

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a light blue color. The hourglass is centered on the page.

# WikiLeaks Document Release

<http://wikileaks.org/wiki/CRS-RS22227>

February 2, 2009

Congressional Research Service

Report RS22227

*Property Rights "Takings": Justice O'Connor's Opinions*

Robert Meltz, American Law Division

August 19, 2005

**Abstract.** When Justice O'Connor ascended to the Supreme Court, expectations were that she would adhere to the conservative line and generally uphold the property rights position over the government's in Fifth Amendment "takings" cases. This did not happen. Instead, in this area as well as others, she established her place at the Court's ideological center. To be sure, Justice O'Connor made many arguments favoring property owners, in both her opinions and her concurrences and dissents. But this asserted empathy for the property owner did not translate into espousal of bold doctrinal shifts in takings law. Rather she preferred an ad hoc case-by-case approach, as embodied in the Penn Central test for regulatory takings, whose current dominance she helped to establish. The remainder of the report reviews her takings-related writings for the Court.

WikiLeaks

# CRS Report for Congress

Received through the CRS Web

## Property Rights “Takings”: Justice O’Connor’s Opinions

Robert Meltz  
Legislative Attorney  
American Law Division

### Summary

When Justice O’Connor ascended to the Supreme Court, expectations were that she would adhere to the conservative line and generally uphold the property rights position over the government’s in Fifth Amendment “takings” cases. This did not happen. Instead, in this area as well as others, she established her place at the Court’s ideological center. To be sure, Justice O’Connor made many arguments favoring property owners, in both her opinions and her concurrences and dissents. But this asserted empathy for the property owner did not translate into espousal of bold doctrinal shifts in takings law. Rather she preferred an ad hoc case-by-case approach, as embodied in the *Penn Central* test for regulatory takings, whose current dominance she helped to establish. The remainder of the report reviews her takings-related writings for the Court.

Beginning in 1978, the Supreme Court embarked on an effort, continuing to this day, to lend some doctrinal clarity to the Takings Clause of the Fifth Amendment.<sup>1</sup> Since the appointment of Sandra Day O’Connor as a Supreme Court Associate Justice on September 25, 1981, the Court has decided by written opinion about 35 takings cases — cases in which property owners asserted that a government action had “taken” their property within the meaning of the Clause. In another five written opinions during this time, the Court decided claims arising out of direct condemnation.<sup>2</sup> This report offers an overview of Justice O’Connor’s views as to the proper application of the Takings Clause. It then summarizes the majority opinions she herself authored, plus important concurrences and dissents that she authored or joined.

---

<sup>1</sup> The Takings Clause states: [N]or shall private property be taken for public use, without just compensation.”

<sup>2</sup> Both “takings cases” and “direct condemnation” cases are premised on the government’s power of eminent domain. The difference between the two is that a takings case is brought by the property owner, who argues that a government action has *effectively* taken his property by eminent domain, as by excessive regulation, even though the government has not formally invoked the power. By contrast, a direct condemnation suit is brought by the government and expressly acknowledges that the government is invoking eminent domain to take property and must compensate.

## Overview

Having been appointed by President Reagan, who explicitly championed a property rights agenda, many expected Justice O'Connor to tilt reflexively toward the property rights side of the Takings Clause cases that came before the Court. This did not happen. Instead, on this issue at least, she established her place at the ideological center of the Court, often, with Justice Kennedy, acting as a swing vote between the liberal/moderate bloc (Justices Stevens, Ginsburg, Souter, and Breyer) and the so-called core conservatives (Justices Rehnquist, Scalia, and Thomas). Of the 40 takings and direct condemnation decisions during her tenure, Justice O'Connor voted on the winning side in 35. In doing so, she voted for the property-owner side in 15 of the 40 cases, roughly the number of cases in which the property-owner side won. Notwithstanding her center position on the Court, Justice O'Connor is associated with many statements sympathetic to property owners. In *Preseault v. ICC*,<sup>3</sup> she wrote in concurrence that federal programs cannot redefine property interests created under state law and thereby deprive property owners of their takings claims. In two dissents from denials of certiorari, she was the only justice to join a core conservative justice in questioning prior government-friendly takings rulings.<sup>4</sup> In *Suitum v. Tahoe Regional Planning Agency*,<sup>5</sup> she famously exclaimed during oral argument on the question whether plaintiff's taking claim was ripe: "Why not give this poor, elderly woman the right to go to court and have her takings claim heard?" And most recently, in *Kelo v. City of New London*,<sup>6</sup> she vigorously dissented from the majority's holding that the Takings Clause poses no obstacle to the condemnation of private homes for transfer to private developers, solely in the name of economic development.

Justice O'Connor, however, did not translate this asserted empathy for the property owner into espousal of bold doctrinal changes to takings law. Perhaps the only explanation for this, and it is certainly not a complete one, is that in takings law as elsewhere, she favored an ad hoc, fact-intensive, case-by-case resolution of constitutional claims, and was hesitant to endorse broad *per se* rules.<sup>7</sup> Thus she favored the ad hoc analysis of regulatory takings claims embodied in the Court's *Penn Central* test — under which courts are to balance a variety of amorphous factors with (so far) little guidance from the Supreme Court.<sup>8</sup> Indeed, an O'Connor concurrence in 2001 played a pivotal role

---

<sup>3</sup> 494 U.S. 1 (1990).

<sup>4</sup> *Stevens v. Town of Cannon Beach*, 510 U.S. 1207 (1994) (joining dissent from denial of certiorari written by Justice Scalia); *Parking Ass'n of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995) (joining dissent from denial of certiorari written by Justice Thomas).

<sup>5</sup> 520 U.S. 725 (1997).

<sup>6</sup> 125 S. Ct. 2655 (2005).

<sup>7</sup> Outside the takings area, Justice O'Connor's preference for flexible ad hoc rules is most closely associated with her "undue burden" criterion for discerning unconstitutional government restrictions on access to abortion. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (adopting "undue burden" standard and collecting her prior opinions on the criterion).

<sup>8</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

in the resurrection of the *Penn Central* test.<sup>9</sup> In any event, the property rights bar certainly did not regard her as a reliable vote.

## Majority/Plurality Opinions Authored by Justice O'Connor

Justice O'Connor authored five majority or plurality opinions in the takings field while on the Court — two ruling for the property owner, three for the government.

*Hawaii v. Midkiff* (1984).<sup>10</sup> A Hawaii statute sought to lessen the highly concentrated pattern of land ownership in the state. It did this by allowing a state agency to condemn qualified lands at the behest of the lessees of such lands, whereupon the agency could sell the lands to the former tenants. Landowners claimed that the private-to-private transfer of their lands did not satisfy the Takings Clause requirement that eminent domain be exercised only for a “public use.” On behalf of a unanimous Court, Justice O'Connor disagreed. The “public use” requirement, she said, is coterminous with the scope of a sovereign’s police powers, and reducing the evils caused by a land oligopoly is a classic exercise of such powers. The Court will not substitute its judgment as to what constitutes a public use for that of the legislature unless the use is without reasonable foundation. And the mere fact that the condemned property is transferred to private beneficiaries does not mean the taking has only a private purpose.

*Hodel v. Irving* (1987).<sup>11</sup> A federal statute required that small fractional interests in allotted Indian lands not descend to heirs by intestacy or devise, but instead escheat to the tribe. Writing for a unanimous Court, Justice O'Connor held that the statute effected a taking. It amounted, she wrote, to a complete abrogation, not just a regulation, of the right to pass on property to one’s heirs — a right that is basic to the concept of property.

*Yee v. City of Escondido* (1992).<sup>12</sup> Mobile home park owners claimed a taking through the combined effect of a mobile-home rent control ordinance and a state law forcing mobile home park owners to accept purchasers of mobile homes in the park as new tenants. Writing for a unanimous Court, Justice O'Connor disagreed. She discerned no physical taking by the tenants who could not be rejected, because neither the state nor local laws required the landowner to dedicate his land to mobile home park use, nor overly limited his ability to terminate such use. Because the physical occupation by the tenants was not coerced, there could be no physical taking. And the owners’ regulatory takings argument was not properly before the Court.

*Eastern Enterprises v. Apfel* (1998).<sup>13</sup> The Coal Industry Retiree Health Benefit Act of 1992 required certain companies to fund the health benefits of miners who had once worked for them even if the company left the mining business before 1974 when the promise of lifetime benefits in collective bargaining agreements became explicit. In her

---

<sup>9</sup> See note 18 *infra* and accompanying text.

<sup>10</sup> 467 U.S. 229.

<sup>11</sup> 481 U.S. 704.

<sup>12</sup> 503 U.S. 519.

<sup>13</sup> 524 U.S. 498.

four-justice plurality opinion, Justice O'Connor found a taking because the statute imposed severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of liability was disproportionate to the company's experience in the mining field. Justice Kennedy provided the fifth vote for the majority, though he supported invalidating the statute's application to the petitioner based on due process, not takings law. The four dissenters also thought that due process was the applicable theory, but unlike Justice Kennedy would have found no violation here.

*Lingle v. Chevron U.S.A. Inc.* (2005).<sup>14</sup> An oil company asserted a taking based on a state statute limiting the rent that oil companies may charge service station operators who lease stations owned by oil companies. The stated purpose of the statute was to hold down retail gas prices. In an opinion by Justice O'Connor, a unanimous Court saw no taking because the oil company's only claim before the Court, that the state regulation failed to substantially advance a legitimate state interest (holding down prices), invoked an improper takings test. The Court admitted its error in inserting the "substantially advance" test into takings law a quarter century previously. Takings law, properly understood, focuses on the *burdens* a regulation imposes on property. By contrast, the "substantially advances" test targets a regulation's *effectiveness*, a due-process-like inquiry.

## Important Concurrences and Dissents

Writing in concurrences and dissents as opposed to majority opinions, a justice has greater freedom to offer his or her unvarnished views, since there is no need to make the compromises often required to attract the votes of at least four other justices. In Justice O'Connor's concurrences and dissents, those she wrote and those she joined, her sympathy for the property-owner side of the argument is more evident.

*Connolly v. Pension Benefit Guaranty Corp.* (1986).<sup>15</sup> A federal statute required that an employer withdrawing from a multi-employer pension plan pay a fixed debt to the plan — in the amount of the employer's proportionate share of the plan's unfunded vested benefits. Though joining the majority opinion in rejecting the facial taking claim, Justice O'Connor wrote separately to emphasize the possible harsh impacts of the withdrawal liability, and the appropriateness of the Court considering those impacts in a future as-applied challenge.

**Note:** Seven years later, when an as-applied taking challenge to the statute did come before the Court, Justice O'Connor joined the Court's unanimous opinion that no taking had occurred.

*Pennell v. City of San Jose* (1988).<sup>16</sup> A rent control ordinance allowed landlords to automatically raise rents by as much as eight percent annually. If a tenant objected to a greater increase, a hearing was required to see whether the increase was reasonable, allowing the hearing officer to consider hardship to a tenant. The majority opinion found

---

<sup>14</sup> 125 S. Ct. 2074.

<sup>15</sup> 475 U.S. 211.

<sup>16</sup> 485 U.S. 1.

the facial taking claim against the hardship provision to be premature, since the hardship provision had never in fact been relied upon to deny a rent increase. Justice O'Connor was the only one to join Justice Scalia's dissent, in which he argued that the claim was not premature, and that on the merits the ordinance effected a taking.

*Preseault v. ICC* (1990).<sup>17</sup> Under the federal "rails-to-trails" statute, unused railroad rights-of-way can be converted into recreational trails despite any reversionary interest that the holder of the underlying title might have under state law. Justice O'Connor joined the Court's unanimous opinion that if a taking occurred, compensation should be sought in the U.S. Court of Federal Claims, which the title owner had not done. She also wrote separately, however, to reject the view of the court below that the ICC, by certifying a trail conversion, merely defers the vesting of the title holder's interest rather than defeats it. She stressed that the ICC could not redefine state-law property interests, so that where a conversion defeated the title holder's reversionary interest, a taking occurred.

*Palazzolo v. Rhode Island* (2001).<sup>18</sup> In the context of a taking challenge to a state wetlands restriction, the majority opinion addressed the "notice rule." This rule, adopted by several state supreme courts, asserts that a regulatory taking claim is absolutely barred when based on a land-use restriction imposed under a regulatory regime that existed when the land was acquired. The majority opinion rejected the rule as an *absolute* bar, but failed to say what role the pre-existing regulatory regime did have in the takings analysis, even if short of dispositive. Justice Scalia, in his concurrence, said none at all. Justice O'Connor's concurrence, by contrast, asserted her usual distaste for such absolute views, insisting that the pre-existing regime was still relevant and that the weight to be given it depended on the particular facts.

**Note:** A year later, in the takings case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002),<sup>19</sup> the Court's majority opinion quoted at length from Justice O'Connor's concurrence in *Palazzolo*. Since then, lower courts have displayed little doubt that her view, not Justice Scalia's, is the reigning legal principle.

*Kelo v. City of New London* (2005).<sup>20</sup> This much-publicized decision involved the city's use of condemnation to further its economic development plan and thus relieve its depressed economy. A slim 5-justice majority found that the condemnations were for a "public use," as the Takings Clause requires — notwithstanding that private land would be transferred to private developers. In an impassioned dissent for herself and three other justices, Justice O'Connor rejected the view that condemnations solely for economic development satisfy the "public use" requirement. "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded ...."

The *Kelo* dissent, in particular, is revealing. Two decades earlier, Justice O'Connor had penned one of the Court's major "public use" decisions, in *Hawaii v. Midkiff*. Recall from page 3 that Justice O'Connor's views there were highly accommodating of the

---

<sup>17</sup> 494 U.S. 1.

<sup>18</sup> 533 U.S. 606.

<sup>19</sup> 535 U.S. 302.

<sup>20</sup> 125 S. Ct. 2655.

government's interests. The "public use" requirement, she had said, is coterminous with the sovereign's police powers. The Court should not substitute its judgment as to what constitutes a public use for that of the legislature. And the mere fact of private-to-private transfers need not be a constitutional problem. In *Kelo*, by contrast, she endorsed a much narrower concept of "public use," requiring her to rethink her *Midkiff* discussion as wrong, or at least overbroad.

What was the reason for the narrower view? In *Kelo*, Justice O'Connor attempted to distinguish the two cases, saying that *Midkiff* involved affirmatively harmful uses of land while in *Kelo* the homes to be condemned were well-maintained — that is, there was no blight. But her effort seems less than convincing. Another hypothesis, admittedly speculative, is that her analysis was affected by the fact that the oligopolistic landowners in *Midkiff* were presumably affluent, while those in *Kelo* appeared to be of modest means. Indeed, she stressed in *Kelo* that the beneficiaries of the majority opinion "are likely to be those citizens with disproportionate influence and power .... As for the victims, the Government now has license to transfer property from those with fewer resources to those with more." In her view, "[t]he Founders cannot have intended this perverse result." Justice O'Connor's differing conclusions in *Midkiff* and *Kelo* thus seemingly exemplify her general sensitivity to the facts of a case and her resistance to hard-and-fast rules.