

Unresolved Issues in Regulatory Takings and the Protection of Private Property Rights

By Steven J. Eagle*

I. Overview.

A. Lingle v. Chevron U.S.A. (2005) Summarizes Regulatory Takings . . .

Although regulatory takings law ostensibly was clarified by Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), it is more problematic than ever. In Lingle, the United States Supreme Court recapitulated its regulatory takings jurisprudence, claiming that its strands shared “a common touchstone.” It affirmed as its primary regulatory takings analysis the ad hoc, multifactor balancing test enunciated in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). Justice O’Connor, writing for the Court, outlined three exceptional situations in which owners could be compensated without the need for Penn Central balancing. See Part II, infra.

Furthermore, Lingle specifically held that the formula providing that a regulation “effects a taking if the ordinance does not substantially advance legitimate state interests” is not a permissible takings test, but rather is a type of analysis associated with due process. See Part III, infra.

B. . . . But Leaves Important Issues Unresolved.

While Justice O’Connor wrote in Lingle that elements of the Court’s takings analysis “share a common touchstone,” she also admitted that “our regulatory takings jurisprudence cannot be characterized as unified.” Lingle, at 539. Given the Court’s failure to explicate private property and its protection under takings, due process, and equal protection jurisprudence, Lingle leaves many conceptual and technical issues unresolved. Among the more important such issues are:

1. The Role of Substantive Due Process in Property Deprivation Cases.

At the same time it held that due process modes of analysis could not be employed in connection with adjudications under the Fifth Amendment Takings Clause, Lingle explicitly reaffirmed that property rights are protected independently by the Due Process Clauses of the Fifth and Fourteenth Amendments. This holding appears to reverse some U.S. Court of Appeals’ decisions that due process claims are not separately viable, but rather are subsumed within takings claims. However, the contours of due process protection of property remains to be defined. See Part IV, infra.

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2. Providing a Property-Based Remedy for Partial Takings Analysis.

Concomitant with splitting off due process analysis Lingle reiterated that Penn Central remained the Court's general regulatory takings test for cases not involving total deprivations of use or permanent physical intrusions. However, the ad hoc, multifactor balancing test of Penn Central itself seems predicated on issues of means and ends that historically are associated with due process. It would seem that, with due process put to one side, takings analysis now would focus on the questions of (a) was there property, and (b) did government take it. Unfortunately, the Court has not developed a workable definition of property rights. Lingle increases pressure for the Court to do so. See Part V, infra.

3. The Williamson County State-Litigation Problem After San Remo.

One month after its decision in Lingle, the Supreme Court held, in San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005), that the full faith and credit statute precluded the relitigation of regulatory takings issues adjudicated by a state court, even where the state action was filed only to satisfy the Supreme Court's mandate that state litigation was necessary to "ripen" the owners' federal constitutional claims for federal judicial review. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985). In a concurring opinion in San Remo, four Justices urged reconsideration of the Williamson County requirement. See Part VI, infra.

4. What is the "Relevant Parcel"?

Because the Penn Central balancing test largely is based on examining the intensity of regulatory burdens imposed on individual property owners, it "requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" Key-stone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (citation omitted). As Justice Brennan put it in Penn Central: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses 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 . . ." Penn Central, 438 U.S. at 130-31.

While the Supreme Court sometimes has expressed doubts about "parcel as a whole," it most recently has reaffirmed its adherence to the principle. Tahoe-Sierra Preservation Council v. Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). Nevertheless, the Court never has defined "parcel as a whole" in any definitive sense, and the lower courts continue to deem the tract of land initially acquired by a given owner to be over- or under-inclusive for this purpose. See Part VII, infra.

5. Do Equal Protection “Classes of One” Require Malice?

In Village of Willowbrook v. Olech, 528 U.S. 562 (2000), the Supreme Court held that a single individual could demonstrate denial of equal protection of the laws if that person could demonstrate that he or she was intentionally treated differently from others similarly situated and that there is no rational basis for the disparity in treatment. While the Court rejected the Seventh Circuit’s additional requirement of “subjective ill will” towards the landowner, cases subsequent to Olech often seem to require such a showing. Judge Richard A. Posner, author of the Seventh Circuit opinion, subsequently asserted that “intentionality is an ambiguous concept.” Tufendsam v. Dearborn County Bd. of Health, 385 F.3d 1124, 1127 (7th Cir. 2004). It will be up to the Supreme Court to resolve that ambiguity. See Part VIII, infra.

6. Legislative Exactions on Development.

In Dolan v. City of Tigard, 512 U.S. 374 (1994), the Supreme Court held that an exaction of real property in connection with approval of a development application would constitute a taking unless there had been an individualized determination that the exaction was roughly proportional to the impact of the proposed development. Id. at 391. In its summary of takings law in Lingle, the Court seemed to limit Dolan to interests in discrete property, since “had the government simply appropriated the easement in question, this would have been a per se physical taking.” Lingle, at 546.

However, Dolan also emphasized that the exaction at issue was imposed administratively rather than mandated by ordinance. This “adjudicative” vs. “legislative” distinction in Dolan has been rejected by some state courts and remains unexplained by the U.S. Supreme Court. See Part IX, infra.

C. Public-Private Redevelopment After Kelo

In Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655 (2005), the United States Supreme Court held that the Fifth Amendment’s Public Use Clause was not violated by the condemnation of private property for retransfer to other private owners in furtherance of an economic development plan. Kelo has proved highly controversial, and many states have since enacted laws purporting to accord landowners greater protection. Likewise, state courts have been split on whether the state constitution and laws countenance condemnation for retransfer for private development. Most notably, such transfers were rejected under the Michigan Constitution the year before Kelo was handed down, in County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004); and under the Ohio Constitution, the year after Kelo, in City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006).

While Kelo broadly holds that retransfer for private economic development does not make the original condemnation violative of the Public Use Clause, it requires that the condemnation be primary for public benefit, with private gains being only incidental. Yet the four dissenters articulated that there was no way to ensure this, and Justice Ken-

nedey, in his concurring opinion, warned that courts should take accusations of favoritism seriously and heightened scrutiny might be required in some situations. Whether courts will consider such accusations *ad seriatim*, or whether prophylactic rules will be developed for certain types of condemnations, remains to be resolved. See Part X, *infra*.

II. Lingle’s Restatement of Regulatory Takings Jurisprudence.

In her summary of contemporary takings law in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), Justice O’Connor briefly noted landmark cases propounding some of its strands.

These include Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), involving permanent physical invasions of private property by government; and Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), involving land use regulations that deprive owners of all economically beneficial use. These “two categories of regulatory action ... generally will be deemed *per se* takings for Fifth Amendment purposes.” Lingle at 538.

Beyond these “relatively narrow categories” and the “special context of land-use exactions,” regulatory takings challenges are adjudicated according to the *ad hoc*, multifactor test first enunciated in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), which stressed “the economic impact of the regulation on the claimant particularly, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the regulation.” Lingle, at 538-39 (discussing Penn Central, 438 U.S. at 124).

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in Loretto, Lucas, and Penn Central) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. In the Lucas context, of course, the complete elimination of a property’s value is the determinative factor. And the Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.

Id., at 539-40 (internal citations omitted).

The third situation involved the application of tests more favorable to landowners where the granting of their development applications was conditioned on government exactions of interests in real property. The Court explained that, “had the government simply appropriated the easement in question, this would have been a *per se* physical taking.” Id. at 546 (citing Dolan v. City of Tigard, 512 U.S. 374, 384 (1994)).

III. Lingle, “Substantially Advance,” and Due Process.

A. The Twenty-Five Year Career of the “Substantially Advances” Test.

In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Supreme Court declared: “The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see Nectow v. Cambridge, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138, n. 36, (1978).”

The “substantially advances” formulation had been much debated during its 25-year life. It was supported as a valid regulatory takings test by some commentators. *See, e.g.*, R. S. Radford, “Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking,” 15 Fordham Env'tl L. Rev. 353 (2004). It was heavily criticized as a disguised due process test by others. *See, e.g.*, Edward J. Sullivan, “Emperors and Clothes: The Genealogy and Operation of the Agins Tests,” 33 Urb. L. 343 (2001).

While never the sole basis for a Supreme Court determination, “substantially advances” often was cited favorably. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); Yee v. Escondido, 503 U.S. 519, 534 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 485 (1987); and United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985).

B. Lingle Rejects “Substantially Advances” as a Takings Test,

In Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), the State of Hawaii had attempted to limit retail gasoline prices by limiting the rent that oil companies could charge lessee-dealers to 15 percent of gross profits. The U.S. district court accepted the State’s argument that the cap was intended to prevent concentration of the gasoline market, and the resulting high price to consumers, by maintaining the viability of independent lessee-dealers. However, it granted Chevron summary judgment on the grounds that the statute would not substantially advance the State’s asserted and legitimate interest, since it did not preclude oil companies from charging the transferees of incumbent dealers a premium that would offset the advantage of the mandated percentage rent deduction. *Id.* at 532-35 (citing Chevron U.S. A. Inc. v. Cayetano, 57 F.Supp.2d 1003, 1014 (D. Hawaii 1998)).

The U.S. Court of Appeals for the Ninth Circuit upheld the district court’s use of the “substantially advances” standard, but vacated the judgment and remanded for a determination of whether the rent cap would, in fact, substantially advance the State’s goal. On remand, the trial court held a one-day bench trial, heard one expert from each side, and concluded that Chevron’s expert was “more persuasive” as to whether the Hawaii statute would achieve its objective. The Ninth Circuit affirmed the remand decision. As

the Supreme Court noted, “the lower courts in this case struck down Hawaii’s rent control statute as an ‘unconstitutional regulatory taking,’ based solely upon a finding that it does not substantially advance the State’s asserted interest in controlling retail gasoline prices.” Id. at 535-36.

The Supreme Court reversed. Justice O’Connor began the Lingle opinion with the observation that the Agins “substantially advances” formula was an example of the “doctrinal rule or test finds its way into our case law through simple repetition of a phrase.” Id. at 531. On close examination, she concluded, the “substantially advances” test relates to the validity of a regulation, an inquiry “logically prior to and distinct from the question whether a regulation effects a taking.” Id. at 543.

The owner of a property subject to a regulation that effectively serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an ineffective regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless “takes” private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.

Id.

Apart from the merits of the litigants’ claims, the Court hinted that it took into account the apparently casual nature of the trial court’s fact finding process in its dismissive summary of that court’s conclusions: “We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.” Id. at 545.

IV. Due Process Review After Lingle.

A. Lingle Affirms Viability of Property Deprivation Due Process Claims.

While attention to Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), has focused on the Court’s disclaimer of “substantially advances” as a takings test, it is important to recognize that Lingle provides one affirmative benefit to landowners—reaffirmation of the right to challenge land use regulations as violative of due process of law. Justice O’Connor declared:

[T]he “substantially advances” inquiry probes the regulation’s underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . Conversely, if a government action is found to be impermissible—for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Id. at 543.

The affirmance of a substantive due process cause of action in Lingle is important, since some U.S. Circuit Courts of Appeals denied the availability of due process review in land use regulation challenges.

In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court reviewed the case of a motorist who alleged that the police stopped and beat him for no good reason. The Supreme Court reviewed Graham's Fourth Amendment search and seizure claim and his more general Due Process Clause claim, but held that only the more specific Fourth Amendment claim would lie. Id. at 395. Although Graham seemed to apply narrowly to the Fourth Amendment, the Court reiterated its holding in much broader terms in Albright v. Oliver, 510 U.S. 266 (1994) (plurality): "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" Id. at 266 (quoting Graham, 490 U.S. at 395).

The Ninth Circuit has been the forerunner in applying the Graham doctrine to property deprivation cases. In its en banc review in Penman v. Armendariz, 75 F.3d 1311 (9th Cir. 1996), it declared that "Graham makes clear that the scope of substantive due process, however ill-defined, does not extend to circumstances already addressed by other constitutional provisions." Id. at 1325. Some other circuits have applied the same distinction. See, e.g., S. County Sand & Gravel Co. v. Town of South Kingstown, 160 F.3d 834, 835 n.2 (1st Cir. 1998); Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207 (10th Cir. 2000). For a more detailed review of circuit applications of the Graham doctrine, see Robert Ashbrook, Comment, "The Graham Doctrine, and the Extinction of Economic Substantive Due Process," 150 U. Pa. L. Rev. 1255 (2002) and Kenneth B. Bley, "Use of the Civil Rights Acts to Recover Damages in Land Use Cases," SK045 ALI-ABA 767 (2005).

In what was apparently the first post-Lingle case on point, Consolidated Waste Systems, LLC v. Metropolitan Government of Nashville, ___ S.W.3d ___, 2005 WL 1541860 (Tenn. Ct. App., Jun 30, 2005), the court surveyed the pre-Lingle split in the U.S. Circuit Courts of Appeals, explained that it did not regard due process claims as subsumed within takings claims, and added

The [Supreme] Court's recent decision in Lingle solidifies our conclusion because the Court rejected the "substantially advances" test as part of a regulatory takings analysis and made it clear that the validity of a zoning ordinance as an exercise of the government's police power is to be tested under traditional due process rational basis principles. . . . After explaining the historical basis for the "commingling" in Agins of due process and takings inquiries, the Court made it clear that the analytical underpinnings of the claims were different.

In MHC Financial Ltd. Partnership v. City of San Rafael, ___ F.Supp.2d ___, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006) the U.S. district court declared:

Lingle undercuts the Ninth Circuit's basis for barring substantive due process challenges to deprivations of property. The reason for this bar was that claims should

rely on the explicit textual sources of constitutional protection, if available, such as the takings clause, rather than “the more generalized notion of substantive due process.” Armendariz, 75 F3d at 1324. But Lingle held that challenges concerning the means-ends relationship of a statute do not implicate the takings clause. 125 S Ct at 2083. Hence, after Lingle, there is no explicit text for assessing whether a regulation is effective in achieving a legitimate public purpose; only the due process clause remains. See also Blaesser & Weinstein, Federal Land Use Law & Litigation § 2:11 (noting that, after Lingle, “[i]f a land use regulation furthers no public purpose whatsoever then, although just compensation is no longer available under the Fifth Amendment, the failure of the regulation to substantially advance any legitimate public purpose in violation of due process * * * would give rise to a cause of action for damages under 42 USC § 1983”). Accordingly, the court concludes that after Lingle, Armendariz and its progeny no longer preclude a substantive due process challenge to deprivations of property.

___ F.Supp.2d at ___, 2006 WL 3507937 at *9.

B. Resolving the Correct Substantive Due Process Standard.

The Fifth Amendment to the U.S. Constitution in part provides: “No person shall ... be deprived of ... life, liberty, or property, without due process of law... .” Likewise, Section 1 of the Fourteenth Amendment provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”

“Substantive review” refers to the judicial determination of whether the substance of a law or regulation is compatible with the Constitution. In an important sense, any judicial review other than one limited to the process by which the government applies a rule to a given individual constitutes substantive review.

“A substantive due process claim does not require proof that all use of the property has been denied, but rather that the interference with property was irrational or arbitrary.” Bateson v. Geisse, 857 F.2d 1300, 1303 (9th Cir. 1988). Furthermore, A violation of the Fourteenth Amendment Due Process Clause may impose liability for undue interference with the use of land not merely because it deprives the land of all value but also because the regulation itself is arbitrary, capricious, or unreasonable. See City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

The fact that a given government action may be challenged as a taking without the payment of just compensation, a denial of procedural due process; or a denial of equal protection does not preclude the act constituting a denial of substantive due process as well. Where more than one constitutional theory is asserted as a basis for liability, courts are required to examine each theory independently. See United States v. James Daniel Good Real Property, 510 U.S. 43 (1993); Soldal v. Cook County, 506 U.S. 56 (1992).

Still, the flowering of meaningful substantive due process review for property deprivation claims awaits the enunciation of a reasonable standard for review of such claims. The Supreme Court has stated that “[t]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and

that the means selected shall have a real and substantial relation to the objective sought to be obtained.” PruneYard Shopping Center v. Robins, 447 U.S. 74, 84-85 (1980).

In practice, however, the bar has been a high one. In County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998), the Supreme Court added that “the core of the concept” of due process is “protection against arbitrary action” and that “only the most egregious official conduct can be said to be ‘arbitrary’ in the constitutional sense.” The U.S. Courts of Appeals have echoed that view. See, e.g., Crider v. Board of County Comm’rs, 246 F.3d 1285, 1289 (10th Cir. 2001) (holding arbitrary and capricious “does not mean simply erroneous;” Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455, 459 (D.C. Cir. 1997) (noting “grave unfairness” as a result of “substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that tramples significant personal or property rights ...”

Justice Kennedy’s concurring opinion in Lingle reminded his colleagues that, although Chevron had voluntarily dismissed its due process claim, the Court’s decision “does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.” 544 U.S. at 548 (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part)). In his concurring opinion in Kelo v. City of New London, 125 S.Ct. 2655 (2005), Justice Kennedy wrote:

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in Berman and Midkiff might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.

Id. at 2670 (Kennedy, J., concurring).

Whether the Supreme Court will adopt some meaningful, intermediate standard for reviewing due process challenges to property deprivations in situations involving serious, albeit not shocking, abuse remains to be resolved.

V. Partial Regulatory Takings After Lingle

A. The Court’s Unexplained Emphasis on “Fairness”

As discussed earlier, the Supreme Court recently summarized its regulatory takings jurisprudence in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005). See Part II, supra. Importantly, Justice O’Connor’s opinion noted that, while scholars have offered various justifications for the Takings Clause, “we have emphasized its role in ‘bar[ring] 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.’” Id. at 537 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). The Court proffered no reason why burden sharing instead of, say, preservation of liberty, should be the fulcrum of its takings ju-

risprudence. “Fairness,” however, comports with reasonableness and ends-means proportionality, which are concepts associated with substantive due process. These factors pertain particularly to the Court’s Penn Central partial takings analysis.

B. Incompletely Conceptualized Categorical Rules.

Our precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). A second categorical rule applies to regulations that completely deprive an owner of “all economically beneficial use” of her property. Lucas v. South Carolina Coastal Council, 505 U.S. [1003] at 1019 [1992] (emphasis in original). We held in Lucas that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law” independently restrict the owner’s intended use of the property. *Id.*, at 1026-1032.

Lingle, 544 U.S. at 538 (case descriptions omitted).

Justice O’Connor explained that “[a] permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.” *Id.* at 539. The Court cited Kaiser Aetna v. United States, 444 U.S. 164, (1979), which memorably expounded upon expounding “one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.” *Id.* at 176. However, this did not stop the Court from upholding a state-created right of free expression within privately-owned shopping centers in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). There, it attempted to distinguish Kaiser Aetna by asserting that “appellants have failed to demonstrate that the ‘right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking.’” *Id.* at 84.

Lingle’s explanation for the Lucas holding, requiring compensation where there was a deprivation of all economically beneficial use, was that “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” 544 U.S. at 539-40 (quoting Lucas, 505 U.S. at 1017). However, this explanation is not literally true, since, as Judge Jay Plager of the Federal Circuit has noted:

A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market. As this court observed . . . , yesterday’s Everglades swamp to be drained as a mosquito haven is today’s wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow’s view of public policy will bring, or how the market will respond to it. . . .

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1566-67 (Fed. Cir. 1994).

While permanent deprivations of all economic use were deemed takings in Lucas, and deprivations of physical possession for periods of time were deemed takings of leasehold interests in United States v. General Motors Corp., 323 U.S. 373 (1945), the Court applied quite a different rule in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). There, small landowners in the foothills surrounding Lake Tahoe were deprived of all rights of use through “temporary” moratoria on development. These began in 1980 and, under the Court’s analysis, lasted for 32 months (although, in fact, they remain in place to this day). The Court simply refused to apply the analysis of cases like General Motors.

The Court, purporting to extrapolate from the “longstanding distinction between acquisitions of property for public use ... and regulations prohibiting private uses,” created a superficially similar dichotomy that would preclude “treat[ing] cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.” Tahoe-Sierra, 535 U.S. at 323

The Court stressed that Lucas applied only where all economically viable use was taken, and declared that “[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.” Id.

C. Partial Regulatory Takings – The Penn Central Ad Hoc Tests

Beyond the “categorical” permanent physical invasion and the deprivation of all economic viable use tests, regulatory takings are generally governed by Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). As Lingle explained:

The Court in Penn Central acknowledged that it had hitherto been “unable to develop any ‘set formula’” for evaluating regulatory takings claims, but identified “several factors that have particular significance.” Id., at 124. Primary among those factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” Ibid. In addition, the “character of the governmental action”—for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good”—may be relevant in discerning whether a taking has occurred. Ibid. The Penn Central factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules.

Lingle, 544 U.S. at 538-39 (quoting Penn Central).

The third Penn Central factor, “character of the governmental action,” was stripped of its role of distinguishing physical from regulatory takings only four years after the case was handed down, when the Court in Loretto made all permanent invasions categorical takings. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

The “economic impact” of a regulation might depend upon the wealth of the owner, which hardly seems like a promising test for the provision of just compensation as measured by property that the government takes, or as the economic impact in terms of the total ownership affected by the regulation. The Supreme Court has taken the latter approach, necessitating in every as applied takings case a quest for the “relevant parcel.” See, Part VII infra.

“Investment-backed expectations” has proven the most durable and powerful of the Penn Central tests. The phrase is derived from a preference for established uses over the purchases of speculators. Penn Central, 438 U.S. at 128 (citing Frank I. Michelman, “Property, Utility, and Fairness: Comments on the Ethical Foundation of ‘Just Compensation’ Law,” 80 Harv. L. Rev. 1165, 1229-34 (1967)). However, “[n]either [Justice Brennan] nor anyone else offers any telling explanation of why this tantalizing notion of expectations is preferable to the words “private property” (which are, after all, not mere gloss, but actual constitutional text).” Richard A. Epstein, “Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations,” 45 Stan. L. Rev. 1369, 1370 (1993).

In Walcek v. United States, 49 Fed. Cl. 248, 271-72 (2001), aff’d 303 F.3d 1349 (Fed. Cir. 2002), the U.S. Court of Federal Claims reviewed existing precedents and determined that, as a factual matter, courts were highly unlikely to fund a regulatory taking under Penn Central unless there was at least an 85% diminution in value.

D. A Property-Based Test for Partial Takings?

The fundamental problem with the Penn Central tests is that they are directed towards ascertaining the proportionality of ends and means, a due process concept. Yet, even as it proclaimed the conceptual separation of takings and due process right in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), Supreme Court reiterated the ad hoc, multi-factor Penn Central tests as the basis of its takings jurisprudence. A more coherent takings test would pose two questions: Did government take private property? If so, did it pay just compensation? Resolution of the problem might come through redefining “relevant parcel” in an objective way, so as to comport with “property” taken. See, Part VII.B, supra.

VI. The Williamson County State-Litigation Problem After San Remo.

The United States Supreme Court’s Williamson County ripeness rules constitute “a special ripeness doctrine applicable only to constitutional property rights claims.” Timothy V. Kassouni, “The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights,” 29 Cal. W. L. Rev. 1, 2 (1992).

A. The William County Two-Prong Ripeness Test.

In Williamson County Regional Plan. Comm’n v. Hamilton Bank, 473 U.S. 172, 194 (1985), the Supreme Court first articulated a two-pronged ripeness rule for regulatory

takings claims. “The first prong requires the government entity charged with enforcing the regulations at issue to have rendered a final decision,” and “[t]he second prong requires the plaintiff to have sought compensation if the state provides a ‘reasonable, certain and adequate provision for obtaining compensation.’” Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 95 (2d Cir.1992) (quoting Williamson County, 473 U.S. at 186, 194). While the “final decision” prong of Williamson County has numerous sub-prongs, the Supreme Court recently has taken a practical view of its requirements. See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001) (holding that regulatory takings claim lacked ripeness until property owner had “followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property”).

B. Williamson’s Prong 2 Requires State Litigation of Federal Takings Claims.

The need for property owners to avail themselves state procedures to obtain just compensation is attributed to fact that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.” Williamson County, 473 U.S. at 194 (citing Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 297, n.40 (1981)). Thus, “because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied.” Id. at 195, n.13. It is not enough for the owner to establish a deprivation of property. It also is not enough for the owner to demonstrate that the state took property without simultaneously tendering payment, since under Williamson County neither advance nor contemporaneous payment was required. Id. at 194. The Court declared that “all that is required is that a ‘reasonable, certain and adequate provision for obtaining compensation’ exist at the time of the taking.” Id. (internal citations omitted). Furthermore, as the Court stated later in MacDonald, Sommer & Frates v. Yolo County, “a court cannot determine whether a municipality has failed to provide ‘just compensation’ until it knows what, if any, compensation the responsible administrative body intends to provide.” 477 U.S. 340, 350 (1986).

C. State Litigation Results in Issue Preclusion.

However, principles of claim preclusion (*res judicata*) as well as issue preclusion (*collateral estoppel*) generally bar federal reexamination of cases claims that were, or could have been, heard in a prior state proceeding. Since the U.S. Constitution is the supreme law of the land, it is enforced by state as well as federal courts. Consequently, state courts normally adjudicate claimants’ rights under the U.S. Constitution.

The Supreme Court apparently provided property owners a way to thread the narrow path between unripe and overripe (*i.e.*, precluded) claims in England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 420-421 (1964). There, the Court approved of the preservation of federal claims for federal fora by permitting state court litigants to assert their state claims only, and to “reserve” their federal claims for subsequent disposition in federal court. In Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118, 130 (2d Cir. 2003), the Second Circuit interpreted the England principle broadly, holding that “parties ‘who litigate state-law takings claims in state court invol-

untarily' pursuant to Williamson County cannot be precluded from having those very claims resolved 'by a federal court.'" On the other hand, the Ninth Circuit rejected such an approach in San Remo Hotel, L.P. v. City and County of San Francisco, 364 F.3d 1088 (9th Cir. 2004).

The Supreme Court granted certiorari to resolve the issue, and held that the federal full faith and credit statute precluded the relitigation of regulatory takings issues adjudicated by the California courts. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005). The Court rejected the "assumption that plaintiffs have a right to vindicated their federal claims in a federal forum," and declared that the "relevant question" was not "whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment." *Id.* at 342. Since it deemed California regulatory takings jurisprudence the equivalent to federal takings jurisprudence in relevant respects, the Court found that the full faith and credit statute, 28 U.S.C. § 1738, prohibited relitigation of the substantive issues.

The preclusive effect of the state litigation requirement recently has been highlighted in Torromeo v. Town of Fremont, 438 F.3d 113 (1st Cir.), *cert. denied*, 127 S.Ct. 257 (2006). A developer sued a New Hampshire town, alleging that its delay in issuing certain building permits violated the Takings Clause. The federal district court found the state court determination in a suit involving the same parties, also seeking compensation for harm caused by the Town's wrongful denial of the permits, to constitute *res judicata*.

However, "building on Williamson County, the New Hampshire Supreme Court held that federal takings and related federal due-process claims raised in a state-court proceeding, alongside state-law claims for compensation, had to be dismissed without prejudice because they were not ripe until the state-law claims were resolved." *Id.* at 116 (citing Blue Jay Realty Trust v. Franklin, 567 A.2d 188, 190-91 (N.H. 1989)). The First Circuit noted in passing that, in San Remo, the U.S. Supreme Court explicitly stated that Williamson County "does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution." 438 F.3d at 116 (quoting San Remo, at 2506).

Even with Blue Jay Realty applicable under state law, however, the First Circuit found that federal issues had been litigated by the New Hampshire Supreme Court in Torromeo. The court noted that plaintiff's state complaint identified the federal Takings Clause as a basis for its cause of action, and cited U.S. Supreme Court takings cases.

Plaintiffs point to the fact that the New Hampshire Supreme Court cited only cases interpreting the New Hampshire Constitution as evidence that the litigation did not involve a federal takings claim. But the New Hampshire Supreme Court has stated that where a plaintiff raises state and federal takings claims in the same action, the court need not consider the claims independently because the Fifth Amendment's Takings Clause is no more protective than its state analogue. Therefore, the court's decision that the Town did not violate the takings provision of the state constitu-

tion means, a fortiori, that, in its view, there was no unlawful taking under federal law.

Id. at 117 and n.3 (internal citations omitted).

Torromeo points out, as did San Remo itself, the difficulty in constructing a takings case solely under state law. Not only must the landowner request relief solely under state law, but must construct the pleadings, briefs, and argument referring only to state law analysis. While not impossible, constructing a state takings case without recourse (to turn the phrase) to federal analogues undoubtedly would prove very difficult in an area of law where state takings law generally is built upon, and refers to, federal takings law in all significant respects.

D. Williamson County Does Not Apply to Defendants' Removal Actions.

In City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), the Supreme Court permitted a municipal defendant to remove standard landowner takings claims federal court, without the need for Williamson County ripening. The Court held that when a state court case is removed to U.S. district court on the basis of federal question jurisdiction, the district court has supplemental jurisdiction to decide state law claims involving deferential review of a local administrative decision. The decision led Professor Robert Freilich and others to observe: “Apparently only property owner takings and substantive due process claims are relegated to state court review under the Williamson ripeness doctrine. States and local governments have the right to have their claims heard in the federal courts.” Robert H. Freilich, et al., “Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government,” 31 Urb. Law. 683, 685 (1999). (However, states might have to pay a price for this privilege. In Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 152 L. Ed. 2d 806, 122 S. Ct. 1640 (2002), the U.S. Supreme Court held that a state waives sovereign immunity when it removes a case to federal court.)

Relying on International College of Surgeons, the plaintiff in Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir.), cert. denied, 540 U.S. 825 (2003), argued that landowners should be able to remove to federal court as well. The Eighth Circuit rejected the argument, suggesting that, while Williamson County has been substantially eroded, any determination that it had been overruled in City of Chicago should be left to the Supreme Court “[A]s the District Court noted, City of Chicago’s holding addresses only the question of federal-question jurisdiction over a ripe takings claim. It does not explicitly answer the question of what is necessary to render a takings claim ripe. The Supreme Court has not explicitly overruled or modified the ripeness requirements laid out in Williamson in the context of takings cases. The requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous. Nonetheless Williamson controls the instant case... . Whether [the rule should be changed] is for the Supreme Court to say, not us.” 319 F.3d at 1040-41. The Supreme Court declined the invitation. Cert. denied, 124 S.Ct. 178 (2003).

E. Is the “State Litigation” Prong Constitutionally Mandated?

A concurrence in the judgment by Chief Justice Rehnquist, joined by Justices O’Connor, Kennedy, and Thomas, agreed that the full faith and credit statute applied, but urged the Court to reconsider in subsequent cases why Williamson County ripeness should require state litigation in the first lace. San Remo, 545 U.S. at 348 (Rehnquist, C.J., concurring in judgment).

It is not clear to me that Williamson County was correct in demanding that, once a government entity has reached a final decision with respect to a claimant’s property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in Williamson County purported to interpret the Fifth Amendment in divining this state-litigation requirement. More recently, we have referred to it as merely a prudential requirement. Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 733-734 (1997). It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim. Cf. Patsy v. Board of Regents of Fla., 457 U.S. 496, 516 (1982) (holding that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies).

Id. at 349 (Rehnquist, C.J., concurring in judgment) (other citations omitted).

The argument that there is something unique and intrinsic in the structure of the Takings Clause that mandates the state litigation requirement has been countered by Professor Gideon Kanner:

The rationale offered [in Williamson County] was ... that the law does not forbid takings of private property, but only takings without compensation, and thus the owners’ case is not ripe until they seek and are denied just compensation in the state courts. ... But with all due respect, this dual rationale makes little sense. After all, to take the first criterion first, there is nothing in the Constitution that forbids the government from depriving its citizens of life, liberty, or property either. The Constitution only requires that such deprivations not occur without due process of law, just as takings may not occur without just compensation.

Gideon Kanner, “Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?,” 30 Urb. Law. 307, 327-28 (1998).

Given the encouragement of the four-Justice concurrence in San Remo (albeit Justice O’Connor subsequently retired and Chief Justice Rehnquist subsequently deceased), it is most likely that property owners will launch renewed attacks on the state litigation requirement. For now, however, this prong of Williamson County remains a formidable barrier to federal court review of alleged regulatory takings by state and local governments.

VII. Relevant Parcel.

A. Current “Relevant Parcel” Analysis.

In Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), Justice Brennan declared that “[i]n deciding whether a particular governmental action has effected a taking, this Court focuses 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” Id. at 130-31. The Court observed in Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987), that “our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property “whose value is to furnish the denominator of the fraction.” Id. at 497 (citation omitted). Alas, Penn Central “gave no guidance on how one is to distinguish a ‘discrete segment’ from a ‘single parcel.’” Id. at 517 n.5.

Indeed, courts often mechanically have defined the “property” as the full extent of contiguous land under a common ownership, often without conscious awareness. See, e.g., John E. Fee, Comment, “Unearthing the Denominator in Regulatory Takings Claims,” 61 U. Chi. L. Rev. 1535 (1994) (citing cases). Even where the landowner has previously sold a part of his or her initial holding, some courts still regard the original contiguous land as the standard for takings fraction analysis. See Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (treating as relevant the original 10,000-acre parcel acquired for residential development even though the developer had previously sold off parts of the tract). Numerous factors, including the prior history of a parcel’s ownership use, possible subdivision, and changes in regulatory regimes must be considered, along with the ownership and use of possibly related nearby parcels, in determining whether the “parcel as a whole” or some lesser “relevant parcel” is appropriate for analysis in a given case. See, e.g., Dwight H. Merriam, “Rules for the Relevant Parcel,” 25 U. Haw. L. Rev. 353 (2003). The nature of the property right taken may affect the court’s determination of the relevant parcel. Additionally, the “discreteness” of the property right will affect how broadly the court interprets the relevant parcel. Id. at 412 (“with water, mining, grazing, billboards or similar property rights, most jurisdictions would find that the claimed right is separate from the land to which it is appurtenant, so the relevant parcel becomes insignificant in the face of the loss of the right.”).

Although the Supreme Court noted its “discomfort” with the “parcel as a whole doctrine” in Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001), it nevertheless reaffirmed the importance of the concept the following year, in Tahoe-Sierra Preservation Council v. Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (extending “parcel as a whole” to the temporal axis of ownership, so that the significance of a complete deprivation of viable economic use for a 32-month period was considered within the context of an indefinite time frame). While Tahoe-Sierra acknowledged that the Court has long treated government commandeering of possession for a term as condemnations of leasehold interests regardless of “parcel as a whole,” it found that more “complex” analysis was required in regulatory takings cases. Id. at 322 & n.17 (citing United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951)).

B. An Objective Definition for “Relevant Parcel”?

As clarified by Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), due process is not an aspect of takings law. See Part III.B, supra. Rather, it has independent constitutional significance. See, Part IV.A, supra. Thus, the time is auspicious for a recasting of “relevant parcel” from an examination of burdens imposed on property owners to one examining whether property was taken by government.

Critics claim that determinations of whether there have been regulatory takings must occur within a context of relative deprivation to the owner because of the insurmountable problem of “conceptual severance.” See Margaret Jane Radin, “The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings,” 88 Colum. L. Rev. 1667 (1988) “[E]very regulation of any portion of an owners ‘bundle of sticks’ is a taking of that particular portion considered separately, price regulations ‘take’ that particular servitude curtailing free alienability, building restrictions ‘take’ a particular negative easement curtailing control over development and so on.” Id. at 1676.

At least two plausible objective definitions of “relevant parcel” have been proposed. The first test, proposed by Professor John Fee, employs the standard of “independent economic viability.” John E. Fee, Comment, “Unearthing the Denominator in Regulatory Takings Claims,” 61 U. Chi. L. Rev. 1535, 1557-62 (1994). “Under this standard, a taking has occurred when ‘any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation.’” Id. at 1538. The other standard, advocated by the present author, is based on the “commercial unit,” as used in commercial law. The commercial unit “[m]eans such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use.” U.C.C. § 2-105(6). See Steven J. Eagle, Regulatory Takings § 7-7(e)(5) (3rd ed., 2005). Under this standard, an owner could claim a taking of a particular property interest, but would have the burden of demonstrating that the interest asserted is one actually recognized as traded in a market in the community in which it is located.

Both of these standards, in effect, attempt to designate base units of property that are freestanding by dint of independent economic significance. Under the economic viability test, property proffered by owners as separate parcels would be tested through appraisals. Under the commercial unit test, the proffered property would have to correspond to market units traded in the vicinity.

VIII. Do Equal Protection “Classes of One” Require Malice?

It has long been asserted that an “equal protection element” within takings law “prevent[s] discriminatory restriction of any one of a number of identically situated owners.” Joseph L. Sax, “Takings, Private Property and Public Rights,” 81 Yale L.J. 149, 166 n.32 (1971). However, each parcel of land traditionally has been regarded as unique, and courts have been very hesitant to determine that parcels treated disparately by municipal line drawing are identically situated. An important exception to this principle, albeit under different legal

bases, has been disparate treatment based on racial or religious grounds. See, e.g., Islamic Center of Mississippi, Inc. v. Starkville, 840 F.2d 293 (5th Cir. 1988) (denial of use permit for Islamic Center under circumstances where many Christian churches permitted by city violates free exercise clause).

The doctrine of equal protection was revived, however, by the Supreme Court's decision in Village of Willowbrook v. Olech, 528 U.S. 562 (2000). The respondent had been deprived of a water hook-up for three months because she would not grant the Village a 33-foot easement for it. Other property owners were asked for only a 15-foot easement. The district court dismissed her claim, but the Seventh Circuit held that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a "spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." Id. at 564 (citing 160 F.3d 386, 387 (7th Cir. 1998) quoting Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995)).

The Supreme Court held that it "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S. at 564 (citations omitted). It concluded:

That reasoning is applicable to this case. Olech's complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners. The complaint also alleged that the Village's demand was "irrational and wholly arbitrary" and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of "subjective ill will" relied on by that court.

Id. at 565 (citation omitted) (emphasis added).

In a short opinion concurring in the result, Justice Breyer worried that the Court would re-fashion the Equal Protection Clause "a way that would transform many ordinary violations of city or state law into violations of the Constitution. It might be thought that a rule that looks only to an intentional difference in treatment and a lack of a rational basis for that different treatment would work such a transformation." Id. (Breyer, J. concurring in the result).

Nevertheless, the requirement of "subjective ill will" requirement has been employed in many post-Olech cases. In a recent summary, Judge Richard Posner acknowledged the "divergent strands in the case law" regarding "class of one" equal protection claims since Olech. Tuffendsam v. Dearborn County Bd. of Health, 385 F.3d 1124, 1127 (7th Cir. 2004) (citing Purze v. Village of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002)); Cruz v. Town of Cicero, 275 F.3d 579, 587 (7th Cir. 2001); Bartell v. Aurora Public Schools, 263 F.3d 1143, 1149 (10th Cir. 2001); and Bell v. Duperrault, 367 F.3d 703, 709-13 (7th Cir. 2004) (Posner, J., concurring) (all requiring deliberate deprivation of equal protection for personal reasons); compare Nevel v. Village of Schaumburg, 297 F.3d 673, 681 (7th Cir.

2002); and Albiero v. City of Kankakee, 246 F.3d 927, 932 (7th Cir. 2001) (all requiring only intentional disparate treatment of similarly situated property without rational basis).

Judge Posner, the author of the Seventh Circuit's Olech opinion, later asserted that disparate holding about "subjective intent" can be "woven together by noting that intentionality is an ambiguous concept, shading at one end into mere knowledge of likely consequences and at the other into a desire for those consequences." Tuffendsam, 385 F.3d at 1127.

Also, despite the First Circuit's traditional hostility to developers' claims under the Civil Rights Act, it affirmed the award of compensatory and punitive damages to a developer in a "class of one" equal protection case in Tapalian v. Tusino, 377 F.3d 1 (1st Cir. 2004) (finding plaintiff singled out for egregiously disparate treatment by town superintendent of public works).

It seems that the *Olech* decision may be starting have an impact for plaintiffs in federal courts. One scholar has observed:

During a recent twenty-five year period, the Supreme Court decided one hundred ten rational basis cases and the plaintiff prevailed in only ten of these, for a success rate of only nine percent. One would imagine then, that "class of one" equal protection claims, which rarely involve suspect classes or fundamental rights, would rarely be successful. After Olech, that is no longer true. In the first eighty-six federal district court opinions after Olech that cite Olech and the term "class of one," plaintiffs prevailed in thirty, for a success rate of thirty-five percent. This is an unexpectedly high percentage which suggests both that Olech is having a significant impact on the federal courts, and that Justice Breyer's and Judge Posner's concerns about the explosion of federal cases were well-justified.

Robert C. Farrell, "Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech," 78 Wash. L. Rev. 367, 416-417 (2003).

Good recent analyses of "class of one" equal protection claims are contained in Bell v. Duperrault, 367 F.3d 703 (7th Cir. 2004) (Posner, J., concurring) and Merry Charters, LLC v. Town of Stonington, 342 F. Supp. 2d 69, 73-74 (D. Conn. 2004).

Another important incentive for landowners bring claims sounding in equal protection is avoidance of the need to "ripen" their claims in state court, with concomitant issue preclusion problems, under the Supreme Court's Williamson County doctrine. See Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000) (finding the plaintiff's allegations that city officials acted "maliciously" in conditioning a plat demonstrated a bona fide equal protection claim, which was independent of the plaintiff's takings claim and thus not subject to Williamson County ripeness requirements); Hager v. City of West Peoria, 84 F.3d 865, 872 (7th Cir. 1996) (recognizing that bona fide equal protection claims arising from land use decisions can be made independently from a takings claim and without being subject to Williamson ripeness). Regarding Williamson County and the preclusion problem generally, see Part VI, supra.

IX. Legislative Exactions on Development After Dolan and Lingle.

In Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987), the Supreme Court struck down the conditioning of a development permit on the granting of an easement, since there was no “essential nexus” between the exaction sought and the powers of the agency. In Dolan v. City of Tigard, 512 U.S. 374 (1994), a nexus was present, and the Court had to develop a test to measure its sufficiency. It declared:

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

Id. at 391

The Supreme Court’s takings summary in Lingle explained this application of heightened scrutiny by stating “had the government simply appropriated the easement in question, this would have been a per se physical taking.” 544 U.S. at 546.

However, Chief Justice Rehnquist’s Dolan opinion also distinguished between “adjudicative” and “legislative” regulations, emphasizing that Dolan involved the latter. 483 U.S. at 385. Justice Souter correctly noted in dissent that the decision, although “adjudicative,” was imposed pursuant to local law. Id. at 414 n.* (Souter, J., dissenting).

Neither Dolan, nor Lingle, nor any of the Court’s other takings cases articulates what role the adjudicative/legislative distinction serves. Nor, except by inference, is there any articulation that it should be outcome determinative.

In Parking Association of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), cert. denied, 515 U.S. 1116 (1995), a City ordinance required downtown surface parking operators to replace a substantial number of parking spaces with landscaping in order to help beautify the city for the Summer Olympic games. The state supreme court found no taking, based on the fact that the regulatory act was legislative in nature, not adjudicative. In an impassioned dissent from denial of certiorari in which he was joined by Justice O’Connor, Justice Thomas declared:

It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1116 (Thomas, J., dissenting from denial of cert.).

Some states have rejected the adjudicative/legislative distinction when reviewing the constitutionality of exactions. See, e.g., Curtis v. Town of South Thomaston, 708 A.2d 657 (Me. 1998) (approving legislative exaction of easement for pond only after Dolan analysis);

Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. 1995) (rejecting change in nomenclature from “conditional special use” to “ordinance as attempt to avoid Dolan review); and National Association of Home Builders v. Chesterfield County, 907 F. Supp. 166 (E.D. Va. 1995) (leaving open possibility that legislative enactment could lead to facial or as-applied takings challenges).

The lack of an articulated rationale for the adjudicative/legislative distinction impresses upon states and localities the task of ascertaining how to apply the adjudicative/legislative test in specific cases, taking into account the nature and details of the controversy and the discretion accorded administrators under applicable ordinances. It also leaves the fundamental nature of the distinction open to further appellate and Supreme Court review.

X. Public-Private Partnerships for Economic Development and “Public Use”

A. The Kelo Decision.

In Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655 (2005), the United States Supreme Court held that the Fifth Amendment’s Public Use Clause was not violated by the condemnation of private property for retransfer to other private owners in furtherance of an economic development plan.

The Fifth Amendment requires that “nor shall private property be taken for public use, without just compensation.” American case law reflects two opposing views of “public use.” What is termed the “broad view” equates “public use” to “public benefit.” Correspondingly, the “narrow view” stresses “public use” as “actual use.” Only physical use of the facility by a government agency or by a considerable segment of the general public would suffice. Judicial support for these two approaches was more or less evenly balanced through the eighteenth century. See Lawrence Berger, “The Public Use Requirement in Eminent Domain,” 57 Or. L. Rev. 203, 205 (1978). Largely as a result of two Supreme Court cases, the “broad view” has prevailed for the past half century. In Berman v. Parker, 348 U.S. 26 (1954), the Court upheld the condemnation of a sound department store building as part of the comprehensive revitalization of the mostly-blighted neighborhood in which it was located. In Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), the Court upheld the condemnation of underlying fee interests for retransfer to the respective tenants with long-term ground leases. Both cases were marked by broad language. Justice Douglas declared that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive This principle admits of no exception merely because the power of eminent domain is involved.” Berman at 32. Justice O’Connor declared that the public use requirement is “co-terminous with the scope of a sovereign’s police powers.” Midkiff, at 240.

Writing for the 5-4 majority in Kelo, Justice Stevens averred that Berman, Midkiff, and earlier cases, as Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-164 (1896) (upholding a mining company’s use of an aerial bucket line to transport ore over property it did not own), justified its broad interpretation. In the principal dissent, Justice O’Connor noted the “errant language in Berman and Midkiff.” Id. 125 S.Ct. at 2675. Her main complaint was that “public use,” as the majority defined it, could not be cabined:

The Court rightfully admits ... that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

B. The Case Law Before and After Kelo.

Kelo noted that States were free to place restrictions on the exercise of eminent domain beyond those the Supreme Court thought required under the Public Use Clause, and that many states have imposed stricter requirements. Kelo, 126 S.Ct. at 2668.

Prior to Kelo, some state courts endorsed condemnation for retransfer for economic development. See, e.g., Dare County Board of Education v. Sakaria, 456 S.E.2d 842 (N.C. App. 1995), *aff'd per curiam*, 466 S.E.2d 717 (N.C. 1996) (deeming “public use” condemnation of land for use as wetlands mitigation and source of fill in connection with proposed offsite athletic facilities); Mentor v. Osborne, 758 N.E.2d 776 (Ohio App. 2001) (approving “banking” of condemned land). Court in other states deemed such condemnations inconsistent with “public use.” See, e.g., Mayor and Aldermen of City of Vicksburg v. Thomas, 645 So. 2d 940 (Miss. 1994) (rejecting claim that taking of riverfront property in order to turn it over to riverboat gaming corporation had a public purpose); City of Bozeman v. Vaniman, 898 P.2d 1208 (Mont. 1995) (rejecting condemnation for freeway off-ramp and rest area/visitor’s center, to extent that offices of local Chamber of Commerce would occupy some forty percent of building planned for site); and Casino Reinvestment Development Authority v. Banin, 727 A.2d 102 (N.J. Super. 1998) (determining condemnation of residences for new parking lot for Trump casino would further private rather than public use).

In one notable case, the exercise of eminent domain was deemed not to have a public purpose largely because the condemnor had advertised that it would condemn land for businesses development on a cost-plus basis. Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 768 N.E.2d 1 (Ill. 2002) (striking down redevelopment agency condemnation of recycling center for reconveyance to adjoining automotive sports racetrack for parking not for public use). In another well-known case, a store was condemned for retransfer to a business competitor, that had paid for a study showing that the target parcel would otherwise be subject to “future blight.” 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), dismissed as moot and remanded, 60 Fed. Appx. 123 (9th Cir. 2003) (noting that “the very reason that Lancaster decided to condemn 99 Cents’ leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes.” 237 F. Supp. 2d at 1129).

Perhaps most important, condemnation for retransfer for private development was rejected under the Michigan Constitution in County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). Decided the year before Kelo, Hathcock repudiated, as a “radical departure from fundamental constitutional principles,” the Michigan court’s earlier decision in Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich.

1981). That case countenanced the transfer of an entire ethnic neighborhood to General Motors Corp. for economic development purposes. Hathcock reinstated its pre-Poletown case law, with its three permissible categories of “public use” gleaned from Justice Ryan’s Poletown dissent:

“First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved ‘public necessity of the extreme sort otherwise impracticable.’ “ Hathcock, 684 N.W.2d at 781 (quoting Poletown, 304 N.W.2d at 478 (Ryan, J. dissenting)).

“Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution’s ‘public use’ requirement when the private entity remains accountable to the public in its use of that property.” Id. at 782 (quoting Poletown, 304 N.W.2d at 479 (Ryan, J. dissenting)).

“Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan’s words, the property must be selected on the basis of ‘facts of independent public significance,’ meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution’s public use requirement.” Id. at 782-83 (quoting Poletown, 304 N.W.2d at 480 (Ryan, J. dissenting)).

Subsequent to Kelo, state judicial review of condemnation for retransfer for development also has led to disparate results.

Some courts have continued granting localities broad latitude regarding “public use.” See, e.g., Mount Laurel Township v. Mipro Homes, LLC, 878 A.2d 38 (N.J. Super. Ct. App. Div. 2005) (citing Kelo for proposition that “the same public purposes that justify the use of public funds to acquire land for open space by voluntary acquisition also justify invocation of the power of eminent domain.” Id. at 48); Talley v. Housing Authority of Columbus, 630 S.E.2d 550 (Ga. Ct. App. 2006) (upholding resale of land to another private party instead of retransfer to original condemnee after land unused for five years).

The leading state case explicitly rejecting the US. Supreme Court’s Kelo approach has been City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006). There, the Supreme Court of Ohio held that the City could not transfer property from one private party to another for the sole purpose of economic development of a “deteriorating area” as defined in the Norwood Code. Id. at 1125 n.5 (defining a “deteriorating area” as “an area . . . which is not a slum, blighted or deteriorated area but which . . . is detrimental to the public health, safety, morals and general welfare, and which will deteriorate, or is in danger of deteriorating, into a blighted area”).

The court held that “an economic or financial benefit alone is insufficient to satisfy the public-use requirement” of Ohio’s constitution. Id. at 1142. Although the court “adhere[s] to a broad construction of ‘public use,’ . . . government does not have the authority to appropriate private property based on . . . speculation that the property may

pose [a threat to the public’s health, safety, or general welfare] in the future.” *Id.* at 1145. The court also accepted the analyses offered by the dissenting justices in *Kelo* and the Michigan Supreme Court *Hathcock* as models for interpreting Ohio’s constitution. *Id.* at 1141.

In *Rhode Island Economic Development Corp. v. The Parking Co., L.P.*, 892 A.2d 87 (R.I. 2006), a state airport authority had a contract with a private parking company for the operation of airport parking. When their relationship soured, the authority’s parent state agency condemned the private company’s occupancy rights. The state supreme court declared the condemnation void. It noted that the Supreme Court’s holding in *Kelo*, “while upholding a taking for economic development purposes, stressed the condemning authority’s responsibility of good faith and due diligence before it may start its condemnation engine.” *Id.* at 104. The court said that, rather than acting in good faith, airport authority’s apparent motives were to increase revenue and acquire the garage at a cheaper price than was possible through the contract, and that the EDC had not made a case for any other public benefit its actions were likely to produce. *Id.* at 105. The court held that “the taking in this case was not a proper exercise of the state’s condemnation authority, but was designed to gain control of Garage B at a discounted price. Accordingly, we are satisfied that the taking was not for a public use.” *Id.* at 107.

C. Post-Kelo Statutory Reform.

Prior to *Kelo*, the use of eminent domain to ease corporate acquisitions of parcels had increased for decades, with little public notice. See, Dean Starkman, “Cities Use Eminent Domain to Clear Lots for Big-Box Stores,” *Wall St. J.*, Dec. 8, 2004, at B1. *Kelo* proved catalytic in mobilizing attempts to limit the doctrine.

Since *Kelo*, the U.S. House of Representatives passed the “Private Property Rights Protection Act of 2006” (H.R. 4128) by a vote of 376-38, but a companion Senate measure (S. 3873) never was brought up for a vote. H.R. 4128 would have withdrawn federal economic development funding for two years from any local government that used eminent domain for economic development.

Legislation restricting eminent domain has been introduced in all 46 state legislatures that have met since *Kelo*. While there continually are new developments, as of December 30, 2006, the National Conference of State Legislatures reports the following:

“Eminent domain legislation in response to the United States Supreme Court decision in *Kelo v. New London* has been considered in each of the 46 states that have been in session since the decision came down on June 23, 2005. Legislatures have passed bills in 31 states to date, as follows:

- Enacted in 26 states—Alabama, Alaska, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Hampshire, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia and Wisconsin.

- Passed a constitutional amendment that will go on the ballot for voter approval in 3 states—Louisiana, Michigan and South Carolina (in addition to Florida, Georgia and New Hampshire, which also enacted statutes).
- Vetoed by the governor in 2 states—Arizona and New Mexico (the Iowa legislature overrode the governor’s veto).

“The legislation generally falls into seven categories:

- Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.
- Defining what constitutes “public use,” generally the possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.
- Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.
- Requiring greater public notice, more public hearings, negotiation in good faith with landowners and approval by elected governing bodies.
- Requiring compensation greater than fair market value where property condemned is the principal residence.
- Placing a moratorium on eminent domain for economic development.
- Establishing legislative study committees or stakeholder task forces to study and report back to legislature with findings.”

See, NCSL web site, at <http://www.ncsl.org/programs/natres/annualmtgupdate06.htm>.

Also, according to the National Conference of State Legislatures, property rights measures were on the November 2006 ballot in 13 states. Measures in Florida, Georgia, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, and South Carolina pertained to eminent domain only. Washington had a regulatory takings initiative that failed. Three states – Arizona, California and Idaho – had initiatives that combine eminent domain and regulatory takings in a single question. All three are similar, but the California proposal did not include a provision that would allow government to waive a land use regulation in lieu of paying monetary compensation. All of the measures passed, except those in California, Idaho, and Washington. See, NCSL web site, at http://www.ncsl.org/programs/legismgt/stateVote/prop_rights_06.htm.

Among the more notable measures, Alabama S.B. 68, enacted in 2005, was the first post-Kelo bill enacted. It prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party. The bill contained a broad blight exception. In 2006, the Alabama legislature narrowed the blight exception to emphasize characteristics that are detrimental to the public health and safety. South Dakota House

Bill 180 forbade the acquisition by many governmental entities of property by use of eminent domain “[f]or transfer to any private person, nongovernmental entity, or other public-private business entity; or Primarily for enhancement of tax revenue.” Another provision provided that, prior to the sale of property owned by government to such an entity, the property would have to be offered for requisition by the original condemnee at the lesser of fair market value or the original condemnation price.

D. Unresolved Condemnation for Retransfer Issues for the Courts.

During the next decade and beyond, courts will have to adjudicate many issues left open by the Kelo decision, both under federal and state law. These include the permissible contours of “blight,” the extent of coordination permitted between the condemnor and the subsequent transferee developer, and the extent that an abundance of process might attenuate such coordination. Perhaps most vexing, courts must decide what it means for a project to be “primarily” for public, as opposed to private, benefit. As Justice O’Connor noted in her Kelo dissent, “private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs.” Kelo 125 S.Ct. at 2675-76 (O’Connor, J., dissenting).