LINGLE V. CHEVRON USA, INC.[*]

Sarah B. Nelson[**]

A quarter century ago, the Supreme Court suggested that a regulation may be considered a taking if it fails to "substantially advance" a legitimate state interest.[1] The phrase developed into a vehicle for attacking environmental regulations, and particularly local land use ordinances.[2] Last May, a unanimous Court recognized its mistake in surprisingly candid language.[3] Taking up a highly political controversy, Justice O'Connor made clear that the "substantially advances" test, while applicable to due process, "has no proper place in our takings jurisprudence."[4] Moreover, she signaled the Court's intention to avoid interfering with the democratic process.[5] Even though a concurrence by Justice Kennedy welcomed increased due process litigation,[6] the tone of *Lingle* rebukes *the* substantive due process review characterized by *Lochner v. New York*.[7] Nevertheless, Justice O'Connor tried distinguishing *Nollan v. Cal. Coastal Comm'n* and *Dolan v. Tigard* as "adjudicative land-use extractions."[8] If this becomes the next fortuitously coined phrase in takings jurisprudence,[9] *Lingle* could create as much doctrinal inconsistency as it resolves. Fortunately, that is unlikely. Given the political climate surrounding Lingle, courts may choose to avoid *Nollan* and *Dolan*'s inherent contradictions with Lingle by limiting their application. Thus, *Lingle* can do a great deal to protect all kinds of environmental regulations from judicial overreaching.

Background

On June 21, 1997, the Hawaii legislature responded to increasing public concern about gasoline prices by enacting Act 257.[10] Act 257 im-

---

[*] 125 S. Ct. 2074 (2005).

[**] J.D. Candidate, Harvard Law School, Class of 2006.

[1] Agins v. Tiburon, 447 U.S. 255, 260–63 (1980).

[2] *See, e.g.*, Dolan v. Tigard, 512 U.S. 374, 385 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[3] Lingle v. Chevron USA, Inc., 125 S. Ct. 2074 (2005).

[4] *Id.* at 2083.

[5] *See id.* at 2085 (observing that the courts are not well-suited to "scrutinize the efficacy of . . . state and federal regulations.").

[6] *Id.* at 2087 (Kennedy, J., concurring).

[7] 198 U.S. 45 (1905) (overturning a legislative limit on working hours on grounds that, in the Court's judgment, the policy would not be effective in furthering its stated goal).

[8] *Id.* at 2086; *see also* Dolan v. Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[9] *Cf. Lingle*, 125 S. Ct. at 2074.

[10] Chevron USA, Inc. v. Cayetano, 57 F. Supp. 2d 1003, 1004–05 (D. Haw. 1998) [hereinafter *Chevron I*]; 1997 Haw. Sess. Laws, Act 257, § 3 (codified as amended at Haw. Rev. Stat. § 486H-10.4 (2004)). Notably, this is only one chapter in the political fight over gasoline prices in Hawaii. For instance, between 1999 and 2001, the state sued oil companies over alleged anti-trust violations that inflated gasoline prices. *See* Anzai v. Chevron

posed rent controls on the lease of service stations, similar to those traditionally imposed on residential properties.[11] In theory, the rent controls would lower operating costs for service stations, and in turn, the service stations would charge Hawaii consumers lower prices.[12] Chevron USA, Inc. ("Chevron") promptly refuted the efficacy of Act 257, pointing out, *inter alia*, that service stations could simply pocket their savings.[13] The owner of sixty-four Hawaii service stations,[14] Chevron sued Hawaii's governor and attorney general, alleging Act 257 was an unconstitutional taking under the Fifth and Fourteenth Amendments.[15]

Chief Judge Kay found for Chevron on summary judgment. He acknowledged the propriety of efforts to "protect consumers from the harmful effects of the highly concentrated petroleum market in Hawaii,"[16] but found that "Act 257 as crafted fails to substantially further this legitimate state interest, and therefore effects an unconstitutional taking."[17] Chief Judge Kay did not elaborate on takings doctrine, but instead broadly cited earlier Supreme Court decisions.[18]

On appeal, the Ninth Circuit affirmed Chief Judge Kay's ruling with respect to Chevron's takings claim, but only after considerably more discussion.[19] Writing for himself and Judge Dorothy Nelson, Judge Beezer quickly dismissed the suggestion that he should evaluate the law as potentially unconstitutional under the Fifth Amendment's Due Process Clause, thus rejecting the application of rational basis review.[20] Instead, he looked

---

Corp., 168 F. Supp. 2d 1180 (D. Haw. 2001) (ruling in favor of Hawaii in partial summary judgment on a procedural matter); Brandon Masuoka, *Gas-Price Lawsuit May Last Three Years*, HONOLULU ADVERTISER, Jan. 28, 1999, at 8B. In 2005, the implementation of gasoline price caps brought praise from state Democrats and the advocacy group, Citizens Against Gasoline Price Gouging, but it prompted state Republicans to canvas gas stations with warnings about possible price increases and supply shortages. *See* B. J. Reyes, *Gas Prices Rise Slowly on Initial Day of Cap*, HONOLULU STAR BULL., Sept. 2, 2005, *available at* http://starbulletin.com/2005/09/02/news/story3.html.

[11] HAW. REV. STAT. § 486H-10.4 (2004).

[12] *Chevron I*, 57 F. Supp. 2d at 1004, 1009.

[13] Chevron initially argued that a desire to protect service station lessee dealers motivated Act 257, rather than any legitimate state interest, but Chief Judge Kay declined the opportunity to question legislative motives, noting that, "on its face, Act 257 appears to be directed toward the protection of consumers." *Id.* at 1009; *see also infra* notes 26 and 49.

[14] *See* Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1032 (9th Cir. 1999) [hereinafter *Chevron II*]. (detailing the case's factual history).

[15] *Chevron I*, 57 F. Supp. 2d at 1003.

[16] *Id.* at 1009.

[17] *Id.* at 1004.

[18] *Id.* at 1007 (citing Dolan v. Tigard, 512 U.S. 374, 385 (1994)).

[19] *Chevron II*, 224 F.3d at 1030.

[20] *Id.* at 1034–35 (adding that Chevron failed to advance their due process argument on summary judgment before the district court, and therefore had procedurally lost this claim). For a definition of the rational basis review standard, see *id.* at 1033 (defining this test as whether "the Legislature rationally could have believed Act 257 would substantially advance a legitimate purpose" and noticing that courts apply less stringent, rational basis review to economic regulations).

to the more demanding "substantially advances" test[21] to identify Act 257 as a regulatory taking under the Fifth Amendment's Takings Clause.[22]

Judge Fletcher concurred with the majority's decision to remand the case to district court for factual findings, but disagreed with its reasoning on the takings issue.[23] Noting that there was no functional difference between rent control laws like Act 257 and price controls, which would be challenged under due process, he wrote that "[t]he constitutional test for ordinary rent control and price control laws is the same [and] essentially requires that the law be 'reasonable' and 'not confiscatory.'"[24] Judge Fletcher traced the "substantially advances" test to its conception in *Agins v. Tiburon*, and argued for limiting it to cases "of severe zoning limitations on the use of land . . . and required dedications by landowners as a condition of receiving building permits."[25] He would direct the district court in *Chevron* to apply the less stringent rational basis review.[26]

On remand, Judge Mollway found for Chevron on the facts.[27] On the case's second appeal to the Ninth Circuit, Hawaii argued for the first time that Act 257 should be analyzed under the Due Process Clause and its rational basis review, rather than as a takings case with more probing "substantially advances" review.[28] Unimpressed, Judge Beezer reminded the litigants that the case's posture precluded this new argument, and further, that while considering whether Chevron made this argument in the first appeal, the majority stated a preference for the "substantially advances" test, making it the law of the case.[29]

---

[21] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) (defining this test as whether "the regulation 'substantially advance[s]' the 'legitimate state interest' sought to be achieved, not that the State *could rationally have decided* that the measure adopted might achieve the State's objectives"); *cf.* Glenn E. Summers, *Private Property without Lochner: Towards a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 841 (1993) (concluding that this test "does nothing more than create an exception to the minimum rationality standard of due process").

[22] *Chevron II*, 224 F.3d at 1035 (citing Richardson v. Honolulu, 124 F.3d 1150 (9th Cir. 1997)).

[23] *Chevron II*, 224 F.3d at 1043 (Fletcher, J., concurring in judgment).

[24] *Id.*

[25] *Id.* at 1044 (citing Agins v. Tiburon, 447 U.S. 255 (1980)); *see also Nollan*, 483 U.S. at 834–37; Dolan v. Tigard, 512 U.S. 374, 385–91 (1994).

[26] *Chevron II*, 224 F.3d at 1044–49 (Fletcher, J., concurring in judgment). Judge Fletcher never directly stated how he would apply rational basis review, but implies that Act 257 would pass this lower level of scrutiny. *Id.*; *see also supra* note 13 and *infra* note 49.

[27] Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1183 (D. Haw. 2002) [hereinafter *Chevron III*] (evaluating a series of complex factual scenarios to find that "Act 257 will not advance the goal of lowering gasoline prices").

[28] Chevron USA, Inc. v. Bronster, 363 F.3d 846, 850 (9th Cir. 2004) [hereinafter *Chevron IV*].

[29] *Id.* at 850–55; *see also Chevron II*, 224 F.3d at 1033–36. Curiously, Judge Beezer looked into *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and distinguished it by noting "the Court applied the more deferential test [i.e. rational basis review instead of the 'substantially advances' test] only because it involved claims of an actual physical taking." *Chevron IV*, 363 F.3d at 850. This system paradoxically reviews government more strin-

Hawaii filed a second petition for certiorari with the Supreme Court.[30] This time, the Court granted certiorari and unanimously reversed.[31]

Justice O'Connor began the opinion by observing that "[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined."[32] Her candor continued, as she wrote that the "substantially advances" test is "tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."[33]

She explained that the "substantially advances" test inappropriately focuses on the efficacy of the regulation, and "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights or how the regulatory burden is *distributed* among property owners."[34] These factors—magnitude, character, and distribution of the burden—are the ones to which the courts should look to determine regulatory takings; they help the court to determine whether the government action is "functionally equivalent to a classic taking in which government directly appropriates private property."[35]

Justice O'Connor elucidated takings inquiries by separating two questions: first, whether the case presents a taking; and second, whether the action is an arbitrary use of government power that would violate the Due Process Clause.[36] In previous cases, these two distinct inquiries have been

---

gently on regulatory takings than it does for physical takings. The justification commonly given for this result is that physical takings require just compensation, and therefore need less review. *See Chevron I*, 57 F. Supp. 2d at 1008 (citing *Midkiff*, 467 U.S. at 242). However, this justification falls apart when you consider that once a court finds a regulatory taking, the government owes full and just compensation identical to what it would owe for a physical taking. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). While *Lingle* clears up this confusion between defining takings and reviewing due process, this example shows how rational basis review, not the "substantially advances" test, works in ordinary physical takings cases.

[30] Hawaii had also appealed the Ninth Circuit's first decision, but the Supreme Court denied certiorari. Cayetano v. Chevron USA, Inc., 532 U.S. 942 (2001).

[31] Lingle v. Chevron USA, Inc., 125 S. Ct. 2074 (2005). Chief Justice Rehnquist and Justice Stevens joined in the opinion, but did not attend oral argument. *See generally* Transcript of Oral Argument, *Lingle*, 125 S. Ct. 2074 (No. 04-163).

[32] *Lingle*, 125 S. Ct. at 2077; *see also* Agins v. Tiburon, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to a particular property effects a taking if the ordinance does not *substantially advance legitimate state interests*.") (emphasis added) (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928) (evaluating a potential taking on due process grounds) and Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (same)); Kenneth B. Bley, *Substantive Due Process and Land Use: The Alternative to a Takings Claim*, *in* TAKINGS: LAND DEVELOPMENT REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS*, 289, 290–92 (David L. Callies ed., 1996) (discussing the evolution of takings jurisprudence with reference to due process cases); Thomas E. Roberts, *Regulatory Takings: Setting Out the Basics and Unveiling the Differences*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES, 1, 5 (Thomas E. Roberts ed., 2002) (discussing the ease with which one could confuse takings jurisprudence and due process).

[33] *Lingle*, 125 S. Ct. at 2084.

[34] *Id.*

[35] *Id.* at 2082.

[36] *Id.* at 2080–84.

conflated by "regrettably imprecise" language.[37] The conflation caused the "substantially advances" test to seep into takings jurisprudence where "it has no proper place."[38] Rather, the test "prescribes an inquiry in the nature of due process."[39] Because earlier findings relied on inappropriately applying a due process test to determine a taking, they could not support a judgment against Act 257.

Teasing out this distinction with logical application, Justice O'Connor pointed out the "ineffective" and "foolish" result of allowing non-invasive regulations to qualify as takings merely because a legislature or executive agency acted ineffectively, when a landowner with identical burdens would not have suffered a taking (and hence would receive no compensation) merely because his legislature or executive agency acted in a way that would effectively serve a legitimate state interest further down the line.[40]

Justice O'Connor's opinion also addressed "serious practical difficulties" that would result if courts had to "scrutinize the efficacy of a vast array of state and federal regulations."[41] She wrote that applying the "substantially advances" test as a standard for finding regulatory takings "would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[42] Noting the highly political nature of gas prices in Hawaii, she observed that "the reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here."[43]

In the final part of her opinion, Justice O'Connor wrote that her candid language in *Lingle* should not be employed to disturb the Court's prior holdings.[44] She explained away most of the Court's earlier references to the "substantially advances" test as mere dicta.[45] *Nollan* and *Dolan* were not as easily dismissed; nevertheless, Justice O'Connor distinguished them on the grounds that they were cases of "adjudicative land use extraction,"

---

[37] *Id.* at 2083.

[38] *Id.* at 2087.

[39] *Id.* at 2083. However, Justice O'Connor's carefully chosen language cannot obscure the fact that other physical takings receive rational basis review. *See supra* note 29.

[40] *Id.* at 2084.

[41] *Id.* at 2085; *see also* Reply Brief for Petitioners at 15–20, Lingle v. Chevron USA, Inc., 125 S. Ct. 2074 (2005) (No. 04-163) [hereinafter Hawaii Brief]; Brief for the United States as Amicus Curiae in support of the Petitioners, Lingle v. Chevron USA, Inc., 125 S. Ct. 2074 (2005) (No. 04-163) [hereinafter Government Brief].

[42] *Lingle*, 125 S. Ct. at 2085.

[43] *Id.*; *see also supra* note 10. In fact, Justice O'Connor considered deference to the legislature to be so well established that she does not provide any supporting citation. *See Lingle*, 125 S. Ct. at 2085.

[44] *Id.* at 2085–86; *but see* Transcript of Oral Argument, *supra* note 31 (Scalia, J.) ("So we have to eat crow no matter what we do. Right?")

[45] *Lingle*, 125 S. Ct. at 2086.

functionally equivalent to a physical taking.[46] A regulatory action like *Lingle* could not fall into this line of precedent.[47]

Justice Kennedy joined in Justice O'Connor's opinion, but wrote separately to observe that *Lingle* did nothing to weaken due process jurisprudence.[48] He explained, "this separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."[49]

ANALYSIS

A. Lingle *in Political Context*

Lingle stands out among the Supreme Court's recent takings decisions both for its unanimity and for its unusual commitment to producing doctrinally coherent takings standards.[50] Early commentators have taken *Lingle* as a sign that the Court wishes to move toward moderation.[51] Yet, a complicated political quandary underlies this lucid decision.

Many conservatives, including those on the Court, support the Private Property Rights Movement,[52] which resists any government interference into private property.[53] In pure doctrinal form, private property rights

---

[46] *Id.*; *see also Chevron II*, 224 F.3d at 1043–44 (Fletcher, J., concurring in judgment).

[47] *Lingle*, 125 S. Ct. at 2086.

[48] *Id.* at 2087 (Kennedy, J., concurring).

[49] *Id.* Neither Hawaii nor Chevron advanced a timely claim for due process review. *See Chevron II*, 224 F.3d at 1030; *Chevron III*, 363 F.3d at 850. This leaves an open question as to whether Act 257 would pass this less stringent review. *See supra* notes 13 and 26; *but cf.* Brief for the Cato Institute as Amicus Curiae in Support of Respondent, Lingle v. Chevron USA, Inc., 125 S. Ct. 20074 (2005) (No. 04-163) [hereinafter Cato Institute Brief].

[50] *See* Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099 (1997); *Lingle*, 125 S. Ct. at 2082 (noting that "our regulatory takings jurisprudence cannot be characterized as unified"); Timothy J. Dowling, *High Court's Takings Decision Marks Restoration of Logic*, DAILY J.: JUDGES & JUDICIARY, June 1, 2005, http://www.dailyjournal.com/newswire/index.cfm?sid=1803714780&tkn=GUEcSNvz&eid=720659&evid=1&scid=37378 (on file with the Harvard Environmental Law Review) ("Law review articles routinely condemn takings jurisprudence as a 'muddle,' a 'mess' or worse. . . . Clarity, thy name is Lingle."); *but see* G. Richard Hill, *Partial Takings after* Dolan, *in* TAKINGS: LAND DEVELOPMENT REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS*, 189, 189 (David L. Callies ed., 1996) (arguing before *Lingle* that "in fact it [was] quite simple for the government to steer clear of [regulatory] takings problems").

[51] *See* Dowling, *supra* note 50; Linda Greenhouse, *The Court in Transition the 2004-2005 Session; Court's Term a Turn Back to Center*, N.Y. TIMES, July 4, 2005, at A1.

[52] *See* JAY M. FEINMAN, UN-MAKING LAW 139–41, 145–47 (2004).

[53] This view has long been recognized as an impediment to environmental protection. *See* STANLEY SCOTT, AN INTRODUCTORY INTERPRETATION, REGULATION V. COMPENSATION IN LAND USE CONTEXT, xi, xiii (1977). In fact, many scholars believe the development of the Private Property Rights Movement is a direct reaction to environmental laws. *See, e.g.*, ALFRED M. OLIVETTI, JR., & JEFF WORSHAM, THIS LAND IS YOUR LAND, THIS LAND IS MY LAND: THE PROPERTY RIGHTS MOVEMENT AND REGULATORY TAKINGS 21–48 (2003); FEINMAN, *supra* note 52, at 128–71. For a view of the Private Property Rights Movement applied to environmental law generally, see NANCIE G. MARZULLA & ROGER J. MAR-

advocates have proposed compensation for *any* regulation that interfered with a property interest.[54] While such extreme views have never been widely credited,[55] the Private Property Rights Movement has received varying degrees of endorsement in Court opinions.[56]

In fact, most of the success enjoyed by the private property rights movement has been in the courts,[57] which is not surprising considering the restrictive limits private property rights advocates place on legislatures and executive agencies. This creates an acute tension between the so-called political branches and the judiciary. It charges the courts with scrutinizing delicate political decisions even in cases where legislatures or administrative agencies applied all of the proper democratic protections and procedures. *Lingle* vividly illustrates this tension: years of heated debate in the state legislature,[58] politicians running from car to car with pamphlets at gas stations,[59] countless citizen editorials in the local press[60]—all to be resolved by a single federal judge in a detached courtroom. This does not sit well with conservatives who pride themselves on judicial restraint, sepa-

---

ZULLA, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION (1997). For a view of the Private Property Rights Movement specific to *Lingle*, see Cato Institute Brief, *supra* note 49.

[54] *See generally* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[55] *See* Lingle v. Chevron USA, Inc., 125 S. Ct. 2074, 2085 (2005) ("[W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.").

[56] *See* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 279–302 (2005).

[57] *See* FEINMAN, *supra* note 53, at 144–45 (noticing the lackluster record of takings initiatives in the political branches); Peter A. Buchsbaum, *Should Land Use be Different? Reflections on* Williamson Co. Reg'l. Planning Bd. v. Hamilton Park, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 471, 471–72 (Thomas E. Roberts ed., 2002) (reporting on the backlash against private property rights advocates by municipal governments and state legislators); Government Brief, *supra* note 41 (explaining why the executive branch and administrative agencies do not like aggressive property rights). However, the Private Property Rights Movement has advocates in the other branches of government. *See* R. G. Converse, *Property Rights Legislation: Some Questions*, *in* TAKINGS: LAND DEVELOPMENT REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS*, 255, 255–65 (David L. Callies ed., 1996) (briefly discussing legislative developments in a more positive light); OLIVETTI & WORSHAM, *supra* note 53, at 73–116 (providing a detailed discussion of legislative private property rights initiatives at the federal level). Some initiatives promoting takings analysis in decision-making have passed. *See* MARZULLA & MARZULLA, *supra* note 53, at 163–78 (focusing on a Reagan-era Executive Order and state action). However, proposals for Fifth Amendment-like compensation almost always fail. *See* Feinman, *supra* note 52, at 128–71.

[58] *See* Hawaii Brief, *supra* note 41, at 18.

[59] For a description of the on-going dispute over gas prices, see Reyes, *supra* note 10.

[60] For a representative sample from a recent month in the ongoing dispute, see Carlito P. Caliboso, Op-Ed, *Ups and Downs of the Gas Cap*, HONOLULU STAR BULL., Oct. 2, 2005, *available at* http://starbulletin.com/2005/10/02/editorial /commentary2.html; Editorial, *Gas Prices Warrant FTC Investigation*, HONOLULU STAR BULL., Oct. 3, 2005, *available at* http://starbulletin.com/2005/10/03/editorial /editorials.html; Frank Young & Jim Wheeler, Op-Ed, *Gas Cap Is Forcing Isle Prices to Fluctuate*, HONOLULU STAR BULL., Oct. 2, 2005, *available at* http://starbulletin.com/2005/10/09/editorial /commentary.html.

ration of powers and fidelity to an originalist notion of democracy[61]—even conservatives who would otherwise support private property rights.

Justice Scalia is more closely associated with the property rights movement than any of his colleagues,[62] and he has often articulated his staunch commitment to private property rights,[63] even in the face of his stated preference for originalist constitutional interpretation. Still, Justice Scalia rejects *Lochner*-like substantive due process.[64] When asked to choose, Justice Scalia—alongside Chief Justice Rehnquist and Justice Thomas—quietly added his vote to overrule aggressive judicial review of political action. This decision on the part of Court conservatives strongly indicates that future regulations will not be disturbed with probing substantive due process inquires.

Looking at the direction of takings jurisprudence, Court watchers also keep a careful eye on the moderates, particularly Justice Kennedy.[65] In *Lingle*, his role was the most intriguing. His concurrence invited a more probing due process inquiry that, while unpopular, has never expressly been overruled.[66] Aware of this danger, early commentators have pointed out that a reversion to *Lochner* would cause exactly the problem that the *Lingle* Court wished to avoid: intrusive judicial review that prevents democratic rule.[67]

---

[61] *See* FEINMAN, *supra* note 52, at 164–68 (criticizing "conservative mythmaking about the long standing, fundamental nature of property rights"); TUSHNET, *supra* note 56, at 283–85 (remarking on how takings deviate from original constitutional interpretation); Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1028 n.15 (1992) (stating that the founding fathers did not envision regulatory takings as part of the Fifth Amendment); *but see* Dowling, *supra* note 50 (noting that *Lingle* properly characterizes the original understanding).

[62] *See* Lazarus, *supra* note 50, at 1118–19 ("None could contend that Justice Scalia has not adhered to a firm position in the regulatory takings cases. Property owners have no greater ally on the Court.").

[63] *See id.*; *see also* FEINMAN, *supra* note 52, at 159 (noticing that Justice Scalia is considerably to the right of center when interpreting private property rights).

[64] *See* Dowling, *supra* note 50. *See also* Lochner v. New York, 198 U.S. 45 (1905); *but see* Lazarus, *supra* note 50, at 1118–19 (noticing that Scalia has sometimes overlooked concerns about overriding democratically elected branches in his takings decisions).

[65] *See* Lazarus, *supra* note 50, at 1101, 1108.

[66] Lingle v. Chevron USA, Inc., 125 S. Ct. 2074, 2086 (2005) (Kennedy, J., concurring); *cf. Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting). "Moderate" sheepskin aside, Justice Kennedy may be a subtle extremist on this point. *See* Lazarus, *supra* note 50, at 1108–09 (noticing that Justice Kennedy tends to favor *Lochner*-like review in defense of property rights); Posting of Paul Utrecht, paulzulpc.com, to SCOTUSBlog, http://www.scotusblog.com/movabletype/mt-tb.cgi/366 (May 28, 2005, 23:00 EST) (on file with the Harvard Environmental Law Review) ("I hope there are more than half a dozen people interested in Lingle, because it may be a critical turning point in constitutional law."); *but see also* Michael M. Berger, *Though No Blockbuster,* Lingle *Disentangles Takings, Process*, DAILY J.: JUDGES & JUDICIARY, June 1, 2005, http://www.dailyjournal.com/newswire/index.cfm?sid=1803714780&tkn=GUEcSNvz&eid=720658&evid=1&scid=37378 (on file with the Harvard Environmental Law Review) (supporting *Lochner*-like review, trivializing concerns about interference with democratic rule by focusing on injury to politicians' ego, and side-stepping serious separation of powers questions).

[67] *See* Utrecht, *supra* note 66 ("Ultimately, the governments may regret their victory in Lingle. If the Due Process Clause is given teeth, it will truly affect each and every piece of

However, considering the political climate that gave birth to *Lingle*, this turn is extremely unlikely.[68] Hardcore property rights advocates may want the most intrusive review possible for environmental regulations and land use restrictions, but most liberals and conservatives do not want the courts to unreasonably interfere with the good-faith predictions of the political branches. Justice Kennedy's invitation to due process claimants may evolve into a clearer due process test, but *Lochner* will remain a textbook story on the importance of not interfering with democracy.

What will develop from *Lingle* is a more coherent takings jurisprudence.[69] The "substantially advances" test acted as a crutch through which litigants and courts could avoid the mystifying *Penn Central* test for determining whether a taking has occurred.[70] With the crutch gone, the Supreme Court will have to end academic debates about the feasibility of a *Penn Central* analysis and show us how it is done.

---

legislation."); Dowling, *supra* note 50 (commenting on the "bizarre" and contradictory nature of this possible result); Bley, *supra* note 32, at 289–97 ("[S]eeking relief for a violations of the due process clause removes some—but not all—of [the] hurdles [associated with a takings claim].").

[68] *Lingle*, 125 S. Ct. at 2086; *see also* Daniel L. Siegel, *With* Lingle*, Supreme Court Finally Lets* Lochner *Rest in Peace*, DAILY J.: CORP., June 2, 2005, http://www.dailyjournal.com/newswire/index.cfm?sid=1806483362&tkn=kyRonAYy&eid=721116&evid=1&scid=35916 (on file with the Harvard Environmental Law Review). For an argument that shying way from *Lochner* might not be desirable, see Douglas W. Kmiec, *At Last the Supreme Court Solves the Takings Puzzle*, *in* TAKINGS: LAND DEVELOPMENT REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS*, 107–18 (David L. Callies ed., 1996).

[69] *Lingle* may be one of the rare legal moments in which clarity is truly value-neutral. At least one special interest group picked up on this fact while trying to mask a defeat with cries of victory. *See* Brief for the National Home Builders Association as Amicus Curiae in support of the Respondents, Lingle v. Chevron USA, Inc., 125 S. Ct. 20074 (2005) (No. 04-163); Press Release, National Home Builders Association, Supreme Court Clarifies Constitutional Property Rights in Lingle v. Chevron (May 23, 2005) (on file with the Harvard Environmental Law Review); *see also* Dowling, *supra* note 50 ("If this is a win for takings claimants, state and local officials would happily welcome more of the same."). Incidentally, another popular coping strategy for private property rights advocates is denying *Lingle*'s effect. *See* Berger, *supra* note 66 (acknowledging that *Lingle* "untangled a quarter-century-old jurisprudential knot" and that substantive due process "lurk[s] below" but insisting that it is not "a blockbuster decision").

[70] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (determining that a building restriction aimed at historical protection was not a regulatory taking and listing factors that contributed to this determination while indicating that such analysis required case-by-case inquiries as "this Court quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government"); Roberts, *supra* note 32, at 7–8 (noting that *Agins* came in the wake of *Penn Central* and heavily implying a lack of clarity in the earlier case lead to the "substantially advances" test); John D. Echeverria, *Do Partial Regulatory Takings Exist?*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES, 219–50, 230 (Thomas E. Roberts ed., 2002) (noting that "there are substantial grounds for questioning whether the *Penn Central* multifactor test represents a coherent standard for evaluating whether regulations amount to takings"); Summers, *supra* note 21, at 873–78 (summarizing debate over whether this is a true balancing test or "merely . . . ad hoc factual determinations" and arguing for the latter).

B. The Future for Nollan *and* Dolan

Despite *Lingle*'s clarity, it leaves "land-use extraction" twins *Nollan* and *Dolan*[71] in a remarkably precarious position.[72] Justice O'Connor, and Judge Fletcher before her, kept them explicitly distinct from the case at hand.[73] Yet, "substantially advances" is a due process inquiry,[74] and a thoughtful analysis shows no relevant substantive due process distinction between "adjudicative land-use extraction" and legislative regulations like Act 257.

To force the distinction between *Lingle* and "adjudicative land-use extraction" cases, Justice O'Connor made much of the fact that *Nollan* and *Dolan*, unlike *Lingle*, require property owners to physically alter the use of their land.[75] The emphasis on the physical nature of the taking appeals to Lockeans or romantics,[76] but it is a technicality in a modern world where value is fungible and economic considerations dominate our thinking.[77] To see how ineffective the distinction is, imagine that Hawaii had mandated that Chevron dedicate five square feet of each service station to the preservation of native plants. Would putting service station soil to work for

---

[71] It is well established that these cases counteract important environmental initiatives. *See* Srinath Jay Govindan, Note, *"Taking" Steps to Protect Private Property and Endangered Species: Constitutional Implications of Habitat Conservation Planning after* Dolan v. Tigard, 47 EMORY L.J. 311 (1998) (discussing the dangers *Dolan* posed to the Endangered Species Act pre-*Lingle*); Editorial, *Judicial Takings and Givings*, WASH. POST, May 28, 2005, at A24 ("*Lingle* is important, because in it the court repudiated a dangerous doctrine in had articulated [in *Agins*], a doctrine with horrid implications for environmental and other regulatory enforcement.").

[72] Both *Nollan* and *Dolan* found regulatory takings in cases in which local planners attached restrictions and requirements while issuing building permits. Using the *Agins* "substantially advances" language the Court found that the land use requirements were takings, because the planners failed to show an "essential nexus" between the regulations and their stated legitimate purposes. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834–37 (1987) (providing background and reasoning through the facts); Dolan v. Tigard, 512 U.S. 374, 385–91 (1994) (same); *see also* Edward J. Sullivan, *Return of the Platonic Guardians:* Nollan *and* Dolan *and the First Prong of Agins*, 34 URB. LAW. 39, 40 (2002) (noting that *Nollan* and *Dolan* "turn solely" on the first prong of *Agins*); *see also* Siegel, *supra* note 68.

[73] *See* Lingle v. Chevron USA, 125 S. Ct. 2086 (2005); *Chevron II*, 224 F.3d at 1044 (Fletcher, J., concurring in judgment).

[74] *Lingle*, 125 S. Ct. at 2086.

[75] *Id*.; *but see* Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (emphasizing that a finding of a taking turns on the degree of the interference with the right, and not the character of the property at issue); *see also Chevron IV*, 363 F.3d at 850 (pointing out that other physical takings receive rational basis review).

[76] *See generally* James R. Stewart, *Property, the Common Law, and John Locke*, *in* NATURAL LAW AND CONTEMPORARY PUBLIC POLICY 193, 193–218 (David F. Forte ed., 1998).

[77] *See* aao r o3(iLin5(k4(g)(a)1e)8(id 3.7v)-t) g3d

the public good really be more of a burden on Chevron than economic regulations that control its commercial transactions?[78]

Perhaps the magic word is "adjudicative."[79] One of the most striking aspects of *Nollan* and *Dolan* is the personally tailored nature of the "land-use exactions,"[80] and the word "adjudicative" calls to mind the long-established doctrine of *Londoner* and *Bi-Metallic*, which distinguishes between cases in which decisions have general application and those in which the decisions affect only a few individuals.[81] Prior to *Lingle*, some scholars had already reviewed administrative practice with respect to takings law, and explored relevant differences between legislative action like that in *Lingle*, and the action by administrative agencies like that in *Nollan* and *Dolan*.[82]

However, *Lingle* makes clear that the "substantially advances" test is substantive—not procedural—due process.[83] The administrative practice cases did not involve evaluating the wisdom behind any particular regulations.[84] Instead, they asked a more fundamental question—whether this was a legitimate mechanism for making law. If one seriously believed that administrative agencies were inappropriately distributing public burdens through the nature of their design, desultory substantive review of particular land-use extraction cases would be wholly inadequate to satisfy the Fifth Amendment. Indeed, the very existence of agency adjudication would be called into question.

---

[78] One might rightly point out that this analysis questions whether *Nollan* and *Dolan* should be considered "takings." *See* Sullivan, *supra* note 72, at 52 ("Nowhere in *Nollan* or *Dolan* is there any examination of whether the property has been 'taken' in any sense people would ordinarily attribute to that word."). But even assuming *Nollan* and *Dolan* are categorical takings, the argument reveals that there is nothing special about "land-use" cases that requires heightened due process scrutiny.

[79] *Lingle*, 125 S. Ct. at 2086.

[80] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. Tigard, 512 U.S. 374 (1994).

[81] Londoner v. Denver, 210 U.S. 373 (1908) (finding a tax too specific to be quasi-legislative and therefore not general administrative rule-making); Bi-Metallic Investment Co. v. State Bd. of Equalization of Colo., 239 U.S. 441 (1915) (finding a tax general enough to be considered quasi-legislative administrative rule-making); *see also* Administrative Procedure Act, 5 U.S.C. § 551(5), (7) (2004) (defining "rule making" and "adjudication").

[82] *See* Sullivan, *supra* note 72, at 71 (applying these administrative law principles to the takings problem and arguing that "arbiters of this balance must not be Supreme Court Justices, but rather the legislators and their agencies, in decisions made within the administrative process, and subject to administrative review"); Breemer, *supra* note 77, at 405–07 (arguing that the legislative-adjudicative distinction is hard to apply to takings in a meaningful way); Fred Bosselman, Dolan *Works*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 345, 348 (Thomas E. Roberts ed., 2002) (taking a functionalist approach to defend the exaction practices in *Dolan*, and showing that "the legislative-adjudicative distinction is irrelevant" in this context); *but see* Kmiec, *supra* note 68, at 377 (asserting that "some nominally legislative land-use actions are really administrative or adjudicatory in character and merit closer review or specialized procedural protections to avoid the disproportionate singling out of particular landowners" but offering no additional explanation).

[83] *See Lingle*, 125 S. Ct. at 2082–83; *supra* note 21.

[84] *See supra* note 81.

This is not the direction taken by Justice O'Connor in *Lingle*; instead, she explained that takings inquiries focus on the burden felt by the property owner, which does not change if a different branch of government acts, just as it does not change when the government has a different purpose or achieves higher efficacy.[85] Assuming you have identical regulations, a skillfully crafted "essential nexus" does nothing to lessen a property owner's burden; nor does replacing an administrative official's signature with a legislative vote. Naturally, disproportionate burdens are a concern,[86] but rational basis review provides adequate protection. It unfairly discredits administrative agencies to suggest that their actions should incur unusually high judicial scrutiny, when the same action by a legislature would receive mere rational basis review.[87]

Asking courts to "substitute their predictive judgments for those of elected legislatures and expert agencies" and to "scrutinize the efficacy of a vast array of state and federal regulations"[88] deserves a sound and explicit justification absent from *Nollan* and *Dolan*.[89] Justice O'Connor should have extended her *Lingle* reasoning to make this point rather than cautiously protecting wrongly decided[90] precedent. But even without an explicit overruling, *Lingle* fatally undercuts *Nollan* and *Dolan*.[91] It also signals the Court's realization that the political branches are better left alone.

Before this opinion, courts readily applied the "substantially advances" test.[92] Now, lower courts concerned with precedent should hesitate to rely on it, and perhaps disregard *Nollan* and *Dolan* all together. Lingle reinforces a political atmosphere in which both liberals and conservatives disfa-

---

[85] *Cf. Lingle*, 125 S. Ct. at 2084.

[86] S*ee* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (noting that the takings' burden should not be disproportionately concentrated).

[87] The suggestion also shows that determining a taking and reviewing due process are highly conflated in *Nollan* and *Dolan*. *Cf. Lingle*, 125 S. Ct. at 2082–83.

[88] *Id.* at 2086.

[89] For an idea of what such a sound and explicit justification would look like, see generally JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE 14TH AMENDMENT (1983) (discussing suspect classes that deserve heightened scrutiny).

[90] *See* Sullivan, *supra* note 72, at 49 (remarking that in *Dolan*, as in *Nollan*, "the Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof. . . . [and] the Court was reverting to territory it had long since rightly abandoned").

[91] *Cf.* Skinner v. Oklahoma, 316 U.S. 535, 538 (1942) (cautiously endorsing *Buck v. Bell*, 274 U.S. 200 (1927) while destroying its logical foundation); WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5 ("That one may smile and smile and be a villain.").

[92] *See* Breemer, *supra* note 77, at 381–82 (observing that "unlike the Court's other regulatory takings tests . . . the essential nexus standard is routinely enforced beyond the halls of the High Court"); *but see* Sullivan, *supra* note 72, at 40 (noting that outside *Nollan* and *Dolan* the Supreme Court has never "seen fit to impugn a land-use ordinance as a taking on the basis that it failed to substantially advance legitimate state interests"); Murray Feldman & Michael J. Brennan, *Judicial Application of the Endangered Species Act and the Implication for Takings of Protected Species and Private Property*, *in* PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT, 25, 38 (Jason F. Shogren ed., 1998) ("Despite the political discourse that has linked the constitutional takings/ private property debates, there has been little litigation addressing the subject under the Endangered Species Act.").

vor probing judicial review. Declining to apply the "substantially advances" test in future cases can avoid the inherent contradictions that arise when one tries to reconcile *Nollan* and *Dolan* with *Lingle*. Thus, *Lingle* may develop additional significance as legal victory for environmentalists, who depend on regulations and land-use restrictions in their efforts to protect human health, preserve endangered species and safeguard natural resources.