§10.2 Inverse Condemnation

§10.2.2 Taking by Regulation

Page 874, insert the following note:

In Lingle v. Chevron, U.S.A., Inc., 125 S.Ct. 2074 (2005), the Supreme Court clarified the relationship between *Lucas*, *Penn Central*, and other possible Takings tests. The Court held that language in previous decisions suggesting that a regulatory act could be a taking if it does not "substantially advance" a legitimate state interest was misplaced, and really described a Due Process test rather than a Takings Clause test.

At issue was a price regulation statute that limited the rent that oil companies could charge dealers for the lease of company-owned facilities. In *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980), the Court had first suggested that a government regulation "effects a taking if [such regulation] does not substantially advance legitimate state interests ...." The Court repeated that formulation in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704, 119 S.Ct. 1624 (1999) and had alluded to it in other decisions.

However, in *Lingle* the Court stated that:

Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property--however minor--it must provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).... A second categorical rule applies to regulations that completely deprive an owner of "all economically beneficial use" of her property....

Outside these two relatively narrow categories (and the special context of land-use exactions discussed below), regulatory takings challenges are governed by the standards set forth in *Penn Central*.... The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula' " for evaluating regulatory takings claims, but identified "several factors that have particular significance." Primary among those factors are...
"[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred. The Penn Central factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or Lucas rules. See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 617-618, 121 S.Ct. 2448 (2001).

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in Loretto, Lucas, and Penn Central) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. See Dolan v. City of Tigard, 512 U.S. 374, 384, 114 S.Ct. 2309 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-832, 107 S.Ct. 3141 (1987); Loretto.... In the Lucas context, of course, the complete elimination of a property's value is the determinative factor.... And the Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

In Agins v. City of Tiburon, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land...." Because this statement is phrased in the disjunctive, Agins' "substantially advances" language has been read to announce a stand-alone regulatory takings test that is wholly independent of Penn Central or any other test. Indeed, the lower courts in this case struck down Hawaii's rent control statute as an "unconstitutional regulatory taking," based solely upon a finding that it does not substantially advance the State's asserted interest in controlling retail gasoline prices. Although a number of our takings precedents have recited the "substantially advances" formula minted in Agins, this is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.
There is no question that the "substantially advances" formula was derived from due process, not takings, precedents. In support of this new language, Agins cited Nectow v. Cambridge, 277 U.S. 183, 48 S.Ct. 447, a 1928 case in which the plaintiff claimed that a city zoning ordinance "deprived him of his property without due process of law in contravention of the Fourteenth Amendment," Agins then went on to discuss Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926), a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

When viewed in historical context, the Court's reliance on Nectow and Euclid is understandable. Agins was the Court's first case involving a challenge to zoning regulations in many decades, so it was natural to turn to these seminal zoning precedents for guidance. Moreover, Agins' apparent commingling of due process and takings inquiries had some precedent in the Court's then-recent decision in Penn Central. See 438 U.S., at 127, 98 S.Ct. 2646 (stating in dicta that "[i]t is ... implicit in Goldblatt v. Hempstead, 369 U.S. 590 (1962),] that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose....") Finally, when Agins was decided, there had been some history of referring to deprivations of property without due process of law as "takings," see, e.g., Rowan v. Post Office Dept., 397 U.S. 728, 740, 90 S.Ct. 1484 (1970), and the Court had yet to clarify whether "regulatory takings" claims were properly cognizable under the Takings Clause or the Due Process Clause, see Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 197-199, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

Although Agins' reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise. The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for 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.

In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it 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.
Chevron appeals to the general principle that the Takings Clause is meant "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." But that appeal is clearly misplaced, for the reasons just indicated. A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that effectively serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an ineffective regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.

Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking." First English Evangelical Lutheran Church, 482 U.S., at 315, 107 S.Ct. 2378 (emphasis added). Conversely, if a government action is found to be impermissible--for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process--that is the end of the inquiry. No amount of compensation can authorize such action.

Chevron's challenge to the Hawaii statute in this case illustrates the flaws in the "substantially advances" theory. To begin with, it is unclear how significantly Hawaii's rent cap actually burdens Chevron's property rights. The parties stipulated below that the cap would reduce Chevron's aggregate rental income on 11 of its 64 lessee-dealer stations by about $207,000 per year, but that Chevron nevertheless expects to receive a return on its investment in these stations that satisfies any constitutional standard. Moreover, Chevron asserted below, and the District Court found, that Chevron would recoup any reductions in its rental income by raising wholesale gasoline prices. In short, Chevron has not clearly argued -- let alone established -- that it has been singled out to bear any particularly severe regulatory burden. Rather, the gravamen of 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. Whatever the merits of that claim, it does not sound under the
Takings Clause. Chevron plainly does not seek compensation for a taking of its property for a legitimate public use, but rather an injunction against the enforcement of a regulation that it alleges to be fundamentally arbitrary and irrational.

Finally, the "substantially advances" formula is not only doctrinally untenable as a takings test--its application as such would also present serious practical difficulties. The Agins formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations--a task for which courts are not well suited. Moreover, it would empower--and might often require--courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. To resolve Chevron's takings claim, the District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be "more persuasive" than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. Along the way, the court determined that the State was not entitled to enact a prophylactic rent cap without actual evidence that oil companies had charged, or would charge, excessive rents. Based on these findings, the District Court enjoined further enforcement of Act 257's rent cap provision against Chevron. We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation....

For the foregoing reasons, we conclude that the "substantially advances" formula announced in Agins is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation. Since Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim.

We emphasize that our holding today--that the "substantially advances" formula is not a valid takings test--does not require us to disturb any of our prior holdings. To be sure, we applied a "substantially advances" inquiry in Agins itself, ... and arguably also in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 485-492, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (quoting " 'substantially advance[s]' " language and then finding that the challenged statute was intended to further a substantial public interest). But in no case have we found a compensable taking based on such an inquiry....

Although Nollan and Dolan [also] quoted Agins' language, see Dolan, supra, at 385, 114 S.Ct. 2309; Nollan, supra, at 834, 107 S.Ct. 3141, the rule those
decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, Nollan and Dolan both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings. In neither case did the Court question whether the exaction would substantially advance some legitimate state interest. See Dolan, supra, at 387-388, 114 S.Ct. 2309; Nollan, supra, at 841, 107 S.Ct. 3141. Rather, the issue was whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in Dolan, these cases involve a special application of the "doctrine of 'unconstitutional conditions,' " which provides that "the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, Nollan and Dolan cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

* * *

Twenty-five years ago, the Court posited that a regulation of private property "effects a taking if [it] does not substantially advance [a] legitimate state interest." Agins, supra. The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course. We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above--by alleging a "physical" taking, a Lucas-type "total regulatory taking," a Penn Central taking, or a land-use exaction violating the standards set forth in Nollan and Dolan. Because Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.