deal Supreme Court and the early years of the Burger Court, which are best understood as an extension of the Warren Court.¹⁸

The second weakness of her position is ultimately more important. Constitutional pragmatism and balancing all presuppose that the correct way to address both legal doctrine and institutional practices is incrementally. But for that approach to make sense, the doctrine and practices have to be at or near the right place to begin with. There are doubtless many areas of Supreme Court jurisprudence that can be regarded as more or less on the mark. I take that view on the dormant commerce clause, which has done a world of good even though it has somewhat porous textual foundations.¹⁹ I think that the same can be said of First Amendment's protection of public

attack). Justice O'Connor joined in Justice Stevens's opinion, leaving Chief Justice Rehnquist, Justice Scalia and Justice Thomas in dissent.

16. *Id.* at 320 ("For petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a per se rule that a taking has occurred."). Indeed, there is no need to go that far. Another sensible reading allows for "normal delays" that are commonly experienced, so long as these are cabined to a relatively short time. *See id.* at 343 (Rehnquist, C.J., dissenting). For a defense of that line, see Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081 (1999).

17. *Kelo v. City of New London*, 545 U.S. 469 (2005). *See infra* Part I.

18. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits as property rights); *Griggs v. Duke Power*, 401 U.S. 424 (1971) (recognizing disparate impact tests in civil rights litigation); *Roe v. Wade*, 410 U.S. 113 (1973) (constitutional protection of abortion).

19. For a discussion, see, for example, Richard A. Epstein, *Waste & the Dormant Commerce Clause*, 3 GREEN BAG 2d 29 (1999).

dissenting voices.²⁰ But takings law is not in any shape to command a level of judicial respect that it has not earned.

Five major decisions shaped this field prior to Justice O'Connor's appearance on the Supreme Court. *Block v. Hirsh*²¹ bestowed extensive power on the state to impose rent control systems on real estate leases. *Euclid v. Ambler Realty Co.*²² immunized virtually all zoning schemes from constitutional attack, except on some small-bore issues.²³ *Home Mortgage Co. v. Blaisdell*²⁴ used an expansive reading of the police power to cope with emergencies to truncate the constitutional protection from state regulation afforded to mortgagees, chiefly banks and other financial institutions. *Berman v. Parker*²⁵ gave local governments a wide berth to institute comprehensive planning schemes without running afoul of the public use limitation found in the Takings Clause. *Penn Central Trans. Corp. v. City of New York*²⁶ relied on a famous three-part balancing test that softened the protection that private property received against land use ordinances—in this instance, a landmark preservation statute. The last two loom very large in Justice O'Connor's pantheon of decided cases.

There is one common element in all these decisions, which is their willingness to show strong deference to the decisions of a government regulator—even when it trenches strongly on the rights of private property and voluntary contract. The great vice of Justice O'Connor's incrementalism is that she begins her deliberation, not with a sound appreciation of how wrong these cases are as a matter of first principle, but from her insistence on asking just how far she can deviate from the current legal position without toppling the apple cart. The justices writing in the earlier cases were, of course, not bound by any particular decision. Even if they were, they would have been quite happy to move the yardstick in their preferred direction without undue concern with *stare decisis*, constitutional text, or constitutional theory. All these vices are evident in Justice Brennan's facile opinion in *Penn Central*. The effect, therefore, of

20. See, e.g., *Feiner v. New York*, 340 U.S. 315 (1951).

21. *Block v. Hirsch*, 256 U.S. 1325 (1921).

22. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

23. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

24. *Home Mortgage Co. v. Blaisdell*, 290 U.S. 398 (1934).

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

26. *Penn Central Trans. Corp. v. City of New York*, 438 U.S. 104 (1978).

Justice O'Connor's position is to entrench the worst in the Supreme Court precedent, which thereby makes it more difficult to undo a bad status quo in the next iteration. This tendency is, of course, not confined to the property cases broadly conceived. It is also exemplified in Chief Justice Rehnquist's commerce clause opinion in *United States v. Lopez*²⁷ which further insulated the gigantic over-reading of the commerce power in *Wickard v. Filburn*²⁸ from much-needed further scrutiny.²⁹

The intellectual root of our current judicial disarray starts with the wretched status quo ante when Justice O'Connor took her seat on the Court in 1981. The dominant approach toward takings issues is summed up by two words that appear nowhere in the Constitution, but which dictate its across-the-board application: rational basis. That test represents one of three flavors of constitutional review. The most exacting form involves strict scrutiny, where the key assumption is that the error cost of letting bad legislation through is far greater than the error cost of keeping good legislation off the books.

There are two types of error: the first can be termed Type I Error, and the second is Type II Error. If Type I error is far more costly, the law should opt for more Type II errors than Type I errors. We, therefore, are trying to minimize the weighted sum of both types of error, each with a distinctive weight n or m . The task is to minimize $n(\text{Type I}) + m(\text{Type II})$ where both n and m can be less than or greater than one. Divide both sides through by m , so that the task is to minimize the sum of $(n/m)\text{Type I} + \text{Type II}$. In a strict scrutiny system, it is plausible, and perhaps even generous, by way of numerical illustration, to set $n/m = 10$. In intermediate scrutiny, that ratio is surely lower. I think that it would not be a fair representation to assume that $n/m = 1$ in these cases, but is in fact greater than 1, which reflects the common perception that intermediate scrutiny is closer to strict scrutiny than it is to the rational basis test, where $n/m < 1$, which is to say, the error of keeping legislation off the books is far greater than the error of letting it in. If that ratio equals 0.1, strict scrutiny cashes out to be 100 times (10/0.1) as serious as rational basis. No wonder it is a rare occasion when legislation is

27. *United States v. Lopez*, 514 U.S. 549 (1995).

28. *Wickard v. Filburn*, 317 U.S. 111 (1942).

29. For my views, see Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O'Connor*, 58 STAN. L. REV. 1793 (2006).

upheld under strict scrutiny or struck down under rational basis. A judicial chasm lies between the two approaches.

The Constitution is not explicitly equipped with any calipers that indicate which standard of review should be used in which particular context. Those critical choices are left to the vagaries of constitutional interpretation. The questions involved in this circumstance, therefore, are as follows. The first is whether or not the Supreme Court (which is the only court whose view truly matters on this issue) should utilize a uniform standard of review across each class of constitutional claims. If the answer to that question is yes, what standard ought to be applied? If the answer is no, which is manifestly the choice today, the next question is which constitutional provisions receive what level of scrutiny, and why. Thus, in the takings area, it seems quite clear that courts give greater scrutiny to the question of what compensation is “just” than they give to the question of whether a taking is for a particular matter of public use. This contrast is made explicitly in the following passage:

There can, in view of the combination of those two words [just and compensation], be no doubt that the compensation must be a full and perfect equivalent for the property taken, and this just compensation, it will be noticed, is for the property, and not to the owner. . . . This [verbal formulation] excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner. . . .

By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just

compensation shall be paid, and the ascertainment of that is a judicial inquiry.³⁰

That persistent distinction, moreover, cannot be derived by any textual inspection of the entire Takings Clause—“nor shall private property be taken for public use, without just compensation”—which reads, across the board, as a strict constraint on all government officials.

So which particular constitutional provisions should receive what level of scrutiny? In the end, I can envision only one sound approach to that challenge. The underlying principle runs in its simplest form as follows: the higher the level of legislative or administrative malfunction, the greater the level of judicial scrutiny.³¹ That view was articulated most forcefully in the late John Hart Ely’s 1980 book, *Democracy and Distrust*, whose title reveals its thesis.³² As stated, this proposition does not take into account the abilities of the Supreme Court to discharge its ultimate function. Surely if the Court were universally regarded as a corrupt institution, say, incorrigible as an Argentinean or Russian court, no one would pay fealty to it. But no one remotely thinks that this is the case, so the question of its competence goes into the balance in the form of question of whether the disputed issue falls within the Supreme Court’s institutional competence. At this point, the relative insulation of the judiciary from political forces means that there are few systematic

30. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326–27 (1893). Several points are worthy of note here. First, in *Monongahela*, there was never any real question of whether the locks involved in that case were for public use, so that the sentence in question only refers to the fact that the legislature has the power to decide which public works project to initiate. The taking for private use issue is just not raised. Second, the reference that the compensation is “for the property, and not to the owner” is used here to indicate that there is no setoff to the amount paid a given owner for the return benefits received from the project that are shared with the public at large. The point here is to preserve parity, which in turn reduces the level of political machinations. On these risks, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 98–103 (1993) on the preservation of the surplus. Note that Justice Brewer is also correct when he observes that some setoffs may well be appropriate for any increased value that goes uniquely to the party whose property is taken. That proposition in turn raises the question of additional recovery for severance damages, an issue to which he alludes, but does not resolve. See *Monongahela*, 148 U.S. at 326 (“We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration.”).

31. For a tantalizingly cryptic discussion of the issue, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 97–98 (1980).

32. *Id.*

fluctuations in its competence level. So the dominant inquiry remains how well the Supreme Court can expect the legislature to reform across different areas.

Historically, that legislative failure was immense on questions of race in the period, between, say, 1890 and 1960,³³ where disenfranchisement and marginalization of minority groups rested on a fashionable form of racial bigotry that all too often permeated legislative and administrative action. Similarly, political dissent calls for a high level of judicial scrutiny, given the inveterate danger that incumbents will stack the deck in their favor. Moving on, there are also high levels of scrutiny in dealing with state restrictions on the flow of interstate commerce, precisely because of the well-known tendency of states to favor their voters at the expense of out-of-state parties who need not only the protection of diversity jurisdiction, but also protection of a nondiscrimination provision so that they are not treated more harshly than their local competitors.³⁴

In dealing with these areas, one theme dominates the interpretation of the case law: every *juncture* follows in rough contour the principles not of the strong libertarian, but of the classical liberal. It is important to state briefly both the similarities and differences between these two positions.³⁵ Both libertarian and classical liberal theories start with the view that individual autonomy, or self-ownership, is the indisputable starting place for the analysis of any system of individual rights. This includes those enshrined in the Constitution, with its explicit guarantees, good against both the state and the federal government, that no person should be deprived of life, liberty of property, without due process of law.³⁶ Clearly, these items are placed on the list because they are the dominant interests that are worth protecting; a proposition that follows easily from the general Lockean proposition that speaks about the protection of “lives, liberties, and estates”³⁷ which compromise the *only* interests that are protected under the name “property,” which clearly let the

33. For a discussion, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974).

34. *See, e.g.*, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

35. I develop this theme in RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

36. U.S. CONST. amends. V & XIV.

37. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 222 (Thomas P. Peardon ed., 1997) (1690).

state afford police power protections against theft, rape and murder in order to protect the autonomy of the person.

For the purposes of this paper, however, the key element is the protection of property, which covers land and much else besides, including water rights, air rights, chattels, and intellectual property. To some libertarians, these rights are conceived of as “absolute” so that they can be forfeited or otherwise lost only for two reasons: first, to satisfy the losses attributable to aggression against others, and second, to honor a prior contractual obligation made to others but not discharged. In contrast, taxation in any form and eminent domain find no secure place under an uncompromising libertarian approach because both involve the state initiation of forced exchanges where the state determines both whether the exchange shall take place and the amount of compensation supplied for that property loss.³⁸

The classical liberal position understands both the necessity for, and the dangers of, the twin practices of taxation and eminent domain. As to need, without the insertion of state power, there is simply no way overcome the massive holdout and coordination problems that stand in the path of organizing key social institutions. In this context, I shall not rehearse the well-understood reasons for requiring the collective provision of public goods.³⁹ But it is important to note that authorization of both the taxing and eminent domain powers is explicit in the Constitution.⁴⁰ Accordingly, no credible case can be made for reading the document as a hard-line libertarian tract. But by the same token, the careful calibration of the rules that govern both taxation and condemnation make it equally clear that the Framers of the Constitution were painfully aware of the abuses that often cropped up in the operation of these powers. Thus, where the commitment to the right is firm, as with speech and free trade, the explicit limitations against exploitation are found in a narrow definition of the police power, such that the use of government force without the payment of compensation is concentrated on activities that involve the use or threat of force or fraud.⁴¹ The state can

38. For a powerful statement of this point of view, see ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* (1987).

39. For the classic exposition, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

40. U.S. CONST. art. I, § 2, cl. 3, § 8, cl. 1, § 9, cls. 1, 4, 5.

41. For a systematic discussion, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 107–46 (1985).

impose restrictions against firms that threaten the use of force against potential customers that choose to do business with their rivals. But it cannot introduce protectionist legislation that prohibits fair competition—no force and fraud—in the marketplace for goods any more than it can do so in the marketplace for ideas, which was the point of the so-called labor exception to the police power in *Lochner v. New York*.⁴² It is, in a word, no accident that the concern for misleading statements marks the limits of state control in dealing with advertisement and other forms of commercial speech.⁴³ It is equally the case that the ability to prevent the shipment of goods into another state depends on a clear showing that they pose a peril to the animal and plant life located there.⁴⁴ When there are no such justifications, the restrictions on outsiders must be matched by similar restrictions on insiders, so that regulation does not create a home court advantage to domestic firms.⁴⁵

All those protections remain in place under any regime of strict scrutiny because the Justices have understood the social gains that come from protection of the underlying interests. But it is just that conviction that fails when the discussion switches to the protection of property rights under the Takings Clause. In modern times, property is no longer regarded as the guardian of every other right. It is often treated as though it were the bastion of privilege or that it protects holdings that have some vague, dubious pedigree. Or that there are a dizzying array of supposed externalities—visual and aesthetic ones easily come to mind⁴⁶—that justify its regulation without compensation. If that capacious definition of the police power were applied to speech, it would allow anyone to plead their own adverse reaction to deny the rights of others to burn the American flag,⁴⁷ or, to push the claim even further, to resist saying the Pledge of Allegiance.⁴⁸ The point here is that there is no alternative to the classical liberal theory on the limited scope of the police power, if the central task of constitutionalism is to design a government that

42. *Lochner v. New York*, 198 U.S. 45 (1905). For discussion of its collusive effects, see DAVID BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

43. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

44. *Maine v. Taylor*, 477 U.S. 131 (1986).

45. *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

46. See *Welch v. Swasey*, 214 U.S. 91 (1909).

47. *Texas v. Johnson*, 491 U.S. 397 (1989).

48. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

is strong enough to protect its catalog of individual rights without letting an abuse of government power snuff out those same rights. The adoption of the rational basis test therefore represents a key surrender on this central point, by adopting a course of action that literally offers the state vastly more running room than the classical liberal position—by a factor of one hundred, as it were. It is this willingness to let down the guard that marks in so many ways Justice O'Connor's jurisprudence in this area. It is instructive to go through her major opinions on this area with this point in mind. In so doing it is instructive to see how they build on all the earlier decisions that were set out above. In Part I I look at the dramatic turn around in her two public use decisions, *Midkiff* and *Kelo*. In Part II, I extend the analysis to her two decisions that deal with the issue of regulatory takings, *Yee v. Village of Escondido*⁴⁹ and *Lingle v. Chevron U.S.A. Inc.*⁵⁰ Part III looks at her opinions in *Connolly* and *Eastern Enterprise* in the context of retroactive legislation. The last Part concludes.

I. PUBLIC USE AND THE TAKINGS CLAUSE: OF *MIDKIFF* AND *KELO*

*Hawaiian Housing Authority v. Midkiff*⁵¹ marked Justice O'Connor's first major opinion on property law. Writing for a unanimous 8–0 majority, she upheld the constitutionality of Hawaii's Land Reform Act of 1967,⁵² which created a scheme for the transfer of a landlord's interest in leased premises to the sitting tenant by use of the state's eminent domain power. The first salient feature of this scheme is that the condemnation was not initiated by the state for some public purpose. Instead, under the Act's provision, any group of sitting tenants could petition the local government for the condemnation. Once the petition is made, the matter was referred to the Hawaiian Housing Authority for a determination of whether

49. *Yee v. Village of Escondido*, 503 U.S. 519 (1993). I have previously made my views clear on the case, in Richard A. Epstein, *Yee v. City of Escondido: The Supreme Court Strikes Out Again*, 26 LOY. L.A. L. REV. 3 (1992).

50. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

51. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); see Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (arguing that *Midkiff* illustrates that "courts have no theory or conceptual foundation from which meaningful standards for judicial review of public use issues might originate."); see also H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (arguing that *Midkiff* was decided in accordance with originalist principles because of "the difficulty of tying the hostility to redistribution directly to the 'public use' language of the fifth amendment.").

52. See HAW. REV. STAT. § 516-1 *et seq.* (2011).

the condemnation is consistent with the provision of the Act. Thereafter, the state was authorized to lend money to individual tenants to help them finance the condemnation in question but could only proceed with the particular condemnation once the financing was arranged so that the state took no independent financial risk. In dealing with this case, the Ninth Circuit held that this elaborate scheme ran afoul of the Constitution because at root, it was nothing more than “a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B’s private use and benefit.”⁵³

When the case reached the Supreme Court therefore, the public use question was regarded as a live one by the lower courts. Affirming that decision on the ground stated by the Ninth Circuit would have done no obvious violence to the constitutional text or, as I shall show, to the prior decisions of the Supreme Court. But Justice O’Connor did not take that course. Instead she took her cue from the one earlier decision, *Berman v. Parker*,⁵⁴ which in good incremental fashion she treated as the “starting point of our analysis.”⁵⁵ That 1954 decision reflected a strong academic consensus that the demands for intelligent urban planning required a virtual nullification of the public use requirement, such that the protection afforded individual property owners was solely through the payment of just compensation.⁵⁶ Those two factors put her immediately in her comfort zone. Her challenge was how to reach that result, where the outcome depended on the choice of the constitutional standard of review. On that question, she opted emphatically for the rational basis test by uttering one sentence, with one key word, that largely charted the course of government takings (as opposed to regulations) in the United States for the next 20 years or more. The key word is, of course, “conceivable.” The larger passage in which it is embedded reads as follows:

To be sure, the Court’s cases have repeatedly stated that “one person’s property may not be taken for the benefit of another

53. *Midkiff*, 467 U.S. at 235 (quoting *Midkiff v. Tom*, 702 F. 2d 788, 798 (1983)).

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

55. *Midkiff*, 467 U.S. at 239.

56. For discussion, see Note, *The Public Use Limitation on Eminent Domain, An Advance Requiem*, 58 YALE L. J. 599, 613–14 (1949). For my views, see RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, 161–62 (1985). For a somewhat different account of public use, see Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

private person without a justifying public purpose, even though compensation be paid.” Thus, in *Missouri Pacific R. Co. v. Nebraska*, where the “order in question was not, and was not claimed to be, . . . a taking of private property for a public use under the right of eminent domain,” the Court invalidated a compensated taking of property for lack of a justifying public purpose. But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

On this basis, we have no trouble concluding that the Hawaii Act is constitutional.⁵⁷

The passage is highly suspect on a large number of grounds. The first of these is textual. The Constitution does not say “nor shall private property be taken for uses that the legislature find serve a conceivable public purpose without just compensation.” The words “public use” are narrower than the words “public purpose,” for there are many government takings that might serve a public purpose where the public makes no use of the land. Indeed, *Midkiff* is just one of those cases, for once the process runs its course the tenant-turned-fee owner has the outright fee interest indistinguishable from that of any other property owner. The elastic nature of the clause is made more palpable by the insertion of the word “conceivable” in the passage, even though that term does not appear in any of the cases that she cites in support of her new general proposition. And with the insertion of that word, it looks as though the public use clause does receive its final burial. It is without question the case that virtually any comprehensive government program serves multiple ends, some of which count as good public policy and others of which count as bad ends. Adding the word “conceivable” makes it highly likely that one of those other purposes, taken alone and out of context, becomes sufficient to support the result. What started out as a limitation on the power of government to take property has now been eviscerated to allow the scheme in question.

So the issue then turns to the question of whether any such conceivable purpose can be identified. On this score, Justice O’Connor does not break stride. Spurred on by an ingenious argument by two constitutional heavyweights, Laurence Tribe and Kathleen Sullivan, Justice O’Connor concluded that the high concentration of land

57. *Midkiff*, 467 U.S. at 241 (internal citations removed).

ownership in Hawaii creates a “land oligopoly,” which the Hawaii legislature could, and did, create as an evil by imposing artificial increases in rents.⁵⁸ Arguments of this sort pass muster only because they are not meant to be subject to scrutiny, let alone refutation. The observation that land is concentrated in the hands of 72 or 22 landowners is consistent with intense competition in the rental market, for these concentrations are far below the three or four firms that attract attention under the antitrust law.⁵⁹

At no point does she ask, however, a theoretical question of whether state intervention is needed to cure any market failure. On this point, moreover, theory lines up squarely against her. The key insight in this area is that the eminent domain power is primarily needed to secure the assembly of many different parcels of land that are needed to achieve a single integrated purpose, such as a railroad that has to cut through the land of many owners. In a world without eminent domain, there is a material risk that individual landowners could hold out for large sums of money, such that the combined demands could easily upend a project that it is in the interest of all to go forward. The just compensation requirement insures that no individual is necessarily made worse off by the state action, at least if the compensation is correctly calculated, which often today it is not.⁶⁰ The decision to go forward in the face of that cost thus allows the state to achieve through coercion a positive collective that no set of private contracts could hope to match.

In contrast, the situation presented in *Midkiff* is the antithesis of the standard setting for invoking the eminent domain power. All that is at stake in *Midkiff* is a large collection of individual bilateral contracts, each of which could be renegotiated independent of the others. Here is a case where private buyouts are simpler, cheaper,

58. See *Midkiff*, 46 U.S. at 241–42; see also HAW. REV. STAT. § 516 (2011).

59. U.S. DEPT OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES, § 5.3 (2010). “The HHI [the Herfindahl-Hirschman Index] is calculated by summing the squares of the individual firms’ market shares, and thus gives proportionately greater weight to the larger market shares.” An HHI below 1500 normally attracts no attention. The HHI for a market with 22 equal size firms is effectively zero. Any market in which the largest firm has only 10 percent of the market will usually have a HHI of under 200. Note that at best the HHI is only a minimum condition for intervention. In some cases a merger between a strong and a weak firm could be justified even if it increases concentration, by adding to the efficiency of the combined firm.

60. See RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 115 (1985).

and more accurate than the clumsy state administrative apparatus. The individual difficulties in lease renegotiation cannot count as a reason to justify forced condemnation under the aegis of the state, for if they do so, then any lease, or indeed any other contract, could be overridden on the ground that contract modification is a complex process, which indeed it is. The simple truth is that the case for eminent domain could not be at a lower ebb than it is in this setting, especially since the Bishop Estate (which was the state's largest landlord) was seeking at the time to work out deals with tenants, in the face of an all-too-evident sovereign risk, which is best combated by diversifying assets across several different jurisdictions.

This theoretical explanation points as well to a strong cleavage between *Midkiff* and *Berman v. Parker* on which Justice O'Connor heavily relied.⁶¹ *Berman* was a *land use* case in which the question was whether to condemn a perfectly viable department store in a blighted neighborhood. On this score, Justice Douglas pointed to the kinds of physical, aesthetic and monetary judgments that had to be made, and claimed that none of these should be second-guessed by the courts.⁶² That proposition is doubtful in *Berman*,⁶³ but even if his point were 100 percent correct, *none* of those considerations were raised in *Midkiff*, where no change in land use of any type was contemplated. *Midkiff* presents no issue of potential nuisances, no issue of aesthetic compatibility. *Berman* and *Midkiff* could have

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

62. We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Berman, 348 U.S. at 33. Note that this particular passage was not quoted in *Midkiff*.

63. For my critique, see Richard A. Epstein, *Public Use in a Post-Kelo World*, 17 SUP. CT. ECON. REV. 151 (2009); see also Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (arguing that *Kelo* has resulted in "a more extensive legislative reaction than any other single court decision in American history"). But see Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 90-99 (2005) (arguing that neither the majority nor dissent in *Kelo* represent pragmatic decision-making, because they do not consider the reason for eminent domain and New London's reasons for invoking eminent domain, and its consequences).

been distinguished on perfectly sensible grounds *if* Justice O'Connor had only been prepared to look closely at the different factual patterns in the two cases.

Once again, the rational basis test is an open invitation for sloppy analysis, where the acontextual use of language trumps any critical examination of the underlying differences, even though Justice O'Connor well knew that the earlier cases did not line up well with *Berman*. Why else would she begin the quoted passage with an apologetic, “[t]o be sure”? Indeed, any close examination of the other cases that she cites reveals that none of them are remotely similar to the outright private transfer in *Midkiff*. To give but one example, in *Rindge v. County of Los Angeles*,⁶⁴ the landowner alleged that the state had made a sham taking of his ranchland for use as a public highway near Malibu, California. The challenge admitted that the road would be open to the public, but insisted that that public roadway would not be connected to other public roads. What this has to do with the situation in *Midkiff* is anyone’s guess. But the bottom line is that the desire not to rock a political consensus dominated over all three defensible grounds on which the case could be examined: text, theory, and precedent.

The many mistakes and confusions in *Midkiff* proved a perfect foil for the second of Justice O'Connor’s public use opinions, her notable *Kelo* dissent.⁶⁵ That opinion gave her some measure of redemption by casting the rational basis test to the winds. Her most famous line will have enduring appeal to both populists and defenders of property alike. “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.”⁶⁶ The clear implication is that all sorts of high-handed activities are possible without some explicit invocation of the eminent domain power. At this point, she pounces on the risk of government abuse that eluded her in *Midkiff*. *Rindge*, for example, re-enters the picture, only now it stands not for the ability of government to spread its tentacles broadly, but as a representative of “straightforward and constitutional” cases in which “the sovereign may transfer private property to public ownership—such as for a road, hospital or military base.”⁶⁷ *Berman* also receives a rather different reading

64. *Rindge v. County of Los Angeles*, 262 U.S. 700 (1923).

65. *Kelo*, 545 U.S. at 494–505.

66. *Id.* at 503.

67. *Id.* at 497.

than it did in *Midkiff*, for now she has no patience with the general proposition that the state enjoys carte blanche in dealing with land development decisions. Thus in *Kelo* she describes in painful detail the lack of adequate street and alleys, light and air, that prompted the DC land use decision.⁶⁸ At this point, she can show the powerful difference between *Berman* and the plight of Wilhelmina Dery, who is dragged from the “well-maintained house” where she had lived with her husband since 1946. The term “conceivable” also gets a complete makeover, which leaves rational basis in tatters. “Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bed-rock principle without which our public use jurisprudence would collapse.”⁶⁹ To drive that point home, she opens her opinion by quoting the well-rehearsed language in *Calder v. Bull* with its natural law overtones:

An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.⁷⁰

It was of course just this trope that motivated the Ninth Circuit in *Midkiff v. Tom*, which Justice O’Connor peremptorily tossed aside in *Midkiff*.⁷¹ The wholesale (and welcome) retreat from her earlier decision becomes clear when she notes that the seeds of the *Kelo* debacle are found in the “errant language”⁷² found in *Berman* and *Midkiff*. *Midkiff*’s devastating word “conceivable” does not appear in her *Kelo* dissent, but it does appear in Justice Thomas’s dissent, when he states that the Takings Clause authorizes “the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.”⁷³ Note the great leap backwards from rational basis to near-strict scrutiny in a single

68. *Id.* at 498.

69. *Id.* at 500.

70. *Kelo*, 545 U.S. at 494 (quoting *Calder v. Bull*, 3 U.S. 386, 388 (1798)) (emphasis deleted in *Kelo*).

71. See discussion, *supra*.

72. *Kelo*, 545 U.S. at 501.

73. *Id.* at 510.

sentence! Nonetheless, Justice O'Connor remains at a loss to distinguish *Kelo* from *Midkiff*, so she invokes a tired terminological ploy in speaking about *Berman* and *Midkiff*: "Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use."⁷⁴ The difficulty is that the statement is false. All the benefits from *Berman* were indirect because the department store had to be sacrificed for collateral goals. All the long-term alleged benefits in *Midkiff* came from how fee ownership could promote economic development. If those cases are direct benefits, then so too the result in *Kelo*, whether those benefits pan out or not.

The real sociological challenge does not lie in spinning fine tales to distinguish *Kelo* from its predecessors. Rather, the challenge is to find out why *Kelo* provoked a political uproar of the first magnitude, while *Midkiff* passed by under the radar to large public silence. The explanation cannot lie on the nature of the public use that was advanced. *Kelo*, like *Berman*, was a land use case, while *Midkiff* was a title-shifting affair, which is surely the weaker ground. Rather, the big difference comes from the other side of the market, which in no way enters into the formal eminent domain equation on public use. *Midkiff* did not involve a change of possession of the subject once the scheme was put into effect. Instead, it let sitting tenants take out landlords whose only interest in the property was in future cash flows. Subjective value was of no concern in *Midkiff* because the properties were always for sale at a price. But with *Kelo*, there was a forcible dispossession of people who had lived their entire lives on the premises, with no desire to sell and no desire to hold out for a higher price. They just wanted to be left alone. Yet they were swept aside in an inexhaustible search for tax revenue, which is what prompted Justice O'Connor's telling Motel 6 to Ritz-Carlton example. Mind you, this should be a powerful theme even if the houses were taken for a road. But at that point, there is no obvious textual hook to block the transaction by invoking the "for public use," because in admitted public use cases, the political processes alone decide whether to go ahead, once the just compensation requirement is satisfied.

None of that mattered in this case, where the toxic combination of unprincipled constitutional interpretation and illicit public purpose gave rise to the backlash of the new millennium against *Kelo*.

74. *Id.* at 500 (italics in original).

Justice O'Connor deserves abundant credit for raising the issue in *Kelo*. But Justice Stevens's thoughtless majority decision came out in the wrong way, in part because Justice O'Connor never offered in *Midkiff* the interpretation of *Berman* that she hit on in *Kelo*. Take on that task early on, and it becomes possible to outline the major factual differences between a plausible land use plan in *Berman* and New London's want of any coherent plan—where the city had all the vacant land it needed for structures it never would build on anyhow. Justice O'Connor's personal redemption for her errors in *Midkiff* brings too little and comes too late. Indeed it is clear that the use of that dangerous term “conceivable” has guided the Court's deliberation in areas outside the narrow public use connection, leading it to uphold dubious real estate taxation schemes in a number of other contexts.⁷⁵

II. PHYSICAL AND REGULATORY TAKINGS: OF *YEE* AND *LINGLE*

Justice O'Connor's next two major takings decisions deal not with public use, but with the distinction between regulatory and physical takings. The problem here is a genuine one because the Takings Clause has its clearest application in those cases where the government swoops down in tyrannical fashion to seize private property for itself. Everyone recognizes that this outright expropriation is caught by the Takings Clause. But the issues become far more complex when the government acts more gingerly in approaching property which is subject to divided ownership, often by the creation of a landlord/tenant relationship. These common arrangements obviously produce gains from trade for the two parties, and a sound law of takings would do little to jeopardize these arrangements by stripping away some

75. The latest manifestation of this regrettable world view is found in Justice Breyer's opinion in *Armour v. City of Indianapolis, Indiana*, in which Breyer thought that the applicable standard was that “the burden is on the one attacking the [classification] to negative every conceivable basis which might support it.” 132 S. Ct. 2073 (2012). In that case, Indianapolis gave its residents two ways to pay for special assessments, one by a lump sum and the other by periodic payments. When it changed the assessment system, it was prepared to waive future payments from those who had only paid the initial installments, but not to refund the unused portion of the prepaid expenses. The administrative burdens here are trivial, and the distinction made thus penalizes one group that took one of two equivalent economic offers. For critique, see Richard A. Epstein, *Intellectual Laziness on the Supreme Court: It's Time to Scrap the Irrational “Rational Basis Test,”* DEFINING IDEAS: A HOOVER INSTITUTION JOURNAL, <http://www.hoover.org/publications/defining-ideas/article/119811>.

of the protection given to owners when they divide their property interest. Nonetheless, in many of these cases, the level of protection to partial interests in real property is given far less protection than is afforded to the unified fee simple interest.

Two of Justice O'Connor's opinions, *Yee v. City of Escondido*⁷⁶ and *Lingle v. Chevron U.S.A. Inc.*,⁷⁷ raise variations on this theme, in connection with one of the central distinctions in the law of takings: what, if any, is the line between physical and regulatory takings. Today's by-the-book Supreme Court doctrine rests on a bedrock distinction between what are termed "physical" takings and "regulatory" takings. The first and more important of these decisions is *Yee*. At stake was a mobile home ordinance that the City passed pursuant to a California authorization statute that allowed tenants who occupied mobile homes to remain on the property of their landlords after the expiration of their leases, at rents determined by the local government to be "just, fair and reasonable," in light of a variety of factors. All of the factors related to the cost of providing the space and none of them related to the increase in value attributable to a shift in market demand.⁷⁸ Justice O'Connor approached this case within the general framework. She understood full well that if this scheme were struck down, the traditional systems of rent control for ordinary apartments would come under increased scrutiny. Her decision dutifully applied a near syllogism. There is a strong distinction between physical and regulatory takings, which is binding on the Court, and which subjected the

76. *Yee v. City of Escondido*, 503 U.S. 519 (1993); see also Epstein, *supra* note 49, at 3.

77. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); see also 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 (arguing that Justice O'Connor's opinion in *Lingle* "makes some valid points" and yet must be a "setback for those interested in reviving constitutional protection for the rights of property owners"); Dale A. Whitman, *Deconstructing Lingle: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573 (2007) (arguing that the implication of Justice O'Connor's *Lingle* opinion is that "governmental purposes and objectives remain highly relevant in assessing whether a taking is justified by the 'background principles' concept of *Lucas* . . .").

78. See *Yee*, 503 U.S. at 524-25. The ordinance allows the rentals to be set: after considering the following nonexclusive list of factors: (1) changes in the Consumer Price Index; (2) the rent charged for comparable mobile home pads in Escondido; (3) the length of time since the last rent increase; (4) the cost of any capital improvements related to the pad or pads at issue; (5) changes in property taxes; (6) changes in any rent paid by the park owner for the land; (7) changes in utility charges; (8) changes in operating and maintenance expenses; (9) the need for repairs other than for ordinary wear and tear; (10) the amount and quality of services provided to the affected tenant; and (11) any lawful existing lease.

government to only minimal scrutiny. This ordinance constituted a regulatory not a physical taking so that the public utility model on rate of return worked. The opinion is just flatly wrong on both points. I shall take them up separately.

A. *Physical Versus Regulatory Takings*

The genesis of this distinction lies in two key Supreme Court cases, *Loretto v. Teleprompter Manhattan CATV Corp.*⁷⁹ and *Penn Central Transportation Co. v. City of New York*.⁸⁰ *Loretto* establishes a near-per se compensation rule in physical takings cases, and *Penn Central* authorizes a rational basis-like standard (though the phrase “rational basis” is never used) in regulatory takings. In *Loretto*, the Court required compensation (which turned out to be very little indeed)⁸¹ when the government occupied private property or when it authorized private parties to do so pursuant to its own legislative powers. In *Loretto*, the application of that rule required compensation when a private cable operator was allowed to install a cable box on the roof of the landowner’s apartment building. On the other side of the line fall those cases in which the government does not either enter or authorize entry but instead imposes regulations that *restrict* the uses that a landowner can make of his or her property. The paradigmatic case on that issue in our law is *Penn Central*, which famously held that in regulatory takings cases, the per se rule gave away to “ad hoc” standards, such that the landowner could not recover the diminution in land values without a clear showing that the government actions had exceeded their proper scope.⁸² The case relies famously on a balancing test of the sort that Justice O’Connor gravitates toward, and which she relied on in *Yee*.⁸³ The ultimate question is whether this hundred-or-so-fold difference in levels of scrutiny is justified in *Yee*.

Justice O’Connor wrote again for a unanimous Court, which was subject to only two short concurrences by Justices Blackmun and Souter on points of no matter. As with *Midkiff*, Justice O’Connor

79. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

80. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

81. *See Loretto v. Group W. Cable*, 522 N.Y.S.2d 543 (N.Y. App. Div. 1987) (affirming a denial of attorney’s fees, effectively upholding Loretto’s final amount of \$1 in damages).

82. *Penn Cent.*, 438 U.S. 104.

83. *Yee*, 503 U.S. at 523 & 531.

was at her worst in dealing with this challenge, because she was always within her comfort zone, and never felt obliged to grapple with any of the tough conceptual issues that are raised by the physical/regulatory taking distinction that has gained such a stranglehold over the judicial imagination. There are, of course, important differences between takings by way of occupation that are concentrated on one person and general regulations that bind large groups. But these are polar opposites that have to be explained as part of a general theory that also encompasses the many intermediate cases. On the one side, regulation can start to focus down until the restrictions bind only one or very few properties. On the other, an aggressive government program could result in the condemnation of small holdings from a large number of people. An ideal theory does not just deal with the polar opposites, but also has to deal with the many intermediate cases. In these cases, the hard-edged line has to be justified as a matter of first principle, and workable in fact.

The decisions in both *Penn Central* and *Loretto* fail to offer the requisite conceptual foundation for this ostensible hard-edged distinction. At issue in *Penn Central* was whether a landmark designation for Grand Central Station allowed the City of New York to block construction of a new office tower over the old station without compensation.⁸⁴ The first challenge asks why this should be treated as though it is a mere regulatory taking, when in fact the decision meant that the landowner was prevented from using his air rights which were a fully protected interest under state law, capable of being sold, mortgaged, leased and the like. For this inquiry, Justice Brennan did not even seek to offer an answer, but only insisted that the proper approach required “this Court [to focus] rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the ‘landmark site.’”⁸⁵ That approach marks an enormous departure from the law of private property more generally, whose signal achievement has been to develop a regime that allows for the creation, transfer and protection of *divided* interests in property in order to permit maximum gain from the use of a particular resource. The process takes place in two steps. First, the transfer allocates the rights between the two parties, where we are confident of a joint

84. *Penn Cent.*, 438 U.S. at 115–19.

85. *Id.* at 130–31.

gain that exceeds the transaction costs of putting the deal together, for otherwise that deal would never have occurred in the first place. The second is that the transaction between the two parties does not increase their rights over that which the original landowner had before the division. The creation of air rights squarely meets both those tests, so the challenge is why the takings law does not follow suit and apply to both interests in that private property at the same time. That result would increase private wealth without blocking the ability of state to acquire the air rights if it decided that the public gain from open space exceeded the private gain from development. The case thus falls exactly under a sensible account of public use so sorely missing in *Berman* and *Midkiff*.

The avenue for that development was presented by the 1960 decision of the Court in *Armstrong v. United States* with its oft and justly quoted passage that the “Fifth Amendment’s guarantee . . . [is] 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.”⁸⁶ In *Penn Central*, Justice Brennan pays lip service to the passage, but then engages in the kind of dangerous deconstruction of rules that dismisses the categorical command of *Armstrong* with the general observation that “this Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”⁸⁷ Justice Brennan couldn’t because he didn’t try. Instead, he retreated to “ad hoc inquiries” tests, where the key trade-off asks whether the:

. . . economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.⁸⁸

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

87. *Penn Cent.*, 438 U.S. at 124.

88. *Id.* (internal citations removed).

But this passage does not contain a whiff of an explanation why the loss of air rights does not count as a physical taking or why the designation of a few buildings for special treatment counts as an adjustment of benefits and burdens instead of a disproportionate exaction on one side. The mystery, moreover, only deepens with *Loretto*, where Justice Marshall affirms the weak holding of *Penn Central*, but then concludes, along with Professor Frank Michelman (also in attendance at our Conference), that the invariable rule for physical takings, or more precisely, those that involve a “permanent occupation,” is one that necessarily calls for just compensation. But a reader can look in vain throughout *Loretto* to find anything more than a recitation of cases that applied this distinction for an explanation of how it fits into a comprehensive theory. At no point does *Loretto* give a theoretical reason why a clause that on its face appears to apply to all forms of private property, including air rights, should lead to such disjoint outcomes. At no point does it explain why the political risks of faction are greater with occupations than with regulations, given that political groups are all too eager to impose regulations that give them enormous benefits while creating social losses at the same time.

One reason why the physical/regulatory takings line is so vexed is that it grew up long after the first rent control cases, which justified these statutes as a wartime effort to combat monopoly rents in cases where there was a rapid increase in the demand for land.⁸⁹ That regulation allowed tenants to stay on after the expiration of their leases, but did not authorize them to stay on in perpetuity. But as these statutes were renewed on a regular basis, their rationale had to change, such that they became a form of tenant protection against ostensible exploitation in real estate markets that are in most locations intensely competitive. Once the physical/regulatory distinction gained traction, it was no simple matter to fit the earlier rental cases in it, given that the holdover tenant remained in possession after the expiration of the lease. The common law view on this question was that the holdover tenant remained in possession only at the sufferance of the landlord.⁹⁰ The landlord was entitled to immediate eviction, or could hold the tenant to the fair market value of the leased premises if that figure were greater than the

89. *Block v. Hirsh*, 256 U.S. 135 (1921).

90. For discussion, see, for example, *Crechale & Polles, Inc. v. Smith*, 295 So.2d 275 (1974).

stipulated rent in the lease, which was often in the case. In some jurisdictions, the holdover tenant was liable for double rent.⁹¹ The simple logic here was that the tenant was in the wrong, so that all doubtful questions had to be resolved in favor of the landlord, which is the best way to avoid difficulties when the tenant overstays his or her welcome. The common law cases do not contain the slightest hint that the holdover tenant could remain in possession at his own option for a rent set by the state.

It follows, therefore, that *Loretto's* per se rule of just compensation should apply to all holdover tenants. Since the rent control statutes provided for a rent that was kept systematically below the appropriate levels, the statutes were necessarily confiscatory unless the state picked up the difference between statutory rent and market value. Indeed, in strict logic, the just compensation issue needed not be addressed at all if *Midkiff* comes out the other way. The only difference between the two cases is that under the Hawaiian statute at issue in *Midkiff*, the reversionary interest was transferred to the tenant in one closed transaction, while in the rent control cases, the transfer takes place month by month, without a definite end. But the differences between a perpetual lease and outright transfer of property have no bearing on either the just compensation or the public use question. In both cases, the statute should fail. Any return to first principles of takings law, therefore, condemns all rent control statutes on *Loretto's* per se basis.

That condemnation is correct not only as a formal doctrinal matter. It also is critical from a social point of view, where the holdover tenants at low rents lead to systematic and pervasive resource misallocations. Tenants that should leave rent control premises stay on for long periods of time, such that outsiders who could make better use of the property are shut out by the system. The landlord, who is constantly short-changed on revenues, now has little incentive to improve the property. Social resources are wasted in the endless rate-making proceedings that take place at city hall. Communities are hurt by the mismatch of the tenants to the neighbor, as graying communities have little use for the ball fields and other facilities that are far more suitable to younger tenants. Nonetheless, the ability of entrenched tenants to vote their preferences shows a difficult public

91. See, e.g., FLA. STAT. ANN. § 83.06 (2011) (providing double rent to the landlord when the tenant refuses "to give up possession of the premises at the end of the tenant's lease").

choice problem that makes it all too difficult to undo the damage by legislation.

B. The Escondido Ordinance

The state of the general law at the time of *Yee* was so fixed that only a Supreme Court decision that undid cases like *Block v. Hirsh* could change the landscape. Indeed, a challenge to San Jose's rent control statute had just gone down in flames in *Pennell v. City of San Jose*,⁹² notwithstanding the strong opinion of Justice Antonin Scalia (both concurring and dissenting, joined only by Justice O'Connor), which noted that the government could avoid expropriation of landlords by renting the property at market rates and reletting it at subsidized rates, making up the difference out of general revenues.⁹³

Faced with strong Supreme Court precedent, determined lower court judges sought to escape the clutches of the rent control law by engaging in what could only be described as an ingenious, but dubious, end run. In the typical rent control case, the tenant remained in possession of the premises after the expiration of the lease. With the typical mobile home, the vehicle remained on someone else's land after the expiration of the lease. In *Hall v. City of Santa Barbara*,⁹⁴ Judge Alex Kozinski seized on that difference to move the Santa Barbara ordinance to the physical takings side of the line. That result was supported by William Fischel,⁹⁵ who claimed that the differences in local politics were such that the concentrated force of these mobile home tenants could dictate outcomes in small communities, but that rent control in larger cities required a solid measure of larger community support.⁹⁶ But the political economy point should run in the opposite direction. As Madison's definition of faction in Federalist Number 10 makes clear, any constitutional order has to attend to two different risks: majority expropriation of the minority, and minority expropriation of the majority. The question of which

92. *Pennell v. City of San Jose*, 485 U.S. 1 (1985).

93. *Id.* at 21–22.

94. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1279 n.24 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

95. William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.–KENT L. REV. 865 (1992), critiqued in Epstein, *supra* note 49, at 11–15.

96. See Fischel, *supra* note 95, at 894–98.

risk is greater cannot be answered in the abstract. Much depends on the salience of the issue in general politics. But there is with the Takings Clause no reason to predict the outcome in advance, for once the politicians have done their work it should be clear in which direction the expropriation goes. That level of wealth transfer is apparent in both settings, so in both the proper result is to invalidate the taking for the want of any serious effort to protect landlord interests.

The novelty of the situation, however, presents a problem for Justice O'Connor because here the intrusion into space took a form that made the physical invasion inescapable. But rather than dealing with the issue head on, she resorted to a set of dubious judicial techniques to avoid a serious analysis of the question. Her first ploy was to insist that this was not really a physical takings case at all: what was at stake in her view “. . . is a regulation of petitioners' *use* of their property, and thus does not amount to a *per se* taking.”⁹⁷ The italicization of the term “use” does not do anything to save the argument. There is no case in which someone enters land without an intention to make use of it. To say that all entries are use cases leaves the class of physical takings empty. The key issue here is that the original entry under the lease was permissible only until the expiration of the lease, so that the rules on physical takings have to be adjusted to deal with future interests,⁹⁸ which is what the law of holdover tenants tries to do. Her astonishing proposition means that it is now respectable to claim that a party who is admitted to land for a year is entitled to stay forever because there is no need for a fresh entry after the expiration of a term. That doctrine would be the end of real estate law as we know it, because it would put in jeopardy all standard commercial leases. But in this instance, the point of this facile argument was to insist that the taking therefore had to be treated under the more lenient balancing test of *Penn Central*, which she then declined to do because that count had not been raised below.⁹⁹ Yet, true to form, when Judge Bybee tried to revive that regulatory takings argument in *Guggenheim v. Goleta*,¹⁰⁰ he was reversed en banc a year later.¹⁰¹ *Yee* had sealed its doom.

97. *Yee*, 503 U.S. at 532 (italics in the original).

98. *See, e.g., Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

99. *See Yee*, 503 U.S. at 522–23.

100. *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009).

101. *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc).

The second part of Justice O'Connor's argument was no more persuasive than the first. She argued that there was really no taking in this situation because the landlord is entitled to regain possession of the land so long as he was prepared to turn it to some alternative use. She writes:

At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Put bluntly, no government has required any physical invasion of petitioner's property.¹⁰²

Put bluntly, this passage offers a classic illustration of how a local government, with Supreme Court blessing, can protect its ordinance by leaving the landowner with one useless stick in the bundle of rights. The point here is made clear by running *any* valuation of the landlord's interest before and after the passage of the local ordinance. Before, the value of the land for its use as a rental site remains intact after the expiration of the lease. During the period of that lease, the landlord's interest is equal to the sum of the discounted lease payments coupled with the discounted present value of the reversionary interest when it falls into possession. For short-term leases that are close to market value, the second term dominates the first. Under the new arrangement, the landlord receives a sum equal to the present discounted value of future payments under the government lease, which are far less than those payments when the property could be leased out again at market value.

To that, Justice O'Connor adds the value of the right to turn the property to other use. But that right is close to worthless for two reasons. First, in most cases the highest and best use of property lies in its current use patterns. Thus the right to regain the premises only applies to what is at best a small set of cases where major changes in land use are contemplated. Second, that supposed right is hemmed in by other land use regulations in the City of Goleta, for any change in land use patterns requires the landowner to go through

102. *Yee*, 503 U.S. at 527–28 (internal citations removed).

extensive administrative hearings that, given the local opposition, are likely to block any projects for life, as it were. In these cases, the correct measure is whether the compensation in question is a full and perfect equivalent of the rights surrendered. Zero does not meet that standard.

There is a close connection between the Justice O'Connor of *Midkiff* and the Justice O'Connor of *Yee*. Both of these cases deal with the transfer of the landlord's reversion to the tenant in possession at below market prices. In both these cases, there is no need at all for government intervention because there is no holdout problem to be dealt with, which could not be countered by a term in the lease that provides, for example, that if the tenant vacates the premises and leaves the mobile home in place, the landlord must pay him the fair market value for the (depreciated) property in question. There is, moreover, no serious monopoly problem in either place, at least if there were more than one mobile home site in the immediate environment, even though that point was raised at the time by Joseph Sax.¹⁰³ And even if there were, the remedy is to make sure that the rents in question are adjusted to competitive levels, which would reflect the increase in the underlying value of the real estate. Those rents would surely be recoverable if the landowner sold the property to a new person for its fair market value, and they should be captured by the incumbent landlord without the interposition of an unnecessary sale. To be sure, someone would have to take some measure of the monopoly power, but if one takes a region that extends beyond Goleta, the HHI index, of relevance in *Midkiff* would be very low, so that the radical restrictions on rates count much more as confiscation of appreciation than the suppression of monopoly behavior. Once again, Justice O'Connor's effort to walk the fine line has ended in shipwreck. Balancing does not work when the relevant precedents are way off line.

103. Professor Sax wrote in a brief: "The property interest that petitioners claim was taken by the Escondido Ordinance is the product of the park owner's economic power over homeowners. That power grows out of immobility, not out of the natural force of supply and demand, and is thus a species of monopoly after the fact." Brief of Golden State Mobilehome Owners League, Inc., et al. as Amici Curiae Supporting Respondent at 6, *Yee v. City of Escondido*, 503 U.S. 519 (1992) (No. 90-1947), reprinted in 25 LOY. L.A. L. REV. 1259, 1269 (1992), discussed in Epstein, *supra* note 49, at 7.

The second of Justice O'Connor's regulatory takings case is *Lingle v. Chevron U.S.A. Inc.*¹⁰⁴ *Lingle* offers yet another window into the vexed interaction between the law of leases and the law of takings.¹⁰⁵ *Lingle* involved a constitutional challenge to Hawaii Act 257,¹⁰⁶ which was fortunately repealed shortly after the Supreme Court's decision came down.¹⁰⁷ The Hawaii statute, which sustained an attack by local gasoline station operators against Chevron and other out-of-state oil companies, represented the worst in local protectionism. The carefully crafted ordinance imposed restrictions on the rent increases that the Chevron could demand from its tenants; it removed the ability to terminate a lessee at the expiration of a term, and it blocked Chevron from putting in new gas stations near to those of an incumbent dealer. First the District Court and then the Ninth Circuit struck down the statute on the ground that it did not advance its stated purpose of lowering the price of gasoline to Hawaiian consumers—this, on the sensible conclusion that dealers who seek to entrench themselves are not likely to pass along savings to consumers.

The basis for these lower court decisions is found in a single sentence in *Agins v. City of Tiburon*,¹⁰⁸ which states that a government regulation of private property should be treated as though it “effects a taking if [that regulation] does not substantially advance legitimate state interests.”¹⁰⁹ That proposition is clearly useless in the form that it is provided, for at a minimum it does not distinguish between cases that raise police power versus those that raise public use issues. In *Agins*, moreover, the test was put to the worst possible purpose by validating an ordinance that set the minimum lot size in Tiburon at five acres, thereby stripping from its owner the substantial value that could be derived from subdividing the property. In *Lingle*, however, the internal inconsistencies of the formula were of little consequence because both courts below did the sensible thing in striking down a statute that, in effect, stripped Chevron of many of its negotiated rights under the lease, which constitutes a clear taking of private property.

104. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

105. For a fuller account of the case, see Richard A. Epstein, *From Penn Central to Lingle: The Long Backwards Road*, 40 J. MARSHALL L. REV. 593 (2007).

106. HAW. REV. STAT. § 486H-10.4 (2006).

107. 2006 HAW. SESS. LAWS 78 (signed by the Governor on May 5, 2006).

108. *Agins v. City of Tiburon*, 447 U.S. 255 (1979).

109. *Id.* at 260.

In writing her opinion for a unanimous Supreme Court, Justice O'Connor reversed and remanded the decision below for reconsideration under the tripartite balancing test that Justice Brennan had earlier developed in *Penn Central*. In her view, the central task was to explain why asking only whether an ordinance substantially advances legitimate state interests does not capture the full range of relevant considerations, including most critically the comparison of benefits and burdens of the regulation that *Penn Central* requires. Unfortunately, what is missing from her opinion is any willingness to ask whether the *Penn Central* formula actually makes sense in a case of this sort, where it decidedly does not.

As with *Midkiff* and *Yee*, the first question to ask is whether the ordinance in question stripped the lessor of rights under the lease, which of course it did. At this point, it hardly matters whether we think of this case as a physical taking of the property or a mere regulation of its operation, for in neither case is there any sensible public-regarding justification for imposing these regulations. The regulation is a straight wealth transfer between the two parties, with negative consequences on consumers. It thus falls outside any sensible account of the police power. What is totally unclear in this instance is how the *Penn Central* formula would even apply to this situation, with its elusive invocation of “investment-backed expectations” that only deflects the inquiry for the constitutional question of whether the government has taken private property. In the end, therefore, this decision shows Justice O'Connor’s strengths and weaknesses. Working within the established tradition, she is able to demolish one useless strand of takings jurisprudence. But once that is done, she refuses to make waves. Instead, she does not critique the *Penn Central* formula; nor does she indicate how it might apply to the question at hand. The law of takings faces its greatest challenges in dealing with the state reconfiguration of divided interests in property—recall that *Pennsylvania Coal v. Mahon*¹¹⁰ dealt with the creation of an easement of subjacent support. A comprehensive law of takings has to be able to treat these cases by something other than the “ad hoc” *Penn Central* rules. But those larger theoretical questions are, regrettably, passed by in silence.

110. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) (“while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

III. RETROACTIVE LEGISLATION—
CONNOLLY AND EASTERN ENTERPRISES

The influence of the *Penn Central* decision has been felt not only in leases and land use regulation, but also with the general area of retroactive legislation. As a matter of general legal theory, retroactive legislation has always been a keen concern because it imposes obligations on individuals for which they were given no opportunity to conform.¹¹¹ The protection of individuals against that kind of legislation imposes major limitations on what a government can do to its citizens. Yet at the same time, the proposition limits the way in which government can act in order to deal with what it regards as its past mistakes. It should therefore come as no surprise that the post–New Deal tendency has been to relax constraints on retroactive applications.¹¹² That issue first reached the Supreme Court in *Usery v. Turner Elkhorn*,¹¹³ which dealt with new burdens imposed on employers to fund a black lung disease program. Justice Marshall said, “[I]t may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.”¹¹⁴ That “solely” carries a lot of weight. That same logic came to the fore in *Connolly v. Pension Benefit Guaranty Corp.*, where the Supreme Court faced a challenge to the Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”)¹¹⁵ and unanimously held that neither the due process nor the Takings Clause prevented a bait and switch.¹¹⁶ Individual firms were lured into membership in the PBGC with the promise that they could withdraw at any time, no strings attached. Then when the financial

111. For discussion, see, for example, LON FULLER, *THE MORALITY OF LAW* (1966).

112. See, e.g., *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935).

113. *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976) (effectively overruling *Alton*).

114. *Id.* at 16.

115. 94 Stat. 1208, 29 U.S.C. §§ 1381–1461 (1980).

116. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986). See also Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II: Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990) (arguing that Justice O'Connor's view in *Connolly* stands for the proposition that in takings cases “A not only must establish that the generalization of wrongdoing was unreasonable, but she also must establish that the lawmakers' judgment of wrongdoing was unreasonable as applied to her particular case . . .”).

obligations incurred by the Board ballooned, Congress amended the original statute so as to allow withdrawal only upon payment of a fee designed to reflect their “unfunded vested benefits” share of the liabilities for the program. The Supreme Court gave great weight to *Turner Elkhorn*, rejected the categorical test for compensation outlined in *Armstrong v. United States*,¹¹⁷ and applied the usual balancing test of *Penn Central* to the case.¹¹⁸ It then dismissed these challenges on the ground that “[p]rudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations.”¹¹⁹ To be forewarned is, therefore, to be forearmed.

Viewed as of the time of the new legislation, Congress only sought to insulate the public at large from having to pay money to support the worker claims to these pension benefits. But the decision not to put this cost on the public at large rests on the view that they were not accountable for the losses in question. Neither, of course, were the companies who wanted to get out of the plan. The difficulty here with the “notice” variation is that each round of legislation makes it easier for the next to similarly renege on earlier promises. In the end, this cycle demeans the credibility of the United States. Therefore, in the future, it will become harder to get people to join government programs. In addition, the operation of all these government programs will become just that much less careful in light of the ability to go back to the industry to fund the excesses of the program’s public administration.

To her credit, in her concurrence Justice O’Connor asked whether, after *Connolly*, there were any limits that the arbitrary and capricious standard imposed on the ability of Congress to so legislate. Her discussion, however, starts with the odd concession that “the mere fact that legislation requires one person to use his or her assets for the benefit of another will not establish either a violation of the Taking Clause or the Due Process Clause,”¹²⁰ without explaining why this

117. *Connolly*, 475 U.S. at 227.

118. *Id.* at 225.

119. *Id.* at 227 (“We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble.”). The source of the trouble came from the highly dubious administration of the program.

120. *Id.* at 228 (O’Connor, J., concurring) (internal quotations removed).

amounts to anything other than the once-forbidden taking from A to B. She also noted that the “readjustments” that Justice Marshall spoke of in *Turner Elkhorn* could justify the imposition of any fine or obligation on any party who is on notice that governments misbehave. In theory, the notice argument should cut in exactly the opposite direction. The foreseeability of government misbehavior explains why strong constitutional protections are needed against government chicanery because everyone is on notice that, left unchecked, legislatures will make easy promises at one time, and then change the rules midstream.

In her view, however, the major doubts about retroactive liability did not suffice to raise a facial challenge of the withdrawal provisions; that led her to voice doubts about plans that “impose substantial retroactive burdens on employers in a manner that may drastically disrupt longstanding expectations, and do so on the basis of a questionable rationale that remains open to review in appropriate cases.”¹²¹ All of this is sensible enough within Justice O’Connor’s balanced approach to these questions. But what is lacking is any plausible theoretical explanation as to why she resists the facial challenges to statutes. There was no question that the legislation challenged in *Connolly* did transfer wealth from mining companies to the pensioners beyond what they agreed to assume. The question then is why the *amount* or *timing* of those transfers goes to anything other than the amount and timing of the compensation that federal government should have to provide the companies for the additional burdens that they have, without question, been forced to bear. Justice White had insisted that it was not fair to impose these obligations on the public, who were not part of the dispute. But nowhere does he explain why it makes sense to empower the public to use legislation to transfer wealth from one private party to another. A strong theory of limited government would find that the tough-mined approach to pension modification has the great virtue of stopping the regime of false promises before it begins, precisely by making the public pay when it wants to take from A and turn it over to B.

Justice O’Connor was true to her word, however, in *Eastern Enterprises v. Apfel*¹²² where she was able secure the concurrences only

121. *Id.*

122. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). See also Barton H. Thompson Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261 (2000) (discussing *Eastern Enterprises*

of Chief Justice Rehnquist and Justices Scalia and Thomas. Writing for that plurality, she struck down under the Takings Clause yet another decision by Congress, this time in the Coal Industry Retiree Health Benefit Act of 1992,¹²³ to intervene yet again in the employer union disputes that had been before Congress on a more or less continuous basis since 1947. The act sought to impose additional financial obligations on coal companies long after they left the coal mining industry. In *Eastern's* case, the 1992 Act sought to impose additional liabilities for the company's actions between 1946 and 1965. That statute was obviously retroactive, but it is by no means crystal clear that it cuts back on legitimate expectations in some distinctive way that the earlier statutes approved by Justice Marshall did not. Justice O'Connor therefore held that this statute so dashed legitimate "investment-backed expectations" that *Eastern* was able to overcome the presumption of validity that was set out in *Turner Elkhorn*. But the distinction between the two cases was only with respect to timing and extent of the obligations, so that all the intellectual difficulties of drawing the line between different retroactive schemes remained.

It is here where the differences in approaches matter. Under the categorical approach that I defended above, the 1992 CIRHBA is just a more egregious illustration of an unconstitutional practice. If the state were intent on going through with the plan, its budgetary allocation would have to be greater. But since the only question was whether it could impose these burdens, an injunction should issue in both cases, precisely because the federal government is not willing to pony up the money from general revenues. Clearly the public choice issues here are identical to those in *Pennell*. The compensation requirement attaches a price to government action and thus induces more responsible deliberation. It is instructive to note that Justice O'Connor could not carry the needed fifth vote, as Justice Kennedy wrote his own due process analysis,¹²⁴ which fractured the Court and thus rendered its precedential value nugatory in future years. There is a clear object lesson: balancing tests work well if

and *Connolly* in the context of the degree to which "courts use the takings protections or due process clauses to scrutinize the way in which the government allocates the costs of its actions . . .").

123. Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.*

124. *Eastern*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

people are in fundamental agreement. But in these pension cases dealing with black lung disease, no such agreement was around. The liberal justices are quite comfortable in taking money from A and giving it to B, and they have little difficulty and less guilt in sticking with the original decision of Justice Marshall in *Turner Elkhorn*. *Eastern Enterprises* is a case where Justice O'Connor's diligent and conscientious effort to get half a loaf was able to do that and no more. The Coal Act was struck down, but the ability to impose principled limitations in future cases became a notable failure, as the lower courts, which have little or no patience with property rights protection seized on the fact that O'Connor's opinion commanded only three other votes, and so was not a binding precedent.¹²⁵

CONCLUSION

It is important to read these criticisms of Justice O'Connor's takings jurisprudence in light of the general trajectory of takings decisions in the Supreme Court. During her term of office, she usually, but not always, took a more property protective decision, the one major exception being her decision to join a Stevens majority in *Tahoe-Sierra Preservation Council*.¹²⁶ Yet at the same time, her two worst decisions, *Midkiff* and *Yee*, were written on behalf of *unanimous* courts, which gives ample testimony to the low level of protection that property interests receive from the Court. In the one case in which she struck out boldly against the majority—*Kelo*—the greatest obstacle that lay in her path was her own *Midkiff* decision.

125. See, e.g., *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1056 (2008) (“[T]he takings analysis is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest.”). *Swisher* involved the imposition of taxes on manufacturers of tobacco goods to ease the costs of transition, but its point surely does seem odd. Money must count as property, and the failure to pay the obligation will surely result in the imposition of a judgment lien that can be levied against specific property. The situation is not different from one in which the state says that the private property owner need surrender only one of three parcels of property, or pay cash equal to its amount. Note too that if there is no property interest here, how then can the due process clause be implicated when it too applies only to the interest that any person has in “life, liberty or property”? *Swisher* itself involved a set of transition payments for farmers who were being stripped of their massive agricultural subsidies. Why anyone should receive any subsidy for being forced to give up an undeserved benefit previously obtained is not made clear in the opinion.

126. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

My disappointment with Justice O'Connor thus applies to the entire Supreme Court. The objections are both doctrinal and practical. At the doctrinal level, there is simply no sustained effort to reconcile three pairs of opposites that work their way through all the cases.

First, in some cases the Supreme Court follows the *Armstrong* test so that disproportionate burdens are the measure of compensation. The "Fifth Amendment's guarantee . . . [is] 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."¹²⁷ In other cases, it follows the "ad hoc" exception to it found in *Penn Central*. Invoke the first sentence, and compensation follows. Invoke the second, and the compensation disappears.

Second, in some cases, the Supreme Court speaks of the wrong of government taking from A and giving to B announced in *Calder v. Bull*.¹²⁸ In other cases, the key line is that of *Usery* stating "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."¹²⁹ The only way to readjust burdens, of course, is to take from A and give to B, a risk of which everyone is on notice.

Third, in *Midkiff*, any "conceivable" public purpose allows a taking to go forward, a proposition that she and the dissenters explicitly rejected in *Kelo*.

Take the more restrictive of each of these three propositions, and the law of takings will be in pretty good shape. Take the more deferential half, and it is not. Unfortunately, the more an issue appears to matter, the more likely it is that the Supreme Court will take the wrong path unaware of the social dislocations that its decisions create. Quite simply, its decisions have introduced a vast gulf between the system of private property that operates in private disputes and the odd jumble of property rights that is fashioned to ease the path to state domination in all manner of land use issues. Once property is divided, the individual pieces consistently receive less protection than does the whole. That weakened level of protection allows courts to make the claim that a mere diminution in value from the partial restriction on property rights does not give rise to a compensable event.

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

128. *Calder*, 3 U.S. 386. See *supra* Part I.

129. *Usery*, 428 U.S. at 16.

At this point, the Court supplies an instructional manual for legislatures to destroy valuable interests in property without having to own up to the financial consequences for their decisions. It is not as though the protection of private property from all forms of regulation is contrary to some larger social interest. Quite the contrary, the only way to protect that social interest in prosperity is to protect the private building blocks that make this possible. The many artifices that are used to defend rent control laws freeze property in its current use, without taking into account the losses that are imposed on those who are not allowed to rent or buy property when it is subject to what amounts to a perpetual lease in favor of the sitting tenant. Those social losses reduce the wealth of the community, the opportunities for advancement, and the size of the tax base. Yet notwithstanding these serious allocative losses, the Supreme Court, Justice O'Connor included, shows too much deference to political institutions whose capacity for misbehavior is all too apparent. It is not that one asks the Justices to invent property protections where none exist. It would be quite sufficient for them to enforce the protections that do, or at least, did exist, instead of whittling them away with a set of distinctions that lack any intellectual coherence. In the end, we are all losers from this sorry overall performance in the area of the constitutional protection of property rights.