AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Property/Takings

**Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005)**

*Chevron controlled 60 percent of the market for gasoline in Hawaii. Most of the gasoline that Chevron sold in the state was through independent lessee-dealer gas stations. Chevron typically owned the land and built the gas station but leased the station to a dealer, with Chevron receiving a monthly rent and a percentage of the retail sales (dealers were also required to buy Chevron gas at the wholesale price set by the oil company). In 1997, the Hawaii legislature limited the rent that an oil company could charge to a dealer to 15 percent of the dealer’s gross profits from gasoline sales plus 15 percent of gross sales on other products.*

*Chevron filed suit in federal district court seeking an injunction preventing the enforcement of the law. The parties jointly stipulated that the law reduced the aggregate rent on just under a fifth of lessee-dealer stations but allowed Chevron to increase the rent on the remaining stations. They also stipulated that Chevron had never been able to recover the cost of the dealer-lessee stations on rent alone, and that Chevron expected to make a positive return-on-investment on the dealer-lessee stations even under the new law. The district court ruled in Chevron’s favor, concluding that the statute failed to substantially advance a legitimate state interest and therefore was an unconstitutional taking because it would not have the intended effect of reducing Chevron’s dominance of the local gas market or lower retail gas prices. After a further round of review, a divided circuit court ultimately affirmed that ruling. In a unanimous decision, the U.S. Supreme Court reversed the lower court, concluding that the “substantially advances” a legitimate state interest standard was not a proper test for determining whether an unconstitutional regulatory takings had occurred.*

JUSTICE O’CONNOR, delivered the opinion of the Court.

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase — however fortuitously coined. A quarter century ago, in *Agins v. City of Tiburon* (1980), the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests. . . ." . . .

. . . . This case requires us to decide whether the "substantially advances" formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.

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The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, provides that private property shall not "be taken for public use, without just compensation." As its text makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987). . . .

The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. . . .

Beginning with *Pennsylvania Coal Co. v. Mahon* (1922)*,* however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster — and that such "regulatory takings" may be compensable under the Fifth Amendment. In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The rub, of course, has been — and remains — how to discern how far is "too far." . . .

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. *Loretto v. Teleprompter Manhattan CATV Corp.* (1982). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of her property. *Lucas v. South Carolina Coastal Council* (1992). We held in *Lucas* that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property.

Outside these two relatively narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Co. v. New York City* (1978). . . .

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. . . .

In *Agins,* 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. . . . 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.

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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. *County of Sacramento v. Lewis* (1998). But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.

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. . . .

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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.

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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.

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*Reversed*.

JUSTICE KENNEDY, concurring.

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. The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry. . . .