Notes

A NEW TAKE ON PUBLIC USE: WERE *KELO* AND *LINGLE* NONJUSTICIABLE?

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The blinding light of familiarity seems to obscure from observation the details of what goes on beneath it.

—Robert L. Hale[1]

INTRODUCTION

When Suzette Kelo sued to prevent New London, Connecticut, from using eminent domain to acquire her home, the Court would have been consistent with its standing jurisprudence if it had dismissed the case for lack of standing. Suzette Kelo was the named plaintiff in *Kelo v. City of New London*,[2] a 2005 takings decision that generated significant criticism nationwide[3] when the Supreme Court ruled that New London could use eminent domain to force the sale of

1. *Our Equivocal Constitutional Guaranties*, 39 COLUM. L. REV. 563, 576 (1939).

2. 125 S. Ct. 2655 (2005).

3. *See, e.g.*, Jeff Jacoby, Editorial, *Eminent Injustice in New London*, BOSTON GLOBE, June 26, 2005, at D11 ("These five justices, . . . I hope someone looks at their property and says, 'You know, we could put that land to better use—why don't we get the town to take it from them by eminent domain.' Then maybe they would understand what they're putting my father through." (quoting Mike Cristofaro, son of one of the *Kelo* plaintiffs)); T.R. Reid, *Missouri Condemnation No Longer So Imminent; Supreme Court Ruling Ignites Political Backlash*, WASH. POST, Sept. 6, 2005, at A2 ("[A]ll over the country, [*Kelo*] has sparked a furious reaction, with politicians of both parties proposing new legislation that would sharply limit the kind of seizure the . . . decision validated."); Benjamin Weyl, *Activist Tries a Grab for Jurist's Property; A Foe of the High Court's Ruling Wants to Apply It to Seize David H. Souter's Home*, L.A. TIMES, June 30, 2005, at A10 (describing an activist's apparently serious suggestion that the city of Weare, New Hampshire, use eminent domain to acquire Justice Souter's vacation home in order to build a new hotel).

homes from residents who had lived in them for decades.[4] Although the Court's standing jurisprudence, when taken at face value, suggests that the homeowners in *Kelo* may not have had standing to sue,[5] the Court never considered that possibility because of an assumption that claims based upon private property interests are more suitable for judicial resolution than less traditional claims that often must overcome significant justiciability hurdles before being addressed on the merits.[6]

The ban on citizen suits prevents federal courts from hearing cases in which a plaintiff seeks to vindicate "the right, possessed by every citizen, to require that the [g]overnment be administered according to law and that the public moneys be not wasted."[7] Consequently, a suit by a citizen seeking an injunction against a city planning a downtown redevelopment project would be dismissed if the sole grounds for suit were that the plan would not actually create jobs or increase tax revenue.[8] Of course, the *Kelo* plaintiffs were not merely concerned citizens—they were losing their homes.[9] Rather than accept the city's offer to pay the just compensation required by the Takings Clause,[10] the *Kelo* plaintiffs sought to enjoin the taking of their property on the ground that it failed to satisfy the Fifth

4. *Kelo*, 125 S. Ct. at 2660.

5. *Kelo* was an appeal from Connecticut's Supreme Court, and although state courts may hear cases that do not qualify as Article III cases or controversies, the Supreme Court must nevertheless ascertain a litigant's standing in a case that arises from state court. *See* Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 954–55 & n.4 (1984) (noting that the Supreme Court does not have jurisdiction to hear cases arising from state court that do not satisfy Article III standing requirements); *see also* U. S. Dep't of Labor v. Triplett, 494 U.S. 715, 721 n.** (1990) (following "longstanding precedent in ascertaining the third-party standing of a respondent in a case arising from state court").

6. *See infra* notes 35–39 and accompanying text.

7. Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) (noting that "although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated . . . or that the [n]ation's laws are faithfully enforced," that interest cannot be vindicated in federal court).

8. *See* Massachusetts v. Mellon, 262 U.S. 447, 487 (1923) ("[A taxpayer's] interest in the moneys of the Treasury . . . realized from taxation . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court . . . .").

9. *Kelo*, 125 S. Ct. at 2660.

10. In fact, many of the residents in the neighborhood that would be used for the redevelopment plan had willingly sold their homes to the city. *Id.* at 2658.

Amendment's requirement that a taking be "for public use."[11] Among other things, they argued that the taking of their properties would not result in any public benefit because the development plan was unlikely to create jobs or increase tax revenue, as the city claimed.[12]

Although the *Kelo* homeowners would be injured if they were forced to sell their homes,[13] those injuries would exist regardless of whether the redevelopment plan succeeded wildly or failed miserably. Suppose that city planners had decided that the New London waterfront would be an ideal location for a sports stadium or another clearly public facility.[14] In such a case, the impact on waterfront property owners would be identical—they would be forced to exchange their homes for just compensation—but they would be unable to sue to enjoin the takings on a public use ground.[15] Put another way, the use to which taken property is put is unrelated to the injury, and consequently to the rights, of its former private owners. In this light, the plaintiffs in *Kelo* are no more harmed *by a failure to comply with the Public Use Clause* than is any other citizen with an interest "that the [g]overnment be administered according to law."[16]

Similarly, *Lingle v. Chevron U.S.A. Inc.*,[17] a regulatory takings case argued the same day as *Kelo*, could have been dismissed for lack of standing. In *Lingle*, the Chevron Corporation challenged an act passed by the Hawaii legislature that capped the rent that oil

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11. *Id.* at 2666–67. The Takings Clause states in its entirety, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

12. *Kelo*, 125 S. Ct. at 2667.

13. *See id.* at 2668 ("[W]e do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.").

14. *See id.* at 2673 (O'Connor, J., dissenting) ("[T]he sovereign may transfer private property to private parties . . . who make the property available for the public's use—such as with a railroad, a public utility, or a stadium.").

15. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign . . . ." (footnote omitted)); *id.* at 1018 n.21 ("To the extent that the operation of the statute provides compensation, no taking has occurred and the [property owner] has no claim against the Government."); *see also* First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 314–15 (1987) ("[The Takings Clause] does not prohibit the taking of private property, . . . but rather . . . secure[s] *compensation* in the event of otherwise proper interference amounting to a taking." (citations omitted)); Berman v. Parker, 348 U.S. 26, 36 (1954) ("The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.").

16. Fairchild v. Hughes, 258 U.S. 126, 129 (1922). To be clear, the argument that public use claims are nonjusticiable was as plausible before *Kelo* was decided as afterwards.

17. 125 S. Ct. 2074 (2005).

companies could charge gasoline dealers who lease company service stations.[18] The legislature hoped that the act would encourage dealers to lower retail gasoline prices,[19] but Chevron argued the act was so economically unsound that it could even cause an increase, rather than a decrease, in prices at the pump.[20] Chevron claimed that because the act was unlikely to actually benefit the public, it violated the Public Use Clause and should be enjoined as an unconstitutional regulatory taking.[21]

The ban on citizen suits would prevent an unhappy consumer from suing to enjoin a state's price-control regulation on the ground that the regulation's economics would be unlikely to actually lower prices.[22] Suppose that another state had enacted a gasoline-price regulation that capped wholesale prices directly and actually lowered the cost for consumers. Gasoline companies such as Chevron would be identically injured by such a regulation but could not prevail on a takings claim.[23] The *Lingle* Court acknowledged as much in its holding—on the merits—that the Takings Clause provided no basis to invalidate the Hawaii rent cap. Justice O'Connor, writing for a unanimous Court, explained that a regulation's effectiveness is irrelevant for determining whether it results in an unconstitutional taking:

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18. *Id.* at 2079.

19. *Id.* at 2078–79.

20. Chevron U.S.A., Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1187 (D. Haw. 2002), *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *rev'd sub nom. Lingle*, 125 S. Ct. at 2074.

21. *Lingle*, 125 S. Ct. at 2079.

22. *Cf.* Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922) ("Plaintiff has only the right, possessed by every citizen, to require . . . that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute [a suit] in the federal courts.").

23. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503, 516–18 (1944) (explaining that price-control regulations do not violate the Takings Clause); *see also, e.g.*, FCC v. Fla. Power Corp., 480 U.S. 245, 252 (1987) ("[S]tatutes regulating the economic relations of landlords and tenants are not *per se* takings."); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) ("States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails."); Fed. Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 582 (1942) ("The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce."); Block v. Hirsch, 256 U.S. 135, 156 (1921) (holding that a rent control ordinance was not a compensable taking); *cf.* Mobil Oil Exploration & Producing Se., Inc. v. United Distribution Cos., 498 U.S. 211, 215 (1991) (noting that Congress has authority to set "just and reasonable" rates for natural gas); Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 601 (1944) (same).

> 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.[24]

In other words, the constitutional infirmity—potential failure to benefit the public—did not cause Chevron's harm.[25] As such, Chevron's interest in effective gas-price control is no greater than, and is perhaps even less than,[26] that of any other Hawaii gasoline consumer.[27]

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24. *Lingle*, 125 S. Ct. at 2084.

25. *See id.* ("[A]n ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly . . . . The notion that such a regulation nevertheless 'takes' private property . . . merely by virtue of its ineffectiveness or foolishness is untenable."); *see also id.* at 2083–84 ("[W]hether a regulation of private property is *effective* in achieving some legitimate public purpose . . . reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."). In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court suggested that a regulation was an unconstitutional taking solely because it did not "substantially advance legitimate state interests." *Id.* at 260. *Lingle* overruled this aspect of *Agins*, noting that its language there had been "regrettably imprecise." 125 S. Ct. at 2083.

26. The interests of Hawaii gasoline consumers in affordable gasoline directly conflict with Chevron's interest in maximizing its profits from selling gasoline, and decoupling Chevron's injury from the failure to benefit the public by lower gas prices exposes the inherent conflict of interest that exists in suits to enjoin takings on a public use ground. *See infra* notes 141–43 and accompanying text. When Chevron raised the claims of Hawaii gasoline consumers as the basis for enjoining the Hawaii rent cap, it was, in effect, basing its claim for relief on the interests of third parties not before the Court. In other contexts, such cases have been dismissed under the Court's third-party standing doctrine. *See infra* Part II.

27. The ban on citizen suits is generally, though not always, considered to be a prudential standing limitation on the jurisdiction of federal courts. Elk Grove Unified Sch. Dist. v. Newdow, 524 U.S. 1, 12 (2004); *see also infra* note 125. However, the plaintiffs' suits in *Lingle* and *Kelo* could be seen as suffering from a constitutional standing infirmity as well—namely, a lack of causation. The success or failure of New London's redevelopment plan has little bearing on the *Kelo* plaintiffs' injuries. *See supra* notes 12–16 and accompanying text. Likewise, the effectiveness of the Hawaii rent cap in benefiting consumers in no way causes Chevron's injury. *See supra* text accompanying notes 22–27. In *Allen v. Wright*, 468 U.S. 737 (1984), the Court explained that a "claim of injury cannot support standing [when] the injury alleged is not fairly traceable *to the government conduct . . . challenge[d] as unlawful*," *id.* at 757 (emphasis added). Such a tight fit between the injury and the allegedly illegal conduct is not always required, however. For example, the Court was willing to grant standing to plaintiffs who challenged the construction of two nuclear power plants on the ground that "in the event of a nuclear accident their property would be 'taken' without any assurance of just compensation." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 69 (1978). Because a federal statute had limited liability for private industry and enabled Duke Power to construct the plants, the Court found that the statute was the "but for" cause of the plaintiffs' injuries and that, as such, the plaintiffs had standing to challenge the statute's constitutionality. *Id.* at 77. In *Kelo* and *Lingle*,

Of course, takings claims have long been adjudicated by federal courts,[28] and it would be preposterous to deny homeowners like those in *Kelo* standing to sue to enjoin the forced sale of their homes—an injury if there ever were one.[29] The intention of this Note is not to argue that *Kelo* and *Lingle* should have been dismissed as nonjusticiable—that would have been an unnecessarily radical departure from the Court's takings jurisprudence, not to mention politically unwise for the Court.[30] Nor does this Note seek to reclassify these cases as standing decisions in disguise—they clearly are not. Rather, this Note highlights the tension between the Public Use line of takings decisions and the Court's standing jurisprudence, namely, that a consistent application of standing doctrines to future takings cases with facts similar to those in *Kelo* and *Lingle* could lead to surprising outcomes. Surprising because, although the Framers probably did not intend the Constitution to enshrine liberal natural-rights ideology to the exclusion of all else,[31] protecting private

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too, the taking of the plaintiffs' property was the "but for" cause of the injuries to the plaintiff. In each case, however, the "conduct challenged as unlawful" was not the taking itself but the government's use of the property once taken. Kelo v. City of New London, 125 S. Ct. 2655, 2660 (2005); *Lingle*, 125 S. Ct. at 2079. As such, the injury to the plaintiffs was not "fairly traceable" to that conduct—i.e., the failure to use the taken property for the public—and, consequently, the element of causation necessary for Article III standing was absent.

28. *See, e.g.*, W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 533–34 (1848) (adjudicating a takings claim).

29. One of the plaintiffs had lived in her house since her birth in 1918; she had lived there with her husband since they were married in the 1940s. *Kelo*, 125 S. Ct. at 2660. Suzette Kelo had "made extensive improvements to her house, which she prize[d] for its water view." *Id.*

30. One can only imagine the reaction if the Court were to duck the issue on procedural grounds, given the uproar that followed the *Kelo* decision on the merits. *See, e.g.*, Timothy Egan, *Ruling Sets Off Tug of War over Private Property*, N.Y. TIMES, July 30, 2005, at A1 (describing the "storm of legislative action and protest" in the wake of *Kelo*).

31. "The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property.*" JOHN LOCKE, TWO TREATISES OF GOVERNMENT 368 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); *see also* DAVID A. SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 15 (1992) (explaining that for Locke, "[p]roperty was a general political term referring to all the personal and political rights of individuals").

There is an ongoing debate about the relative importance to the Founders of Lockean liberalism on the one hand and of republican government ideals on the other. SCHULTZ, *supra*, at 11–13. For those who emphasize the Lockean influence, "[t]he hallmark of liberal constitutionalism is a vision of law and society emphasizing a harsh, overarching separation of the private and the public, the individual and the state." WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 21 (1996). For example, Professor Richard Epstein views the Takings Clause as the constitutional embodiment of a strict natural-rights theory of property in the tradition of Locke, which, according to Epstein, requires the government to make a property owner "whole" when it acts in any way

property from arbitrary government interference was surely one of their main objectives,[32] either as an end in-and-of itself[33] or as a means to the end of securing individual liberty.[34]

Courts are unlikely even to suggest that standing may be an issue in cases such as *Kelo* and *Lingle*,[35] not because such a suggestion is doctrinally untenable, but because of an often-unstated assumption that the individual right to private property asserted in such takings

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that limits the owner's property rights. RICHARD A. EPSTEIN, TAKINGS 52–53, 57–92 (1985). Others counter that history does not support this view, characterizing it as the product of the misconceptions of "property-minded advocates of minimalism [who] all too often portray the nineteenth century's constitutional doctrines as having religiously fostered . . . sweeping protection to private rights in property as a matter of fundamental law." Harry N. Scheiber, *The Jurisprudence—and Mythology—of Eminent Domain in American Legal History*, *in* LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 217, 218 (Ellen Frankel Paul & Howard Dickman eds., 1989). Scheiber contends that "[t]he history of our eminent domain law has been one of tension between economic individualism and community values," *id.* at 231, and that "[early American] judges gave a good deal of sustained attention to producing a theory of 'public rights' . . . [to balance] against constitutional mandates for the protection of private [property] rights," *id.* at 218. Novak explains that the common law principle of *salus populi suprema lex est* (the welfare of the people is the supreme law)—in other words, the supremacy of the public interest—was at least as important a limit on private property rights in the early days of the United States as its perhaps better-known cousin, *sic utere tuo ut alienum non laedas* (use your own so as not to injure another). NOVAK, *supra*, at 35–50; *see also* SCHULTZ, *supra*, at 21 ("[T]he founders . . . realized that at times property might have to be limited for public necessity."); *cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 64 (1977) (noting that as late as 1800, "there still existed a perhaps dominant body of opinion maintaining that individuals held their property at the sufferance of the state").

32. "[T]he right to acquire and own property was undoubtedly a paramount value for the framers of the Constitution." JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 43 (1992); *see also, e.g.*, THE FEDERALIST NO. 1, at 36 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (recommending adoption of the Constitution because of the protection it "afford[s] to the preservation of [republican] government, to liberty, and to property" (emphasis omitted)); *see also infra* notes 105–06.

33. Justice Patterson spoke for many of the Founders when he described property as a "natural, inherent, and unalienable right[]" and explained that "[t]he preservation of property . . . is a primary object of the social compact." Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795).

34. Thomas Jefferson and other early Republicans had a functional view of property rights that differed from Lockean conceptions of property. *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 27–37 (1997) ("Jefferson's doctrine asserts . . . the social character of property rights . . . . Property was valued not as an end in itself but as a foundation for republican government."); *see also* ELY, *supra* note 32, at 43 (explaining that "the framers saw property ownership as a buffer protecting individuals from governmental coercion").

35. Justice Blackmun *was* willing to suggest such a possibility in *Lucas v. South Carolina Coastal Council*. 505 U.S. 1003, 1043 n.5 (1992) (Blackmun, J., dissenting); *see also infra* notes 151–58 and accompanying text.

cases is more valuable than the public interest.[36] Courts "assume that the core values, which the individual interest asserts, are *presumptively superior* to the core values that the competing public interest involves."[37] Many standing doctrines have evolved to keep ideologically driven plaintiffs out of court.[38] If it is true, however, that habit and history rather than principled legal reasoning prevent these doctrines from being applied in cases such as *Kelo* and *Lingle*,[39] then perhaps their application in other contexts ought to be questioned as well. Part I examines the similarities between the Court's respective interpretations of the condition that a taking be "for public use" and the condition that Congress exercise its taxing power "for the general welfare." Part I also explores whether the effective nonjusticiability of the latter has implications for the former. Part II returns to, and elaborates on, the standing issues lurking within *Kelo* and *Lingle* and questions why those issues are raised in some types of cases—for example, environmental suits—but not in cases that concern traditional property rights.

I. "FOR PUBLIC USE" *IS* "FOR THE GENERAL WELFARE"

Kelo reaffirmed "the broader and more natural interpretation of public use as 'public purpose'"[40] and upheld a city's use of eminent domain to acquire homeowners' property for a downtown economic redevelopment plan because "that plan unquestionably serve[d] a public purpose."[41] Justice Thomas dissented because, in his view, the "most natural reading" of the Public Use Clause requires "either the government or its citizens as a whole [to] actually 'employ' the taken property."[42] In addition to supporting his position with various Founding-era documents,[43] Justice Thomas drew a comparison from

36. LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 156 (2003).

37. *Id.*

38. *See infra* notes 145–46, 164–66 and accompanying text.

39. *Cf.* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 1 (1990) ("The Framers' preoccupation with property generated a shallow conception of democracy and a system of institutions that allocates political power unequally and fails to foster political participation.").

40. 125 S. Ct. 2655, 2662 (2005).

41. *Id.* at 2665.

42. *Id.* at 2679 (Thomas, J., dissenting).

43. *See, e.g.*, *id.* (citing a 1773 dictionary for the definition of "use").

language in the Constitution itself. He noted that "the phrase 'public use' contrasts with the very different phrase 'general Welfare' used elsewhere in the Constitution."[44] Accordingly, he explained, "The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope."[45]

The "sweeping scope" to which Justice Thomas referred is "the wide range of discretion permitted to the Congress"[46] concerning its power under Article I "[t]o lay and collect Taxes . . . to pay the Debts and provide for the . . . general Welfare."[47] The Court has repeatedly explained that "[t]he discretion . . . is not confided to the courts" to decide "between one welfare and another, between particular and general,"[48] and "[w]hether the chosen means appear bad, unwise, or unworkable to [the Court] is irrelevant."[49] Unless there is "no reasonable possibility [that] the challenged legislation fall[s] within the wide range of discretion permitted to . . . Congress,"[50] the Court will not scrutinize the decision "unless the choice is clearly wrong, a display of arbitrary power, [and] not an exercise of judgment."[51] This level of deference to Congress is such that the Court has "questioned whether 'general welfare' is a judicially enforceable restriction at all,"[52] and commentators have described the condition as "effectively nonjusticiable."[53]

If "public use" means actual use by the public, as Justice Thomas would prefer, then that question would certainly be amenable to a

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44. *Id.*

45. *Id*. at 2680.

46. United States v. Butler, 297 U.S. 1, 67 (1936).

47. U.S. CONST. art. I, § 8, cl. 1.

48. Helvering v. Davis, 301 U.S. 619, 640 (1937); *see also* Buckley v. Valeo, 424 U.S. 1, 91 (1976) (per curiam) ("Congress has concluded that the means are 'necessary and proper' to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art[icle] I, § 8.").

49. *Buckley*, 424 U.S. at 91 (quotations omitted).

50. *Butler*, 297 U.S. at 67.

51. *Davis*, 301 U.S. at 640.

52. South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987).

53. Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 197 (2001); *see* David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1200 (2004) ("*Dole*'s requirement that spending programs serve the 'general welfare' is, by the Court's own admission, nonjusticiable."); Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 161 (2004) ("There is no justiciable limit on the expenditure of funds . . . for 'the General Welfare.'").

judicial determination. Currently, however, a taking is for public use as long as it "serves a public purpose."[54] For physical takings, at least five Justices are unwilling to engage in any means-ends analysis,[55] and for regulatory takings, the *Lingle* Court unanimously agreed that the Public Use Clause does not license courts to scrutinize a regulation's effectiveness in achieving its stated public purpose.[56] Rather, such heightened scrutiny would "present serious practical difficulties" and is "a task for which courts are not well suited."[57] But once public use is understood to mean "public purpose" and is satisfied by a legislature's "not irrational" determination that a taking is for public use,[58] the level of scrutiny that applies is similar to that which applies in general welfare cases. Perhaps, then, the Public Use Clause could fairly be described as what it appears to be—effectively nonjusticiable.

The nonjusticiability[59] of the General Welfare Clause is consistent with the prudential limitation on citizens' ability to sue for general violations of the taxing and spending powers.[60] Taxpayers are usually unable to sue the government for injunctive relief on the grounds that an alleged taxing and spending violation will increase

54. Kelo v. City of New London, 125 S. Ct. 2655, 2665 (2005).

55. *See id.* at 2667–68 (upholding a legislature's "not irrational" public use determination, and comparing that result to *Lingle*).

56. Although Justice O'Connor and Chief Justice Rehnquist are no longer on the Court, this is unlikely to change significantly the Court's direction on these issues in the near future. Because the decision in *Lingle* was unanimous, 125 S. Ct. 2074, 2077 (2005), it is unlikely that their replacements will impact the Court's position on this issue. *Kelo* was a 5–4 decision, but neither Justice O'Connor nor Chief Justice Rehnquist were in the majority. 125 S. Ct. at 2658.

57. *Lingle*, 125 S. Ct. at 2084–85; *see also Kelo*, 125 S. Ct. at 2674 (O'Connor, J., dissenting) ("[C]ourts are ill-equipped to evaluate the efficacy of proposed legislative initiatives.").

58. *Kelo*, 125 S. Ct. at 2665, 2667.

59. There appears to be a slight distinction between "effective" nonjusticiability and actual nonjusticiability. The Court's description of its role in General Welfare Clause challenges is that it will decline to decide them unless there is "no reasonable possibility" that the challenged conduct is within the scope of Congress's powers. United States v. Butler, 297 U.S. 1, 67 (1936). A case that is actually nonjusticiable, however, cannot be adjudicated even if there is no reasonable possibility that the government could act as it did. *See* Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 954 n.4 (1984) (noting that standing is a jurisdictional requirement). The General Welfare Clause might be described as subject to review more deferential than even rational basis review, rather than as nonjusticiable in the Article III sense. Regardless, the point is that commentators, and even the Court itself, have no qualms about labeling the General Welfare Clause nonjusticiable, while declining to describe the Public Use Clause in the same terms.

60. Baker, *supra* note 53, at 197.

their tax burden.[61] Such suits are nonjusticiable because the grievance is a generalized one—a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others . . . and the effect upon future taxation, of any payment out of the funds [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court."[62] Although taxpayer suits are dismissed because the Taxing and Spending Clause does not give rise to an individual right to seek a judicial remedy, courts are also disinclined to adjudicate such claims because they perceive themselves to be ill equipped to decide issues in which matters of public concern outweigh matters of individual concern.[63]

The Takings Clause, by contrast, often has been understood as granting an individual right to enjoin the government from taking property when not for a public use,[64] as if that clause in fact stated "Private property shall not be taken *except* for public use, nor without just compensation."[65] The condition that a taking be for public use has

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61. Massachusetts v. Mellon, 262 U.S. 447, 487 (1923). *But see* Flast v. Cohen, 392 U.S. 83, 101 (1968) (granting taxpayer standing to challenge an expenditure that allegedly violated the Establishment Clause of the First Amendment). Although later plaintiffs sought to extend *Flast* to allow taxpayer standing when a tax or expenditure violated other parts of the Constitution, the Court has consistently limited *Flast* to Establishment Clause violations. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 93 (2d ed. 2002).

62. *Mellon*, 262 U.S. at 487.

63. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 896 (1983) (noting that courts "have in a way been specifically *designed* to be bad at [protecting rights that can be vindicated through the democratic process]"); *cf. Flast*, 392 U.S. at 130 (Harlan, J., dissenting) ("It seems . . . clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary.").

64. *See, e.g.*, Cincinnati v. Vester, 281 U.S. 439, 446 (1930) ("[T]he question what is a public use is a judicial one."), *quoted in* Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting); *see also* SCHULTZ, *supra* note 31, at 28 (describing an 1837 New York case that "represented one of the first state cases where the judiciary failed to defer to a legislature" about a determination that a taking was for public use).

65. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES, at II (Chicago, Callaghan & Co. 1888). Although the Takings Clause does not expressly forbid takings for private use, "the courts have universally read [the Takings Clause] as a proscription against takings for a private purpose." Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1977). From the text itself, it is "questionable" whether the Public Use Clause was intended as a limitation at all.

> If the intent had been to make the words, *public use*, a limitation, the natural form of the expression would have been: "Private property shall not be taken *except* for public use, nor without just compensation." It is certainly questionable whether anything more was intended by the provision . . . than as though it read, "Private property shall not be taken *under the power of eminent domain* without just compensation."

been considered part of the individual cause of action created by the Takings Clause as a whole.[66] Accordingly, whereas the Court's review of general welfare under a "no reasonable possibility" standard[67] has led to viewing that condition as nonjusticiable,[68] the Court's review of public use under a "not irrational" standard[69] has led to a different assessment.[70] Because the Takings Clause (as part of the Bill of Rights) creates an individual right while the Taxing and Spending Clause (as part of Article I's delegation of powers to Congress) does not, the Court and commentators reasonably describe public use

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LEWIS, *supra*.

66. *See* Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1161 (2005) ("If the government is otherwise acting within the bounds of its authority, it cannot be enjoined from seizing property under the clause, but it can be ordered to pay judicially determined 'just compensation' after the fact. . . . *By negative implication*, when a taking is not for a 'public use,' the owner can enjoin it . . . ." (emphasis added)); Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow*: A Procedural Loose End*, 24 U. HAW. L. REV. 623, 626 (2002) ("[C]ourts disregard the fact that the remedy for a taking is compensation when they freely entertain takings claims that seek injunctive relief.").

The Court has expanded this cause of action beyond the Framers' intentions. Specifically, regulatory takings did not exist before Justice Holmes's famous "too far" formulation in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922). The general consensus is that the drafters of the Fifth Amendment did not consider government regulation to fall within the purview of the Takings Clause. *See, e.g.*, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995) (claiming that the Fifth Amendment was originally interpreted to require compensation "when the government physically took property"); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1057 n.23 (1992) (Blackmun, J., dissenting) ("James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property . . . ."); *id.* at 1028 n.15 (majority opinion) ("Justice B[lackmun] is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all . . . .").

Changing conceptions of property may have influenced the development of the regulatory takings doctrine. "Under the classical conception, actual dispossession was required before ownership rights were violated and property was taken. By contrast, . . . modern legal scholars . . . see property in resources as consisting of the infinitely divisible claims to possession, use, disposition, and profit that people might have with respect to those things." Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 30 (1986) (footnote omitted).

67. *See supra* notes 65–66 and accompanying text.

68. Baker, *supra* note 53, at 197; Engstrom, *supra* note 53, at 1200; Galle, *supra* note 53, at 161.

69. *Kelo*, 125 S. Ct. at 2667.

70. *See id.* at 2668 ("[The] Court's authority . . . extends . . . to determining whether . . . proposed condemnations are for a 'public use' . . . ."). Regarding decisions such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), one commentator has noted that "court cases appear . . . to have made [public use] determinations *political questions* for legislatures," SCHULTZ, *supra* note 31, at 73 (emphasis added). This comment was more a description of the chances of mounting a successful public use challenge rather than an assessment that the Court had subsumed the public use inquiry into the political question doctrine.

cases as decided on the merits—albeit under a weak rational basis standard—while at the same time apply the label nonjusticiable to General Welfare Clause challenges.[71]

Nonetheless, this disparity of terminology seems incorrect after *Kelo* and *Lingle*, which together stand for the proposition that a takings challenge can rarely, if ever, succeed when predicated solely on an allegation that the taken property will not sufficiently benefit the public.[72] *Kelo* and *Lingle* do not foreclose plaintiffs' ability to challenge conduct as a taking even when the government believes it is not,[73] and private property owners can, of course, still seek just compensation for takings.[74] But public use challenges are in a separate category. The Court tepidly suggested that it would still police extreme abuses of power in this regard,[75] possibly under the Due Process Clause rather than the Takings Clause,[76] but in general, "the

71. *Compare Kelo*, 125 S. Ct. at 2667 ("[E]mpirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."), *and id.* at 2669 (Kennedy, J., concurring) ("This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses." (citation omitted)), *with* South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987) ("The level of deference to the congressional decision is such that the Court has . . . questioned whether 'general welfare' is a judicially enforceable restriction at all.").

72. *See* Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2085 (2005) ("Whatever the merits of [Chevron's claim that Hawaii's rent cap will not serve the legitimate public purpose of controlling retail gas prices], it does not sound under the Takings Clause."); *cf. Kelo*, 125 S. Ct. at 2664 ("'[I]t is only the taking's purpose, and not its mechanics' . . . that matters in determining public use." (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)); *id.* at 2671 (O'Connor, J., dissenting) (accusing the Court of "effectively . . . delet[ing] the words 'for public use' from the Takings Clause of the Fifth Amendment").

73. In many cases, a suit that seeks to classify governmental conduct as a taking is the effective equivalent to a suit for injunctive relief because, if successful, the government will be unwilling or unable to pay the just compensation and will instead pursue a different course of conduct. As such, plaintiffs can still prevent the government from taking their property in many instances.

74. *But see* Richard A. Epstein, Kelo*: An American Original*, 8 GREEN BAG 2D 355, 355 (2005) ("Like all eminent domain cases, the *Kelo* condemnations raised the typical questions of valuation for the property to be taken, where the rules of the game are all rigged in favor of the government entity.").

75. The *Kelo* majority noted that a city "[would not] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 125 S. Ct. at 2661.

76. Or, at the very least, the analysis will be identical to that used for due process challenges. *Compare Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring) ("[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause."), *with Lingle*, 125 S. Ct. at 2083 ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or

government [can] do what it wants so long as it pays the charge."[77] In *Lingle*, the Court discussed the Public Use Clause in the context of regulatory takings and concluded that the question of whether a regulation is effective is "logically . . . distinct from the question whether a regulation effects a taking."[78] Any sort of heightened means-ends review, explained Justice O'Connor, "would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[79] This is "a task for which courts are not well suited,"[80] as the *Lingle* lower court proceedings demonstrate.[81] Rather, such arguments about

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irrational that it runs afoul of the Due Process Clause.") *and id.* at 2087 (Kennedy, J., concurring) ("[T]oday's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.").

77. *Kelo*, 125 S. Ct. at 2667 n.19 (quoting E. Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)); *see* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign . . . ." (footnote omitted)); *see also* First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 314–15 (1987) ("[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of [the] power . . . to secure *compensation* in the event of otherwise proper interference amounting to a taking." (citations omitted)); *Ruckelshaus*, 467 U.S. at 1018 n.21 ("To the extent that the operation of the statute provides compensation, no taking has occurred and the [property owner] has no claim against the Government."); Berman v. Parker, 348 U.S. 26, 36 (1954) ("The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.") .

78. *Lingle*, 125 S. Ct. at 2084.

79. *Id.* at 2085.

80. *Id.* Quoting a passage from *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240–41 (1984), which itself borrowed language from an earlier case, *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946), Justice O'Connor wrote in her *Kelo* dissent:

> Because courts are ill-equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts' "'deciding on what is and is not a governmental function and . . . invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.'"

125 S. Ct. at 2674 (O'Connor, J., dissenting).

81. Each time the district court heard essentially the same evidence from two expert economists with opposing views, it reached contradictory conclusions. *Compare* Chevron U.S.A., Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1187 (D. Haw. 2002) (finding that if oil companies increased wholesale prices to offset the revenue loss caused by the rent cap, service station owners would "respond to the increase in the wholesale price *by raising retail prices*" (emphasis added)), *with* Chevron U.S.A. Inc. v. Cayetano, 57 F. Supp. 2d 1003, 1013 (D. Haw. 1998) (finding "*no economic reason* why a shift from paying a certain sum as 'rent' to paying that same sum as 'fuel price' *would lead a dealer to react by raising his gas prices* when his overall costs remain[ed] the same" (emphases added)). Not surprisingly, the Supreme Court viewed the lower court proceedings as "remarkable, to say the least." *Lingle*, 125 S. Ct. at 2085; *cf.* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 177 (1987)

a regulation's impact "are better directed to Congress" than to the courts.[82]

The Court's public use cases in the physical takings context—exemplified by *Berman v. Parker*,[83] *Hawaii Housing Authority v. Midkiff*,[84] and now *Kelo*—also accord considerable deference to a legislature's judgment that an exercise of eminent domain is for public use.[85] These cases have "embraced the broader and more natural interpretation of public use as 'public purpose,'"[86] rather than requiring actual use by the public[87] or some other intermediate interpretation.[88] In *Kelo*, the Court held that because the city's development plan "unquestionably serves a public purpose, the takings . . . satisfy the public use requirement of the Fifth Amendment."[89] Outside an "unusual exercise of government power"[90] in which "the property of *A* [is taken] for the sole purpose of transferring it to another private party *B* . . . . under the mere pretext

("Litigation based upon hypothetical possibility rather than concrete fact is apt to be poor litigation.").

82. *Ruckelshaus*, 467 U.S. at 1015 n.18.

83. 348 U.S. 26 (1954).

84. 467 U.S. 229 (1984).

85. Whether *Kelo* is an extension of the Court's prior cases concerning the appropriate level of deference to a legislature's determination of public use is the crux of the disagreement between the majority and the dissent. *Compare Kelo*, 125 S. Ct. at 2663–66 (discussing *Berman*, 348 U.S. at 26, and *Haw. Hous. Auth.*, 467 U.S. at 229, and holding that there is "no principled way of distinguishing economic development from the other public purposes" recognized in those cases), *with id.* at 2673–75 (O'Connor, J., dissenting) (arguing that the Court's holding abandons its role "in reviewing a legislature's judgment of what constitutes a public use . . . [though] the Court in *Berman* made clear that it is 'an extremely narrow' one." (quoting *Haw. Hous. Auth.*, 467 U.S. at 240 (alteration and omission in original))), *and id.* at 2675 ("[T]he Court today significantly expands the meaning of public use.").

86. *Kelo*, 125 S. Ct. at 2662.

87. *See, e.g.*, *id.* at 2681–82 (Thomas, J., dissenting) (characterizing the Court's early public use decisions as requiring "the government or the public [to] actually use[] the taken property").

88. Justice O'Connor would read the Public Use Clause as a limitation requiring that the "precondemnation use of the targeted property inflicted affirmative harm on society." *Id.* at 2674 (O'Connor, J., dissenting). In Justice O'Connor's view, *Berman* and *Hawaii Housing Authority* stand for the proposition that a valid public benefit can accrue when the taking of property itself eliminates a public harm. *Id.* This approach would partially undermine the argument that public use plaintiffs could be denied standing because the conduct that causes the harm—the taking of property—is the same conduct that causes the public benefit.

89. *Id.* at 2665.

90. *Id.* at 2667.

of a public purpose,"[91] federal courts will not second guess a legislature's use of eminent domain.[92]

Once public use is equated with "public purpose," the condition that a taking be "for public use" begins to sound quite similar to the condition that a tax or expenditure be "for the general welfare."[93] In fact, the General Welfare Clause itself has been described as "[t]he power of Congress to authorize [an] expenditure of public moneys *for public purposes*."[94] The Court will not review a congressional exercise of that power unless there is "no reasonable possibility" that a tax or expenditure is for the general welfare.[95] Likewise, as long as a legislature's public use determination is "not irrational," the Public Use Clause cannot be used to enjoin a taking.[96] As the Court has indicated, "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates

91. *Id.* at 2661. An early Supreme Court case listed several hypothetical examples of obviously invalid laws, one of which was "a law that takes *property* from *A*. and gives it to *B*." Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). This case has been employed as a rhetorical flourish by all sides in the public use debate. *Compare Kelo*, 125 S. Ct. at 2661 & n.5 (quoting *Calder* to support the idea that New London "would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party"), *with id.* at 2671 (O'Connor, J., dissenting) (quoting *Calder* to emphasize that *Kelo* "abandons this long-held, basic limitation on government power"), *and id.* at 2680 (Thomas, J., dissenting) (quoting *Calder* to support the argument that "[t]he Public Use Clause . . . embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] *property* from *A*. and giv[ing] it to *B*'").

92. *Id.* at 2667. The role that the Court has carved out for itself in public use cases is "'an extremely narrow' one," Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)), and, contrary to the conventional wisdom, appears to be present in general welfare cases as well. The Court will invalidate a taking if the legislature's public use determination is "irrational," *cf. Kelo*, 125 S. Ct. at 2667, just as a tax will be invalidated if there is "no reasonable possibility" that it serves the general welfare, United States v. Butler, 297 U.S. 1, 67 (1936). *See also supra* note 59. Interestingly, the *Kelo* majority implicitly compared its deferential approach to the deference accorded to the legislature in matters of taxation. *See Kelo*, 125 S. Ct. at 2667 n.18 ("The power to tax is not the power to destroy while this Court sits." (quoting Panhandle Oil Co. v. Miss. *ex rel.* Knox, 277 U.S. 218, 223 (1923) (Holmes, J., dissenting))).

93. This is the inverse of the comparison made by Justice Thomas in his *Kelo* dissent. *See Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting) ("Tellingly, the phrase 'public use' contrasts with the very different phrase 'general Welfare' used elsewhere in the Constitution."); *see also supra* notes 42–53 and accompanying text.

94. Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam) (emphasis added) (quoting United States v. Butler, 297 U.S. 1, 66 (1936)).

95. *Butler*, 297 U.S. at 67.

96. *Kelo*, 125 S. Ct. at 2667.

over the wisdom of takings . . . are not to be carried out in the federal courts."[97]

Just as an otherwise valid regulation is not an unconstitutional taking "merely by virtue of its ineffectiveness or foolishness,"[98] valid taxes and expenditures do not violate the General Welfare Clause because they may be "bad, unwise, or unworkable."[99] To be sure, "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause,"[100] and a violation of the General Welfare Clause that is "a display of arbitrary power" may likewise violate other constitutional provisions.[101] But the idea that legislatures are better suited than courts to decide if a particular course of conduct is for a public purpose would seem to be true whether that decision is made in the context of the power to tax and spend[102] or the power to take private property in exchange for just compensation.[103] When public use is defined broadly as public purpose, little distinction remains between the Court's role in adjudicating the condition that a taking be "for public use" and the condition that a tax or expenditure be "for the general welfare."

Admittedly, the distinction in terminology used to describe these two clauses may have little real-world impact—either way, the plaintiffs lose. Sometimes, however, semantic differences are useful for what they reveal about the underlying conceptual framework that produced those differences.[104] For centuries, the American constitutional tradition sanctified private property as a critical mechanism for protecting individual liberty against government

97. *Id.* (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43).

98. Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2084 (2005).

99. *Buckley*, 424 U.S. at 91 (internal quotations omitted).

100. *Lingle*, 125 S. Ct. at 2084.

101. Helvering v. Davis, 301 U.S. 619, 640 (1937).

102. *See, e.g.*, *Buckley*, 424 U.S. at 90 ("It is for Congress to decide which expenditures will promote the general welfare.").

103. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2676 (2005) (O'Connor, J., dissenting) ("[T]he judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer.").

104. *Cf.* Terence Ball & J.G.A. Pocock, *Introduction* to CONCEPTUAL CHANGE AND THE CONSTITUTION 1, 1–4, 7–11 (Terence Ball & J.G.A. Pocock eds., 1988) (discussing how "the limits and possibilities of . . . language" influenced the way that the drafters of the Constitution conveyed the ideas they wanted to embody in it).

interference.[105] Dean Treanor explains that the Takings Clause was included in the Bill of Rights to correct for the failure of the political process to protect landowners, an insular minority that James Madison considered to be "peculiarly vulnerable to majoritarian decisionmaking."[106] Treanor argues that when applying the Framers' intent[107] to takings in the modern context, courts should only order compensation for today's equivalent of 1791 landowners, that is, insular minorities that are particularly unlikely to receive compensation through the political process.[108] The implication of this approach is that court access is unnecessary whenever the political process compensates property owners, as it did the plaintiffs in *Kelo* as well as those in other eminent domain cases.[109]

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105. "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole." Boyd v. United States, 116 U.S. 616, 627 (1885) (quoting Entick v. Carrington, (1765) 95 Eng. Rep. 807, 817–18 (K.B.)). The centrality of property, as expressed in these early cases, is closely connected to the protections of individual liberties that the Court developed during the twentieth century. For example, the Court has explained the constitutional basis for a fundamental right of privacy by reference to the importance of property articulated in *Entick* and *Boyd*:

> The principles laid down in this opinion [by Lord Camden in *Entick v. Carrington*] affect the very essence of constitutional liberty and security. . . . It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .

Griswold v. Connecticut, 381 U.S. 479, 485 n.* (1965) (quoting *Boyd*, 116 U.S. at 630 (citation omitted)).

106. Treanor, *supra* note 66, at 847–48. Although "the framers anticipated that property owners would dominate the new government and that such persons could be relied on to respect property rights," Madison nevertheless considered it necessary to ensure that "extended representation would diffuse the tendency of majority factions at the state level to oppress the minority, particularly property owners." ELY, *supra* note 32, at 47–49; *see also* NEDELSKY, *supra* note 39, at 32 (arguing that Madison thought the "inevitable inequality of property [distribution] made [property] particularly vulnerable in a republic" and consequently believed that "the protection of property was part of the larger problem of protecting minority rights").

107. For more on "translation" as a method of constitutional interpretation, see generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

108. *See* Treanor, *supra* note 66, at 887 ("Compensation should be mandated only in those types of cases where the political process is particularly unlikely to consider property claims fairly . . . . Today, the cases in which process failure is most likely involve minority groups . . . and the singling out of individuals or small groups of people."). This was not so in *Kelo*, given that many of the residents affected by the New London redevelopment plan had sold their homes to the city voluntarily. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005). Thus, it is reasonable to assume that individuals in the position analogous to that of the *Kelo* plaintiffs would not need the courts to obtain compensation.

109. "The political process, through which citizens and interest groups lobby for their interests to be represented by their legislators, safeguards private property rights, so courts

The Court and commentators describe the General Welfare Clause, but not the Public Use Clause, as "effectively nonjusticiable"[110] for the same reason that it sounds radical to argue that property owners who can depend on the political process to obtain compensation should not have access to the courts. Specifically, the rights guaranteed (and, by implication, the powers granted) by the Takings Clause are presumed to be essentially private and individual, whereas the powers granted (and, by implication, the rights guaranteed) by the Taxing and Spending Clause are presumed to be essentially public. But Treanor's argument and the similarities between the Public Use Clause and the General Welfare Clause both undermine this assumption that the Takings Clause in general, and the Public Use Clause in particular, necessarily provides a private judicial remedy. Part II questions the assumption of a judicial remedy even further by highlighting the doctrinal inconsistency between cases that describe the scope of standing—often cases in which an individual seeks to vindicate an environmental damage claim[111] or other "public" interest[112]—and cases such as *Kelo* and *Lingle*, which rarely mention standing but share many characteristics with cases that do.

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should defer to legislative determinations of public use." Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1855 (2005) (footnote omitted). For example, in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the state legislature's plan to break up the state's system of highly concentrated land ownership provided compensation to landowners whose land would be taken, *id.* at 232–34.

110. *See supra* note 53 and accompanying text.

111. *See* Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27, 27 (2003) ("[S]tanding . . . is often a major [issue in the] numerous actions brought by concerned citizens and environmental advocacy organizations to . . . enjoin harmful activities.").

112. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209–11, 220–21 (1974) (finding that plaintiffs who sought to enjoin members of Congress from serving in the military reserves in violation of the Constitution, which prohibits members of Congress from holding another civil office, lacked standing); *Ex parte* Levitt, 302 U.S. 633, 633–34 (1937) (per curiam) (finding that plaintiffs who claimed that Justice Hugo Black's Supreme Court nomination violated the Emoluments Clause—because Justice Black had been a senator when Congress voted to increase Supreme Court Justices' retirement benefits—lacked standing); *see also* CHEMERINSKY, *supra* note 61, at 70 (noting that standing is usually found when a litigant claims "a violation of an individual liberty" but not when a litigant claims "a violation of a constitutional provision dealing with the structure of government").

II. PUBLIC USE CLAIMS AS THIRD-PARTY GENERALIZED GRIEVANCES

When a plaintiff challenges a taking on the ground that the taken property will not be used in a way that satisfies the Public Use Clause, that unconstitutional conduct has no relation to the plaintiff's injury.[113] Such a plaintiff shares that injury with every other citizen, and a suit to enjoin the taking on a public use ground is essentially a citizen suit of the kind that has been dismissed in other contexts. The discussion that follows expands on this argument and explores its logical corollary—that public use challenges such as *Kelo* and *Lingle* inherently share many essential features with cases that have been dismissed under the rule prohibiting third-party standing.

The ban on generalized grievances prevents federal courts from hearing cases in which the alleged injury is "shared in substantially equal measure by all or a large class of citizens"[114] and is designed to prevent federal courts from being used "to air . . . generalized grievances about the conduct of government."[115] Just because an injury happens to be widely shared, however, does not mean that a case presents a "generalized grievance,"[116] and "standing is not to be denied simply because many people suffer the same injury."[117] In other words, the doctrine prohibits federal courts from hearing so-called "citizen suits," in which a plaintiff seeks to vindicate "the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted."[118] Because such suits require courts to resolve questions that are "essentially matter[s] of public and not of individual concern,"[119]

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113. *See supra* Part I.

114. Warth v. Seldin, 422 U.S. 490, 499 (1975).

115. United States v. Richardson, 418 U.S. 166, 175 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

116. *See* CHEMERINSKY, *supra* note 61, at 90 ("The term generalized grievance . . . [incorrectly] implies that no one would have standing to challenge a blatantly unconstitutional law applicable to everyone in the country.").

117. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973).

118. Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) (noting that "although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated . . . or that the Nation's laws are faithfully enforced," neither interest can be vindicated in federal court).

119. Massachusetts v. Mellon, 262 U.S. 447, 487 (1923). "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent

this rule ensures that the judicial branch does not impinge upon the legislative and executive functions by deciding "'abstract questions of wide public significance' [that] amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."[120]

The rationale for the ban on citizen suits is similar to that of the third-party standing doctrine—both seek to "prevent[] the judicial process from becoming no more than a vehicle for the vindication of the . . . interests of concerned bystanders"[121]—and the presence of one of these standing limitations often implicates the other.[122] Under the third-party standing doctrine, a "plaintiff generally must assert his own legal rights and interests" rather than those of others not before the court,[123] "even when the very same allegedly illegal act that affects

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of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern." *Id.*

120. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)); *see Richardson*, 418 U.S. at 179 ("In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."); Scalia, *supra* note 63, at 881–82 (arguing that the prudential standing limitations are essential for ensuring that "the judicial [branch] shall never exercise the legislative and executive powers" (quoting MASS. CONST. pt. 1, art. 30)); *cf.* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) ("The assumption that if [these plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.").

121. *SCRAP*, 412 U.S. at 687.

122. For example, although an environmental group's suit to compel compliance with environmental law is an impermissible citizen suit because no "abstract, self-contained . . . 'right' to have the Executive observe the . . . law" exists, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992), such a suit also seeks to vindicate the rights of directly affected third parties, namely, those who actually use or live near the threatened natural resources. *Compare id.* at 572 n.7 (noting that the plaintiffs effectively sought "standing for persons who have no concrete interests affected—*persons who live (and propose to live) at the other end of the country* from the dam" (emphasis added)), *and* Sierra Club v. Morton, 405 U.S. 727, 735 (1972) ("The alleged injury will be felt directly *only by those who use* Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort." (emphasis added)), *with* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) (granting standing to "environmental plaintiffs [who] . . . aver *that they use* the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity" (emphasis added) (quoting *Sierra Club*, 405 U.S. at 735)), *and SCRAP*, 412 U.S. at 687 ("Here, [in] contrast [with *Sierra Club*], the appellees claimed that the specific and allegedly illegal action . . . would *directly harm them in their use* of the natural resources of the Washington Metropolitan Area." (emphasis added)).

123. *Warth*, 422 U.S. at 499; *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 83 (4th ed. 2003) ("[A] plaintiff can assert only injuries that he or she has suffered . . . [and] cannot present the claims of third parties who are not part of the lawsuit.").

the litigant also affects a third party."[124] Like the Article III justiciability requirements,[125] the third-party standing doctrine helps to ensure the "concrete adverseness" that "sharpens the presentation of issues"[126] upon which federal courts depend for effective constitutional adjudication because "third parties themselves usually will be the best proponents of their own rights."[127] More fundamentally, however, the third-party standing and citizen-suit doctrines both ensure that the judicial branch remains within its sphere of competence and constitutional authority.[128] "Without such

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124. U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990).

125. Article III extends the judicial power of the United States "to all Cases" and "Controversies." U.S. CONST. art. III, §2, cl.1. The five justiciability doctrines—standing, ripeness, mootness, the prohibition against advisory opinions, and the political question doctrine—are derived from Article III of the Constitution. Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 304 (1996).

The Court has established particular tests for each of these justiciability doctrines, and the standing doctrine requires a plaintiff to show that an injury caused by the defendant is likely to be redressed by a favorable court decision. *Lujan*, 504 U.S. at 560–61. Although the third-party standing doctrine is a prudential limitation on the jurisdiction of federal courts, Kowalski v. Tesmer, 543 U.S. 125, 128 (2004), the Court has treated the ban on citizen suits as a constitutional requirement. In *Lujan v. Defenders of Wildlife*, the Court invalidated a citizen-suit provision in the Endangered Species Act and implied that the "case-or-controversy requirement of Article III" prohibits Congress from authorizing citizen suits by statute. 504 U.S. at 560, 564, 575. *See also* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 209 (1992) (criticizing what he describes as "[b]y far the most important and novel holding in *Lujan* . . .[,] that Congress cannot grant standing to citizens"). More recently, however, the Court explained that the citizen-suit ban is "closely related to Art[icle] III . . . but essentially [a] matter[] of judicial self-governance." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)). Regardless of whether the ban on citizen suits is constitutional or prudential, its application by courts serves to limit the availability of judicial review for some constitutional clauses. *See, e.g.*, *Richardson*, 418 U.S. at 179 (noting that dismissal as a citizen suit essentially renders the Statements and Accounts Clause, U.S. CONST. art. I, § 9, cl. 7, immune from judicial review).

126. Baker v. Carr, 369 U.S. 186, 204 (1962). The value of "concreteness" may be questionable, however. "On the one hand, the Supreme Court has insisted on justiciability criteria that aim to make adjudication concrete, rather than abstract. On the other hand, it often relies upon abstract formalist reasoning to resolve cases on the merits, thereby gaining no benefit from the concrete context." David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 813–14 (2004). Note that this observation may be less true for decisions on the merits in lower courts.

127. Singleton v. Wulff, 428 U.S. 106, 114 (1976). *But see* Scalia, *supra* note 63, at 891 ("Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever.").

128. *See* Scalia, *supra* note 63, at 894–96 ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals . . . and excludes them from the even more undemocratic role of prescribing how the other two branches should function . . . .");

limitations—closely related to Art[icle] III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions . . . ."[129]

Despite these concerns about institutional competence and the role of the judicial branch, the Court has permitted third-party suits when two conditions are present. First, a plaintiff must have a "'close' relationship" to the third party whose rights the plaintiff is asserting, and second, some obstacle must prevent the third party from protecting her own interests.[130] For example, in *Gilmore v. Utah*,[131] after a death row inmate voluntarily waived his right to appeal, the Court denied his mother standing to seek a stay of his execution because nothing prevented him from pursuing his claim in court.[132] As *Gilmore* demonstrated, however, whether the parties *themselves* are closely related is irrelevant. Rather, the plaintiff's *interests* must be closely aligned with those of the third party.

Thus, in *Elk Grove Unified School District v. Newdow*,[133] a father alleging that the phrase "under God" in the Pledge of Allegiance violated the First Amendment was denied standing to sue his daughter's school district.[134] Although the same allegedly unconstitutional act—the school's daily recital of the Pledge—injured both Newdow's parental right to "inculcat[e] his child with his views

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cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982) ("The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch.").

129. *Newdow*, 542 U.S. at 12 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

130. *Kowalski*, 543 U.S. at 129–30; Powers v. Ohio, 499 U.S. 400, 411 (1991); *Singleton*, 428 U.S. at 114–16. The Court has emphasized that both these conditions must be present to allow third-party standing. *See Kowalski*, 543 U.S. at 129–30 ("[A] party seeking third-party standing [must] make [these] two . . . showings."); *Singleton*, 428 U.S. at 116 ("Even where the relationship is close, the reasons for requiring persons to assert their own rights . . . still apply."); *see also* Miller v. Albright, 523 U.S. 420, 447 (1998) (plurality opinion) (O'Connor, J., concurring) ("While . . . [the] petitioner has a significant stake in challenging the statute and a close relationship with her father, she has not demonstrated a substantial hindrance to her father's ability to assert his own rights.").

131. 429 U.S. 1012 (1976) (per curiam).

132. *Id.* at 1017 (Stevens, J., concurring); *see also id.* ("[A death row inmate's] access to the courts is entirely unimpeded and therefore a third party has no standing to litigate an Eighth Amendment claim—or indeed any other claim—on his behalf.").

133. 542 U.S. 1 (2004).

134. *Id.* at 4–5.

on religion" and his daughter's First Amendment rights (had she wished to vindicate them),[135] the Court viewed Newdow's injury—and thus his standing—as deriving entirely from his relationship with his daughter.[136] But because the Court believed that Newdow's interest was "in many respects antagonistic" to the interests of his daughter—she was not offended by the phrase "under God"[137]—the Court held that the rule against third-party standing prohibited his suit.[138]

In *Kelo* and *Lingle*, the Court could plausibly have questioned the plaintiffs' standing to enjoin a violation of the Public Use Clause, because that violation would not exist but for the injury suffered by other citizens *qua* citizens, who were unable to seek judicial relief. Moreover, the interests of plaintiffs who sue to enjoin a taking on the ground that it is not for a public use "are not parallel and, indeed, are potentially in conflict"[139] with those of the public. For example, most New London residents presumably would support a plan to improve the city's economy, create jobs, and increase tax revenues. Given that the success or failure of the redevelopment plan in *Kelo* has no bearing on the plaintiffs' injuries,[140] their interest in enjoining the plan entirely—based on a claim that the plan will in fact fail—conflicts with the public's interest in the plan's success.

This conflict of interest is even more apparent in *Lingle*: a disgruntled consumer could not sue to enjoin a price-control regulation on the ground that the regulation would not actually lower prices.[141] Citizens do not have standing to drag legislators who enact foolish laws into federal court, neither after an act's ineffectiveness becomes apparent, nor beforehand, when reasonable people—and

135. *Id.* at 15.

136. All the Justices appeared to agree on this point. *Compare id.* ("Newdow's standing derives entirely from his relationship with his daughter."), *with id.* at 24 (Rehnquist, J., concurring in the judgment) ("While she is intimately associated with the source of respondent's standing (the father-daughter relationship and respondent's rights thereunder), the daughter *is not the source* of respondent's standing; instead *it is their relationship* that provides respondent his standing . . . ." (second emphasis added)).

137. *Id.* at 5, 15. The girl's mother had informed the lower court that "her daughter is a Christian who believes in God and has no objection either to reciting or hearing others recite the Pledge of Allegiance." *Id.* at 10.

138. *Id.* at 13–18.

139. *Id.* at 15.

140. *See supra* notes 7–16 and accompanying text.

141. *See supra* notes 17–27 and accompanying text.

even reasonable economists—still disagree about its impact.[142] The only remedy available to such a consumer would be to lobby for a more effective regulation or to support the campaigns of economically astute legislators in the next election. In *Lingle*, Chevron wanted to enjoin the rent cap entirely,[143] whereas consumers presumably wanted gasoline price regulations that actually lowered prices at the pump. Imagine that gasoline consumers decided to lobby for more effective gas price controls while Chevron simultaneously sought relief in federal court. Such consumers, who are directly harmed by the rent cap's ineffectiveness, would be seeking relief from the legislature while Chevron, whose injury bears no relation to the act's effectiveness, would be bringing its claims before the court.[144]

The proposition that cases such as *Lingle* and *Kelo* could have been dismissed for lack of standing is counterintuitive and has never been a factor in the Court's takings decisions, which in the public-use context do not even mention standing. The Court's standing cases have often been criticized for drawing arbitrary distinctions,[145] and the Burger and Rehnquist Courts used standing in a way that suggests a skepticism of certain types of claims.[146] Taking that criticism one step further, the fact that standing issues tend to be raised in connection with environmental claims,[147] rather than in connection with property

142. The district court reached its decision in *Lingle v. Chevron U.S.A. Inc.* by evaluating the testimony of two expert economists, one for Chevron and one for Hawaii. 125 S. Ct. 2078, 2084 (2005).

143. *See id.* at 2084 ("Chevron's claim is simply that Hawaii's rent cap will not actually serve the State's legitimate interest in protecting consumers against high gasoline prices.").

144. *See id.* ("The owner of a property subject to a regulation that *effectively* serves a legitimate interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation."); *see supra* notes 22–27 and accompanying text.

145. *See, e.g.*, Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1324–25 (1995) (discussing the Court's notable standing decisions and commenting that many seem irreconcilable with the others); Sunstein, *supra* note 125, at 209 (claiming that the distinction to forbid a citizen suit is "quite a stretch"); *cf.* Covington v. Jefferson County, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("A theory that 'injury to all is injury to none' seems wrong in theory, for it would deny standing to every citizen such that no matter how badly the whole may be hurt, none of the parts could ever have standing to go to court to cure a harmful violation.").

146. *See* Stearns, *supra* note 145, at 1326–27 (noting that although the Burger and Rehnquist Courts used standing in ways consistent with social-choice theory, the doctrine was first created to "stave off unwelcome challenges to New Deal regulatory programs").

147. *See* Weinberg, *supra* note 111, at 27 (explaining that "standing . . . is often a major [issue]" in the "numerous actions brought by concerned citizens and environmental advocacy organizations to . . . enjoin harmful activities").

claims,[148] itself indicates a systemic bias in favor of property rights,[149] stemming in part from the axiomatic status of property rights in the American constitutional tradition.[150]

In few takings cases has a Justice explicitly suggested that a consistent application of the Court's standing jurisprudence might

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148. An interesting counterexample is *Bennett v. Spear*, 520 U.S. 154 (1997), in which several property owners sued the United States Fish & Wildlife Service (FWS) under the citizen-suit provision of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544 (2000), to enjoin the FWS from taking certain actions to protect two species of endangered fish, *Bennett*, 520 U.S. at 159–60. The plaintiffs alleged that they would suffer economic loss to their property, but the lower courts denied standing because the plaintiffs' claims were not within the "zone of interests" protected by the ESA, finding that "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Id.* at 161 (quoting Bennett v. Plenert, 63 F.3d 915, 919 (9th Cir. 1995)). The Supreme Court reversed in a unanimous decision and granted the plaintiffs standing. *Id.* at 164–66. The Court held that because the "zone of interests" test was a prudential bar to standing, Congress could—and did in the ESA—legislatively circumvent it. *Id.* at 161–66. *Bennett* serves as an interesting contrast to *Lujan*, in which plaintiffs were denied standing to sue to prevent the government from engaging in conduct that would allegedly injure endangered species. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63, 578 (1992); *see infra* notes 155–56 and accompanying text. For a discussion of the significance of *Bennett*, see generally Robert S. Nix, Comment, Bennett v. Spear*: Justice Scalia Oversees the Latest "Battle" in the "War" Between Property Rights and Environmentalism*, 70 TEMP. L. REV. 745 (1997).

149. The Court's opinion of statutes containing citizen-suit provisions is exemplified by the assumption that "plaintiffs seeking to enforce theses statutes as private attorneys general [allege] injuries [that] are 'noneconomic' and probably noncompensable." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 17 (1981). In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), one of the few cases to question the standing of a takings plaintiff, the Court considered whether landlords had standing to challenge the validity of a rent-control ordinance that had never been applied to their properties, *id.* at 6–7. Although the Court conceded that "it is speculative" whether the ordinance would injure any of the plaintiffs, the Court found standing because "application of the constitutional standing requirement [is not] a mechanical exercise." *Id.* at 6–7 (alteration in original) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). Of course, the Court's standing jurisprudence in environmental cases has been criticized as precisely that—an overly formal mechanical exercise. *See, e.g.*, *Lujan*, 504 U.S. at 592 (Blackmun, J., dissenting) (criticizing the Court for "demand[ing] what is likely an empty formality" when, to demonstrate a sufficiently imminent injury for standing, the Court requires that plaintiffs allege a "description of concrete plans" to return to a region whose environment is allegedly threatened by the challenged conduct).

150. In this vein, Professor Laura Underkuffler explains a "hidden rationale" running through the Court's takings cases:

> [T]he conception of property as a 'right' which 'protects' is driven by the underlying assumption that the case involves the assertion of the highly prized values associated with property against those of an unrelated (and lesser-valued) public interest. We assume that the core values, which the individual interest asserts, are *presumptively superior* to the core values that the competing public interest involves.

UNDERKUFFLER, *supra* note 36, at 156. Whether the Takings Clause in fact elevates such presumptions to constitutional status is questionable. *See supra* notes 31 and 104–09 and accompanying text.

deny standing to a takings plaintiff. In *Lucas v. South Carolina Coastal Council*,[151] the Court held that a regulation to prevent coastal erosion was a taking because it denied the plaintiff all "economically viable use of his land."[152] Justice Blackmun noted, in his vehement dissent, that if the principles the Court had enunciated several days earlier in *Lujan v. Defenders of Wildlife*[153] were to be applied consistently, then the plaintiff in *Lucas* should be denied standing.[154] The *Lujan* plaintiffs sued, under the Endangered Species Act, to prevent the construction of a dam that they alleged would harm protected species.[155] The plaintiffs had visited the vicinity, observed various threatened species in their natural habitat, and intended to visit again. The Court, however, denied standing because "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day w[ould] be—d[id] not support a finding of the 'actual or imminent' injury that [the Court's] cases require[d]."[156] Justice Blackmun, quoting this language, pointed out that the same problem was present in *Lucas*: the plaintiff "failed to demonstrate any immediate concrete plans to build or sell."[157] In other words, the plaintiff should have been denied standing because

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151. 505 U.S. 1003 (1992).

152. *Id.* at 1016 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

153. 504 U.S. 555 (1992).

154. *Lucas*, 505 U.S. at 1043 n.5 (Blackmun, J., dissenting).

155. *Lujan*, 504 U.S. at 563.

156. *Id.* at 564. Five years after *Lujan* was decided, Justice Scalia discussed the citizen-suit provision of the ESA in surprisingly broad, inclusive terms:

> [The ESA] says that 'any person may commence a civil suit'—an authorization of remarkable breadth when compared with the language Congress ordinarily uses. . . . Our readiness to take the term 'any person' at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general' . . . . Given these factors, we think the conclusion of expanded standing . . . to the full extent permitted under Article III [is warranted].

Bennett v. Spear, 520 U.S. 154, 164–66 (1997) (quoting 16 U.S.C. § 1540(g)(1) (2000)); *see also supra* note 148. This language from *Bennett* is less surprising when viewed in context—in sharp contrast to *Lujan*, the plaintiffs in *Bennett* were owners of private property seeking to enjoin the government's conduct to prevent an economic injury to their private property. *Bennett*, 520 U.S. at 159–60. In *Lujan*, the plaintiffs sought to prevent damage to the environment, which is, of course, the express purpose of the ESA. *See Lujan*, 504 U.S. at 559 (noting that the action was filed by an organization "dedicated to wildlife conservation and other environmental causes"). Nevertheless, unlike the plaintiffs in *Lujan*, the plaintiffs in *Bennett* were accorded standing. *Bennett*, 520 U.S. at 164–66.

157. *Lucas*, 505 U.S. at 1043 n.5 (Blackmun, J., dissenting).

the alleged injury depended on his "'[s]ome day' intentions" to use the property.[158]

CONCLUSION

Whether the plaintiffs had standing in *Lujan* and its ilk[159] on the one hand, and *Lucas*—or for that matter *Kelo* and *Lingle*—on the other, is beside the point. Rather, the fact that standing is central to the inquiry in *Lujan* but not even discussed in *Lucas* is emblematic of how the property paradigm intrinsic in the constitutional order colors the development of a procedural doctrine such as standing.[160] The disparity between the characterizations of the Public Use and General Welfare Clauses is another manifestation of how jurists' thinking about property pervades the interpretation of seemingly unrelated constitutional clauses.[161] According to the conventional wisdom, the United States in the first century following the Revolutionary War was a "quintessentially Lockean" society exemplified by economic individualism and vested natural rights[162] in which the law's primary purpose was to ensure that private property

158. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)).

159. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 173, 183 (2000) (finding standing to sue under the Clean Water Act, 33 U.S.C. § 1365 (2005), for discharge into a river); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105 (1998) (finding no standing to sue a company for violations of a statute that required companies to report the presence of toxic chemicals); *Lujan*, 504 U.S. at 563–64 (finding no standing to sue to prevent development that would allegedly injure endangered species); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 881–82, 886–89, 900 (1990) (finding no standing to challenge mining on federal lands by plaintiffs who used only a small part of affected lands); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687–90 (1973) (finding standing to challenge a federal policy that would allegedly decrease the nation's air quality); Sierra Club v. Morton, 405 U.S. 727, 732, 735, 741 (1972) (finding no standing under the Administrative Procedure Act, 5 U.S.C. § 702 (2005), to sue to enjoin development in part of the Sequoia National Forest).

160. The effect of *Lujan*'s requirement of a "concrete and particularized" injury is that "very 'old'—traditional common law—property is . . . 'more owned,' so far as the federal courts are concerned," than is "new" property created by statutory entitlement programs. Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1, 65–66 & n.194 (2005). Analogously, "the U.S. Supreme Court's 'takings' jurisprudence . . . appears to be bringing greater security to 'old' property even against democratically decided actions by the state, [such that] *traditional* assets definitely look to be increasingly 'asset-like'" relative to statutory entitlement programs, *id.* at 65–66 n.195, not to mention relative to public rights such as environmental rights.

161. *See supra* notes 64–71, 110–112 and accompanying text.

162. *See* NOVAK, *supra* note 31, at 6 ("Nineteenth-century political ideology . . . was quintessentially Lockean, suffused with a passion for private rights and predestined for market capitalism.").

owners retained "virtually uncontrolled dominion over the use and disposition of [their] property."[163] Although subsequent scholarship has shed considerable doubt on the accuracy of this assessment,[164] it continues to hold sway for many[165] and has contributed to the development of standing as an obstacle to vindicating interests not predicated on traditional property rights.[166] To be sure, the Court has repeatedly stated that aesthetic and environmental injuries stand on equal footing with economic injuries: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[167] If the Court is to be taken at its word, however, then perhaps it ought not require plaintiffs alleging the former to meet formalistic standing requirements while it assumes that plaintiffs alleging the latter automatically meet those requirements.

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163. Scheiber, *supra* note 31, at 221 (alteration in original) (quoting B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE U.S., PART III: THE RIGHTS OF PROPERTY 231 (1965)); *see* EPSTEIN, *supra* note 31, at 16 ("The Lockean system was dominant at the time when the Constitution was adopted . . . , and the protection of property against its enemies was a central and recurrent feature of the political thought of the day."); HORWITZ, *supra* note 31, at 31 ("In the eighteenth century, the right to property had been the right to absolute dominion over land . . . .").

164. *See, e.g.*, Scheiber, *supra* note 31, at 231 ("We find, therefore, no historical monolith that bespeaks a single-minded devotion to the sacred rights of private property."); *see also* ALEXANDER, *supra* note 34, at 36–42 (discussing the limitations on traditional private property rights that Jefferson and others advocated to achieve various ends for society); NOVAK, *supra* note 31, at 6 (detailing the breadth and depth of nineteenth-century regulation of private property and the extent that the resultant infringement on property rights was generally accepted); *cf.* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM 7–9 (1956) (exploring and reassessing "the myth of our laissez faire past").

165. *See* Hugo L. Black, *The Bill of Rights and the Federal Government*, *in* THE GREAT RIGHTS 41, 58–60 (Edmond Cahn ed., 1963) (arguing that the Takings Clause provides no leeway for courts to balance its proscription against the public interest); *cf.* JOHN BRIGHAM, PROPERTY AND THE POLITICS OF ENTITLEMENT 7 (1990) ("[T]he right wing in the legal academy has been intellectually provocative in its arguments that . . . the . . . Takings Clause provide[s] a basis for dismantling the welfare state.").

166. *See supra* notes 145–58 and accompanying text.

167. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686 (1973) (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.").