

LINGLE'S LEGACY: UNTANGLING SUBSTANTIVE DUE PROCESS FROM TAKINGS DOCTRINE

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*This Article examines the importance of the Supreme Court's recent decision in *Lingle v. Chevron USA, Inc.*, arguing that, rather than a simple technical correction, it marked the conclusion to a long-running debate within the Court's regulatory takings jurisprudence on whether substantive due process has a role in takings analysis. The author traces the Court's early land use cases, which were based in due process, to identify the origins of two separate strands of analysis for government regulations affecting the use of property, one focusing on the extent of government intrusion, the other on the substantive legitimacy of the regulation. This duality between economic impact and substantive legitimacy persisted, although not fully acknowledged, in modern takings analysis, and underlies the debates within the Court over the proper takings remedy and the extent of the government's liability for regulations designed to prevent public harm. The author then analyzes the Court's lengthy struggle to define whether the legitimacy of government action (a due process inquiry) is properly a part of the takings analysis, noting the tension between *Penn Central* and *Agins*. In *Lingle*, the Article concludes, the Court took its clear opportunity to reject the "substantially advances" test, removing any substantive due process element from the takings inquiry and espousing a narrow vision of what constitutes a regulatory taking that will have important policy consequences.*

INTRODUCTION

Compared to the *sturm und drang* surrounding the *Kelo*¹ decision, the Supreme Court's decision last year in *Lingle v. Chevron USA, Inc.*² dropped from sight with hardly a ripple. The lack of sparks within a unanimous Court, together with a relatively unsexy subject matter—whether the Takings Clause permits review of the economic rationality of a rent control ordinance for gas stations—created a sense that *Lingle* was another of the Court's routine technical corrections to the law, undertaken for reasons understandable only to the Justices and scholars. Even those familiar with the field of regulatory takings are likely to view *Lingle* as a narrow decision that simply brought a little-used and poorly understood the-

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¹ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (holding that condemnation of private property for the purpose of economic development satisfies the Taking Clause's "public use" requirement).

² 125 S. Ct. 2074 (2005).

ory of takings liability—a “frolic and detour” in the Court’s regulatory takings jurisprudence, as one commentator calls it³—to a sudden end.

I submit that those perceptions are mistaken. In fact, *Lingle* marks the culmination of one of the more prolonged and difficult debates in the history of the Court’s constitutional jurisprudence. For more than a century, the Court has struggled to define the relationship between the Fifth Amendment’s protection against deprivation of property without due process and its command that property not be taken for public use without just compensation. By finally separating the long-entangled strands of substantive due process from takings doctrine, *Lingle* brings a remarkable coherence to the Court’s confused regulatory takings doctrine. The paradigm of a regulatory taking that emerges, once extraneous notions of substantive due process are filtered out, is relatively clear, and quite narrow. And that narrow understanding has profound consequences, I believe, for those who have been engaged in the struggles over property rights in this country, whether on the side of private property owners or government regulators.

I. A SIMPLE SEPARATION OF CONSTITUTIONAL DOCTRINES ACCIDENTALLY CONJOINED?

Lingle confronted the Court with the legacy of confusion resulting from the Court’s historic intermingling of concepts of substantive due process and takings. Twenty-five years prior to *Lingle*, Justice Powell, writing for a unanimous Court, had stated in *Agins v. City of Tiburon*⁴ 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.”⁵ The second prong of the *Agins* standard reflected the Court’s long-standing focus in regulatory takings doctrine on the economic impact of regulation on a property owner, prominently displayed in its landmark decision in *Penn Central Transportation Co. v. City of New York*⁶ two years previous. The first prong, however, appeared to invite an examination of a regulation’s means-ends rationality, an inquiry traditionally understood to lie under substantive due process. The Court’s reliance in *Agins* upon *Nectow v. City of Cambridge*⁷ and *Village of Euclid v. Ambler Realty Co.*,⁸ both seminal due process cases, confirmed the origins of the “substantially advances” test in due process, rather than in takings doctrine. The *Agins* Court did not explain

³ John D. Echeverria, *Lingle, Etc.: The U.S. Supreme Court’s 2005 Takings Trilogy*, 35 ENVTL. L. REP. 10,577, 10,582 (2005).

⁴ 447 U.S. 255 (1980) (upholding municipal zoning ordinance against takings challenge).

⁵ *Id.* at 260 (citations omitted).

⁶ 438 U.S. 104 (1978).

⁷ 277 U.S. 183 (1928).

⁸ 272 U.S. 365 (1926).

the relevance of such a means-ends inquiry to takings doctrine, and subsequent decisions invoking the *Agins* formulation offered no better insight.⁹

The question presented in *Lingle*—whether the “substantially advances” test in fact constitutes a valid theory of takings liability—was thus on its surface a straightforward matter of correcting an historic error in constitutional doctrine. Petitioner State of Hawaii argued to the Court that its incorporation of due process concepts into takings doctrine had simply been a mistake; understandable, perhaps, in historic context, but wrong nonetheless. The Court accepted that premise, declaring: “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.”¹⁰ The Court acknowledged the origins of the “substantially advances” test in due process precedents, and concluded that its language had been “regrettably imprecise.”¹¹ The substantially advances formula, the Court concluded, “prescribes an inquiry in the nature of a due process, not a takings, test, and . . . has no proper place in our takings jurisprudence.”¹²

At one level, therefore, *Lingle* can be seen as simply separating distinct strands of constitutional doctrine that had been mistakenly woven together, for reasons that now appear insubstantial or even accidental, twenty-five years ago in *Agins*. The full story of the Court's century-long dalliance in takings law with due process principles, however, and *Lingle*'s significance for that debate, are considerably more complex.

II. THE HISTORIC TENSION BETWEEN DUE PROCESS AND REGULATORY TAKINGS DOCTRINE: *MUGLER* VERSUS *PENNSYLVANIA COAL*

The evolution of modern regulatory takings doctrine has been marked by a fundamental tension between the Court's original approach to the constitutionality of land use regulations in the late nineteenth and early twentieth centuries, which focused on the legitimacy of the government's actions under principles of substantive due process, and its subsequent focus, following the seminal decision of *Pennsylvania Coal Co. v. Mahon*,¹³ on whether the severity of the economic impact of such regulations demands compensation under the Takings Clause.

The Court's early cases addressing the constitutionality of property regulations under the Due Process Clause centered on whether a challenged

⁹ The Court acknowledged in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999), that its decisions have not provided “a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests.”

¹⁰ *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074, 2077 (2005).

¹¹ *Id.* at 2083.

¹² *Id.*

¹³ 260 U.S. 393 (1922).

regulation properly fell within the government's police power. If the regulation rationally furthered legitimate state interests, it was sustained even if it diminished or destroyed private property. As the Court made clear in *Mugler v. Kansas*,¹⁴ it viewed the constitutional principle that no person shall be deprived of life, liberty, or property without due process of law as fully compatible with the "equally vital" principle that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."¹⁵ The critical issue for the Court in these land use cases, therefore, was whether a challenged statute could reasonably be viewed as preventing injury to the community. If so, it fell within the state's police power, and did not violate the Due Process Clause regardless of its economic impact.¹⁶

These early land use cases did indeed involve allegations that government regulation—for example, the prohibition of the manufacture of alcoholic beverages in *Mugler*—in effect took private property for public use without just compensation.¹⁷ Such claims, however, were framed under the Due Process Clause of the Fourteenth Amendment, alleging that the imposition of regulations that severely diminished the value of private property violated due process unless accompanied by compensation.¹⁸ The Court in *Mugler*, however, flatly rejected the notion that a valid police power regulation could be conditioned on the payment of compensation to an affected property owner, implicitly repudiating the underlying idea that government regulation can effect a taking at all.

This interpretation of the fourteenth amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community¹⁹

¹⁴ 123 U.S. 623 (1887) (upholding state prohibition on the manufacture of alcoholic beverages against due process challenge by owner of brewery).

¹⁵ *Id.* at 665.

¹⁶ As scholars have noted, under the classical principles of substantive due process then prevailing, the Court viewed the question of the proper extent of the state's police power as involving an idealized boundary between the property owner and the surrounding community. If an ordinance fell within the sphere of the government's proper powers, it would be sustained regardless of the economic impact on the property owner. *See, e.g.*, Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 *YALE L.J.* 613, 624–25, 628–30 (1996); William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 *GEO. L.J.* 813, 832–36 (1998).

¹⁷ *See Mugler*, 123 U.S. at 664 (noting defendants' contention that the prohibition on manufacture of alcoholic beverages so diminished the value of their brewery that it constitutes, "in effect, a taking of property for public use without compensation, and [a deprivation of the citizen's] property without due process of law").

¹⁸ *See id.*

¹⁹ *Id.*

[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply on the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit *The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and consistently with the existence and safety of organized society, cannot be burdened with the condition that the State must compensate . . . individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury on the community.*²⁰

Thus, in *Mugler* and later cases such as *Hadacheck v. Sebastian*,²¹ *Euclid*,²² and *Miller v. Schoene*,²³ the Court broadly upheld land use regulations that protected public health, safety or welfare as valid exercises of the police power, without regard for the extent of economic burden imposed by such regulations. *Nectow*,²⁴ later relied upon by the Court in *Agins*, struck down an application of a zoning ordinance to a specific property that had been found not to serve any legitimate state purpose, again without any particular consideration of the economic impact of the law.

In *Pennsylvania Coal Co*, however, the case credited today as the foundation of the Court's regulatory takings jurisprudence, Justice Holmes advanced a very different model for analysis of the constitutionality of land use regulations. In the face of the long line of cases reviewing whether land use regulations were proper exercises of the police power without reference to their economic impact, Justice Holmes declared in *Pennsylvania Coal* that the extent of the economic injury suffered by the property owner was in fact a *critical* factor in determining whether government regulation exceeded the police power, and that if such impact were too severe, it could indeed require compensation.

In *Pennsylvania Coal*, the Court reviewed the constitutionality of a state law that prohibited coal mining causing surface subsidence, even where the coal company owned property and contract rights to do so under state law. Writing for the Court, Justice Holmes succinctly summarized the question as he saw it: "As applied to this case the statute is ad-

²⁰ *Id.* at 668–69 (emphasis added).

²¹ 239 U.S. 394 (1915).

²² 272 U.S. 365 (1926).

²³ 276 U.S. 272 (1928).

²⁴ 277 U.S. 183 (1928).

mitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.”²⁵ He then observed:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. *One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.*²⁶

Justice Holmes summarized his views in a famous, if cryptic, aphorism: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”²⁷ Noting that making the mining of coal commercially impracticable “has very nearly the same effect for constitutional purposes as appropriating or destroying it,”²⁸ Justice Holmes held that, although the state would presumably be warranted in using its power of eminent domain to prevent mining that caused surface subsidence, in the absence of compensation the Pennsylvania law exceeded the state’s police powers.²⁹

The framework of analysis presented by Justice Holmes in *Pennsylvania Coal* thus differed radically from earlier (and indeed, from later) decisions of the Court examining whether land use regulations constituted valid exercises of the police power without consideration of the extent to which such regulations diminished the value of the affected property. In Justice Holmes’s model, the police power permits the government to change the law in a manner that adversely affects property values without any compensation, but only up to a point. Beyond that point, the government is required to proceed by the exercise of eminent domain, with just compensation to affected property owners.

Justice Holmes thus implicitly rejected the reasoning of the Court’s contemporaneous land use cases holding that regulation seeking to protect the public’s health, safety, morals or welfare was a valid exercise of the police power regardless of its economic impact on affected property owners, and could not be conditioned upon payment of compensation. Indeed, the Court’s departure in *Pennsylvania Coal* from that older para-

²⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

²⁶ *Id.* (emphasis added).

²⁷ *Id.* at 415.

²⁸ *Id.* at 414.

²⁹ *Id.* at 416.

digm is vividly demonstrated by Justice Brandeis's dissent, which explicitly argued that valid police power regulations cannot be burdened with a duty to pay compensation, relying on the Court's decisions in *Mugler*, *Hadacheck*, and other land use cases.³⁰ Justice Holmes dismissed the notion that a valid public interest was the determinative issue in evaluating the constitutionality of a regulation, however, noting that "[t]he protection of private property in the Fifth Amendment *presupposes* that it is wanted for public use, but provides that it shall not be taken for such use without compensation."³¹ Justice Holmes added: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."³²

The modern doctrine of "regulatory takings" unmistakably traces to Justice Holmes's seminal analysis in *Pennsylvania Coal*, and effectively establishes a limiting principle on the Court's earlier cases categorically upholding land use regulations under the Due Process Clause. Inspired by Justice Holmes's maxim that property regulation that "goes too far" constitutes a taking, regulatory takings doctrine focuses on whether state action that is legitimate may nonetheless impose unfair economic burdens on particular property owners, warranting payment of just compensation. To the extent that *Mugler* and other early cases held that valid police power regulation cannot be conditioned on payment of compensation, and implicitly suggested that regulation cannot effect a taking, it seems impossible to avoid the conclusion that *Pennsylvania Coal* effectively overruled those cases.

III. THE COURT'S STRUGGLE TO DEFINE THE MEANING OF ITS EARLY LAND USE CASES FOR TAKINGS LAW

Oddly, however, *Pennsylvania Coal* was apparently not recognized by the Court at the time as establishing a new doctrine of takings law (or as imposing a new limit on its prior cases that upheld land use regulations as valid exercises of the police power). *Pennsylvania Coal* was viewed by the Court as a Due Process and Contracts Clause case, rather than as a takings case,³³ and the decision was rarely cited by the Court in the next forty years. The Court's subsequent decisions involving the constitutionality of land use regulations under due process—*Euclid*, *Miller v. Schoene*, and *Nectow*—returned to the categorical due process analysis of *Mugler*;

³⁰ *Id.* at 416–22 (Brandeis, J., dissenting).

³¹ *Id.* at 415 (majority opinion) (emphasis added).

³² *Id.* at 416.

³³ Brauneis, *supra* note 16, at 666. Indeed, it is ambiguous in *Pennsylvania Coal* whether Justice Holmes himself viewed a regulation that "goes too far" as effecting a taking for which compensation is required, or as simply exceeding the government's police power, and therefore invalid under the Due Process Clause.

the Court did not cite *Pennsylvania Coal* or suggest that the economic impact of the regulations at issue in those cases might impose a check upon the exercise of the police power. Justice Holmes joined in those decisions without comment.

The Court's failure to recognize the inherent conflict between the new framework of constitutional analysis announced in *Pennsylvania Coal* and the categorical due process analysis of its earlier land use cases has had profound consequences in the halting evolution of regulatory takings doctrine. The Court has continued to invoke its due process cases as precedent in its regulatory takings jurisprudence, relying upon *Hadacheck*, *Euclid*, and other early cases, for example, for the proposition that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."³⁴ That proposition would appear to be in direct conflict with the Court's holding in *Lucas v. South Carolina Coastal Council*³⁵ that denial of all economically viable use of land is a *per se* taking, and in implicit conflict with Justice Holmes's framework of analysis in *Pennsylvania Coal*, which is premised on recognition that when diminution in value "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."³⁶ Yet the Court had not acknowledged that the framework of analysis in its early due process cases was inapposite in this respect to modern takings doctrine.³⁷ Indeed, in 1987, the Court flatly rejected a petitioner's "implicit assertion that *Pennsylvania Coal* overruled" *Mugler* and other early due process cases.³⁸

The significance of the Court's early land use cases, and the relationship between the concepts of substantive due process and takings doctrine they embody, has nonetheless been at the center of two of the most difficult doctrinal debates in the Court's evolving understanding of the premises of regulatory takings doctrine: whether the proper remedy for a regulatory taking is payment of just compensation, rather than invalidation of the offending ordinance, and whether there is a broad exception to takings liability for government regulation intended to protect the public from harm.

³⁴ *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915)). *Accord*, *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("When we review regulation, a reduction in the value of property is not necessarily equated with a taking.") (citing *Hadacheck*, 239 U.S. at 394, and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)).

³⁵ 505 U.S. 1003 (1992).

³⁶ 260 U.S. at 413.

³⁷ *Concrete Pipe*, for example, post-dates *Lucas*, but makes no reference to its holding regarding deprivation of economic use.

³⁸ *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 490 (1987).

A. *Is the Remedy for a Regulatory Taking Payment of Compensation?*

At its heart, the remedy question turns on an issue left ambiguous in *Pennsylvania Coal*: whether a regulation that “goes too far” exceeds the government’s police power, and is thus a violation of the Due Process Clause, or whether it instead effects an actual taking of the owner’s property for which just compensation must be provided under the Takings Clause. The Court’s early land use cases clearly treated claims that land use regulations took property without compensation as arguments that the ordinances were invalid under the Due Process Clause.³⁹ A number of state courts, prominently including the California Supreme Court, took a similar position in modern times, holding that the appropriate remedy when an ordinance is found to effect a taking is a declaratory judgment or mandamus holding the law invalid, rather than an award for “inverse condemnation.”⁴⁰

The Supreme Court took a long succession of cases in the late 1970s and 1980s in an effort to resolve this fundamental point. The California Supreme Court’s endorsement of the invalidation theory in *Agins* in 1979 prompted the Supreme Court to grant certiorari in that case, but the Court was unable to reach the remedy issue because it affirmed the California court’s finding that no taking had occurred. The following term, the Court granted review in *San Diego Gas & Electric Co. v. City of San Diego*,⁴¹ but again found itself unable to reach the merits of the issue because it was unclear whether the lower courts had made a conclusive finding of a taking. Justice Brennan dissented from dismissal of the case, however, and addressed the remedial issue squarely, concluding that the Court’s precedents in *Pennsylvania Coal*, *Goldblatt*, *Penn Central*, and *Agins* established that a restrictive regulation could effect an actual taking of property requiring compensation under the Fifth Amendment.⁴² Justice Brennan rejected the views of several state courts that Justice Holmes’s use of the word “taking” in *Pennsylvania Coal* was “metaphorical,” and meant to describe the limit beyond which government could not constitutionally control land use by regulation without an exercise of eminent domain.⁴³ Noting that “[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property,” Justice Brennan concluded that an award of just compensation was the only appropriate rem-

³⁹ See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 664 (1887).

⁴⁰ See, e.g., *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), *aff’d on other grounds*, 447 U.S. 255 (1980).

⁴¹ 450 U.S. 621 (1981).

⁴² *Id.* at 647–50 (Brennan, J., dissenting).

⁴³ *Id.* at 648 n.14, 650 n.17.

edy, even in circumstances where the government rescinded the offending ordinance.⁴⁴

The Court again took cases in 1985 and 1986 to resolve the issue of the appropriate remedy when a law is determined to effect a taking, but was forced to dispose of each case on procedural grounds. In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*,⁴⁵ the Court held that the issue of remedy was not ripe because the plaintiff had not yet obtained a final decision regarding the application of the challenged zoning ordinance to its property, and had not utilized the procedures the state provided for obtaining just compensation. Justice Blackmun's opinion recognized, however, that the fundamental issue of whether an unduly restrictive regulation effects a taking under the Takings Clause or instead is simply invalid under due process had not to that point been resolved, and treated both positions at length and with equal respect.⁴⁶ Noting that the Court "often has referred to regulation that 'goes too far' . . . as a 'taking,'"⁴⁷ Justice Blackmun emphasized the ambiguity of the Court's use of that term, plainly showing that the Court was not yet persuaded that a regulation could effect an actual taking within the meaning of the Takings Clause:

*Even assuming that those decisions meant to refer literally to the Takings Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation, . . . and even assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld.*⁴⁸

The next term, in *MacDonald, Sommer & Frates v. County of Yolo*,⁴⁹ the Court once again failed to reach the merits of the remedy issue for procedural reasons. Significantly, however, neither the majority nor the dissenting Justices returned to the theoretical question of whether an unduly restrictive land use regulation constitutes an actual taking or a violation of due process. Rather, all nine Justices seemed to assume that such a regulation effected a taking, leaving open only the question whether the government's rescission of an offensive ordinance required compensation for a "temporary" taking for the period the regulation was in effect.

The Court finally reached and resolved the remedy issue in *First English Evangelical Lutheran Church of Glendale v. County of Los Ange-*

⁴⁴ *Id.* at 652, 653–56.

⁴⁵ 473 U.S. 172 (1985).

⁴⁶ *See id.* at 185–86, 198–99.

⁴⁷ *Id.* at 185 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

⁴⁸ *Id.* at 185 (emphasis added).

⁴⁹ 477 U.S. 340 (1986).

les.⁵⁰ Reviewing a claim that a county ordinance restricting construction in a flood plain effected a regulatory taking, Chief Justice Rehnquist's opinion for a six-Justice majority concluded that the state court's dismissal of the plaintiff's claim for compensatory damages "isolates the remedial question for our consideration."⁵¹ The remedial question in *First English* was also isolated, significantly, from the larger constitutional debate in *San Diego Gas & Electric* and *Williamson County* regarding whether an unduly restrictive regulation effects a compensable taking or is simply invalid under due process. The Court noted that the state court in *First English* had not relied on the theory that regulatory measures may never constitute a taking in the constitutional sense,⁵² and proceeded to analyze the remedial issue as if it were uncontested that a severely restrictive regulation can constitute a violation of the Takings Clause. Justice Rehnquist's opinion noted that it had been "established doctrine at least since Justice Holmes's opinion for the Court in *Pennsylvania Coal Co. v. Mahon*" that "if regulation goes too far it will be recognized as a taking,"⁵³ adding that "[l]ater cases have unhesitatingly applied this principle."⁵⁴ In short, the uncertainties expressed by the Court about this issue just a few years earlier had been swept away, without explicit resolution.

To determine whether money damages were a necessary remedy for such a taking, Justice Rehnquist focused squarely on the fundamental compensatory purpose of the Takings Clause:

As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."⁵⁵

The Court in *First English* thus implicitly rejected the theory, adopted by the California Supreme Court and other state courts, that the duty to avoid taking private property without compensation creates a substantive limitation upon the government's ability to legislate, rendering regulations that work a taking invalid under the Due Process Clause. More broadly, the Court's focus on the compensatory purpose of the Takings

⁵⁰ 482 U.S. 304 (1987).

⁵¹ *Id.* at 311.

⁵² *Id.* at 311–12.

⁵³ *Id.* at 316 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

⁵⁴ *Id.* at 317.

⁵⁵ *Id.* at 314–15 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Clause seemed to disclaim *any* use of the Takings Clause to hold government action invalid, so long as compensation can be obtained. The Court's treatment of the Takings Clause as a condition upon "otherwise proper" regulation echoes Justice Holmes's observation in *Pennsylvania Coal* that "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation."⁵⁶

B. The "Harm Prevention" Exception

The dissent in *First English* by Justices Stevens, Blackmun, and O'Connor invoked the Court's old land use cases for a different proposition, however, marking a second major theoretical debate concerning the role of these due process precedents in takings doctrine. The dissenting Justices argued that *First English* did not present a valid takings issue because the county flood plain ordinance at issue was a protection of the public health, safety and welfare that could not, under the principle established in *Mugler*, constitute a taking.⁵⁷ That issue—whether the Court's early land use cases in fact established a broad exemption from takings liability for government actions taken to protect the public from harm—divided the Court, and was at the center of heated debate within the Court in two major, and conflicting, decisions: *Keystone Bituminous Coal Association v. DeBenedictis*,⁵⁸ issued in 1987, and *Lucas*, issued in 1992.

In its landmark decision in *Penn Central*, the Court had given considerable discussion to its early land use cases, citing *Euclid*, *Nectow* and other due process decisions as support for the proposition that "government may execute laws or programs that adversely affect recognized economic values."⁵⁹ Justice Brennan's opinion observed that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."⁶⁰

Whether these cases established a broad exemption from takings liability for laws seeking to protect societal interests was at the center of two subsequent cases. In *Keystone*, the Court broadly re-examined its seminal case, *Pennsylvania Coal*, and addressed the relationship of its earlier due process cases to regulatory takings doctrine. *Keystone* involved a takings challenge to a Pennsylvania law prohibiting coal mining that caused subsidence damage, much like the statute in *Pennsylvania Coal*. Noting that "there are some obvious similarities between the cases," a five-Justice

⁵⁶ 260 U.S. at 415 (emphasis added).

⁵⁷ *First English*, 482 U.S. at 324–28 (Stevens, J., dissenting).

⁵⁸ 480 U.S. 470 (1987).

⁵⁹ 438 U.S. at 124.

⁶⁰ *Id.* at 125.

majority concluded that those similarities were less significant than the differences, and held that *Pennsylvania Coal* did not control.⁶¹

Writing for the Court, Justice Stevens characterized the portion of Justice Holmes's opinion in *Pennsylvania Coal* that addressed the general validity of the state law at issue in that case as "an advisory opinion."⁶² Justice Stevens described Justice Holmes's opinion as resting on two propositions, "both critical to the Court's decision:" first, the state law in *Pennsylvania Coal* served only private interests, not the general public health or safety, and so could not be sustained as an exercise of the police power; and second, the law made it commercially impracticable to mine certain coal.⁶³ Justice Stevens noted that the modern version of the anti-subsidence statute differed from the older law at issue in *Pennsylvania Coal* in that it broadly sought "to protect the public interest in health, the environment, and the fiscal integrity of the area," rather than merely seeking to protect individual homeowners.⁶⁴

Justice Stevens explicitly invoked the Court's early land use regulation cases as support for the proposition that the state's interest in protecting public health and safety weighed heavily against a finding that the Pennsylvania regulation effected a taking. Citing *Mugler*, *Hadacheck*, and other early due process cases, Justice Stevens noted that "[m]any cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis."⁶⁵ Justice Stevens quoted *Mugler*'s broad declaration that prohibitions on the use of property for purposes "injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property," and its assertion that the power of the States to prohibit property use prejudicial to the public "is not—and, consistently with the existence and safety of organized society cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."⁶⁶ Justice Stevens squarely rejected "petitioners' implicit assertion that *Pennsylvania Coal* overruled these cases which focused so heavily on the nature of the State's interest in the regulation."⁶⁷

⁶¹ *Keystone*, 480 U.S. at 481.

⁶² *Id.* at 484.

⁶³ *Id.* Justice Stevens linked those propositions to modern regulatory takings analysis, and in particular to the *Agins* test: "The two factors that the Court considered relevant, have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.'" *Id.* at 485 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

⁶⁴ *Id.* at 488.

⁶⁵ *Id.* at 489–90.

⁶⁶ *Id.* at 489 (quoting *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)).

⁶⁷ *Id.* at 490.

Justice Stevens concluded: "As the cases discussed above demonstrate, the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation."⁶⁸ The Court's decision did not rest on this principle alone, however, and thus did not squarely hold that an ordinance directed at protecting the public from harm could not constitute a taking. Viewing the coal that would have to be left in place to avoid subsidence as only a small part of the coal company's property interest, the Court also found that "petitioners have also failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases,"⁶⁹ and concluded that their attack on the statute under the Takings Clause "must surely fail."⁷⁰

In dissent, Justice Rehnquist, joined by Justices Powell, O'Connor, and Scalia, disputed the Court's treatment of much of Justice Holmes's opinion in *Pennsylvania Coal* as "advisory," noting that *Pennsylvania Coal* "has for 65 years been the foundation of our 'regulatory takings' jurisprudence," and had become "a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation Clause."⁷¹ Justice Rehnquist also disagreed with the majority's assertion that Justice Holmes perceived the subsidence law in *Pennsylvania Coal* as protecting only private interests, arguing that the Court in *Pennsylvania Coal* had recognized the public interests served by the earlier state law, but had made clear that "the mere existence of a public purpose was insufficient to release the government from the compensation requirement."⁷²

Although he concluded that both the earlier and the present subsidence laws in fact served similar public purposes, Justice Rehnquist asserted that the similarity in their purposes "does not resolve the question whether a taking has occurred; *the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power.*"⁷³ Justice Rehnquist expressed serious concern with the manner in which the majority had contrasted the effectiveness of the current subsidence law in achieving its purposes with the earlier law struck down in *Pennsylvania Coal*, noting that "our inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation."⁷⁴

Finally, although he did not dispute that the character of the government's action might be relevant to a takings inquiry, Justice Rehnquist strongly disagreed with the majority regarding the breadth of the so-called "nuisance exception" drawn from the Court's due process cases. Justice

⁶⁸ *Id.* at 492.

⁶⁹ *Id.* at 492-93.

⁷⁰ *Id.* at 502.

⁷¹ *Id.* at 508 (Rehnquist, J., dissenting).

⁷² *Id.* at 510.

⁷³ *Id.* at 511 (emphasis added).

⁷⁴ *Id.* at 511 n.3.

Rehnquist accepted that “[t]he *nature* of [the government’s] purposes may be relevant, for we have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use.”⁷⁵ He argued, however, that the “nuisance exception” was “narrow,” and should not be extended to “essentially economic concerns” regarding “preservation of buildings, economic development, and maintenance of property values” served by the state’s present subsidence law.⁷⁶ Moreover, Justice Rehnquist asserted that the Court’s cases had “never applied the nuisance exception to allow complete extinction of the value of a parcel of property.”⁷⁷ Contending that the state’s subsidence law had destroyed the plaintiffs’ interests in particular coal deposits and in a recognized estate in land, Justice Rehnquist asserted that the “nuisance exception” was inapplicable,⁷⁸ and ultimately concluded that the law constituted a taking.⁷⁹

Five years later, in *Lucas*,⁸⁰ the Court returned to the question of whether its older due process cases establish a broad exemption from takings liability for government action taken to protect the public from harm, with dramatically different results. In *Lucas*, the Court extended the second prong of the *Agins* formulation—that a government action is a taking if it “denies an owner economically viable use of his land”—into a *per se* rule that regulations that prohibit “all economically beneficial use of land” constitute takings. In doing so, the Court resolved the divisive issue of the extent to which ordinances enacted to protect the public from harm are excluded from takings liability, holding that the government may ban all economically beneficial use of private property only where the use would be illegal under established principles of state property or nuisance law. The Court treated its early due process cases not as establishing a broad categorical exemption from takings liability, but rather as reflecting only the police power predicate for government action to affect private property at all.

In *Lucas*, the Court held that a state coastal zone regulation that prohibited construction of new homes on beachfront property constituted a taking of the plaintiff’s beachfront lot. Accepting as a given the state court’s determination that the law deprived the plaintiff of all economically productive or beneficial use of his property, the Court declared that a regulation imposing such total loss constitutes a taking without the need for the Court’s traditional case-by-case weighing of circumstances.⁸¹ The Court

⁷⁵ *Id.* at 511.

⁷⁶ *Id.* at 513.

⁷⁷ *Id.* at 512.

⁷⁸ *Id.* at 514.

⁷⁹ *Id.* at 520–21.

⁸⁰ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁸¹ *Id.* at 1015, 1019.

rejected the South Carolina Supreme Court's view that the state's purpose in protecting the public from harms caused by beachfront development precluded the need for compensation under the Supreme Court's prior decisions.⁸²

Writing for the Court, Justice Scalia acknowledged that *Mugler*, *Hadacheck*, and other due process cases "suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."⁸³ Justice Scalia characterized that principle as "the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the whole scope of the State's police power."⁸⁴ Justice Scalia noted that the Court in *Penn Central* had rejected the "suggestion that *Mugler* and the cases following it were premised on, and thus limited by, some objective conception of 'noxiousness,'"⁸⁵ since the uses prohibited in those cases (e.g., brick-making,⁸⁶ brewing beer,⁸⁷ and operating a quarry⁸⁸) were legal and permissible at the time they were undertaken. Such cases were "'better understood,'" Justice Brennan had observed in *Penn Central*, as "'resting . . . on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.'"⁸⁹

Justice Scalia concluded: "'Harmful or noxious use' analysis was, in other words, simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'"⁹⁰ "Prevention of harmful use" was thus "merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value."⁹¹ For that reason, together with the difficulty in distinguishing regulations that prevent harm from those that confer public benefits, "it becomes self-evident that noxious-use logic cannot serve as the touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation."⁹² Indeed, since

⁸² *Id.* at 1026.

⁸³ *Id.* at 1022.

⁸⁴ *Id.* at 1022–23.

⁸⁵ *Id.* at 1023.

⁸⁶ See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

⁸⁷ See *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁸⁸ See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

⁸⁹ *Lucas*, 505 U.S. at 1023 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 133–34 n.30 (1978)).

⁹⁰ *Id.* at 1023–24 (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987)).

⁹¹ *Id.* at 1026.

⁹² *Id.*

legislation can almost always be justified as seeking to prevent public harm, using that principle to justify government action would “essentially nullify *Pennsylvania Coal*’s affirmation of limits to the noncompensable exercise of the police power.”⁹³

Ironically, having broadly disclaimed the relevance of the legislature’s purposes to takings doctrine, Justice Scalia then affirmed the core principle of the “nuisance exception” by holding that even a regulation that completely eliminates economic use is not a taking if the uses prohibited were always subject to restriction under “background principles of the State’s law of property and nuisance.”⁹⁴ In that circumstance, Justice Scalia noted, the restricted use interests “were not part of [the owner’s] title to begin with,”⁹⁵ and thus could not be “taken” by the regulation. Property uses that in fact constitute “nuisances” under state law, therefore, may be prohibited without compensation, although that consequence follows from the nature of the owner’s property interests rather than from the laudable purposes sought to be furthered by the state.⁹⁶

The critical questions at the center of both of these landmark decisions—*First English* and *Lucas*—thus focused on the meaning and continued significance of the Court’s early due process land use cases. *First English* finally laid to rest the divergent strand of takings doctrine, rooted in the Court’s old land use cases and evident in Justice Holmes’s seminal, but ambiguous, decision in *Pennsylvania Coal*, which viewed a government regulation that “goes too far” as simply invalid under due process. Instead, the Court confirmed that such a regulation effects an actual taking for which just compensation must be paid. *Lucas* attempted, arguably with only partial success, to cabin the notion in the Court’s older due process cases that government actions taken to protect public health, safety or welfare enjoy a broad immunity from takings liability.

IV. THE LINGERING QUESTION: DOES THE LEGITIMACY OF THE GOVERNMENT’S ACTION MATTER?

The Court’s resolution of each of these fundamental questions—whether the proper remedy for a regulatory taking is compensation, and whether there is a broad exemption from takings liability for regulations seeking to protect the public against harm—suggests that the legitimacy of the government’s action is properly viewed as a separate issue from whether it may effect a taking. The purpose of the Takings Clause, Justice Rehnquist declared in *First English*, is fundamentally compensatory; it is not a constraint on the government’s power to act, but instead secures

⁹³ *Id.*

⁹⁴ *Id.* at 1029.

⁹⁵ *Id.* at 1027.

⁹⁶ *Id.*

compensation for “*otherwise proper*” action that effects a taking.⁹⁷ The legitimacy of a government action, Justice Scalia subsequently explained in *Lucas*, is only a necessary predicate for the exercise of police power; it cannot serve to *determine* whether the action is a regulatory taking.⁹⁸ Inquiry into the purposes and effectiveness of a government action would not appear to illuminate the severity of the economic burden imposed by the regulation, the central concern under *Penn Central*, nor the extent to which that burden might be concentrated unfairly on one or a few property owners. Moreover, another foundational element of takings law, the “public use” doctrine, independently requires that a government action taking private property serve a valid public use.⁹⁹ Thus, a conclusion that a government action does not serve a valid public purpose would seem to *preclude* a finding of a taking, rather than support it.

The Court has nonetheless struggled to define whether the legitimacy of a government action, the central inquiry in its older due process cases, is properly a part of takings analysis. *Mugler* and its famous progeny, after all, focused squarely on that issue in determining the constitutionality of land use controls, and in particular in rejecting claims that such controls were invalid because they took property without compensation. The test the Court applied to determine if a land use regulation fell within the government’s police power was whether the regulation bore “a substantial relation” to the public health, safety, morals, or general welfare. If so, it was upheld regardless of its economic impact on regulated landowners. What significance should these early due process precedents have for modern regulatory takings law?

One possible answer is that these cases establish the principle that a government regulation is not a taking—indeed, can *never* be a taking—if it bears a substantial relationship to a legitimate public purpose. That proposition, which *Mugler* and other early cases squarely support, was implicitly repudiated by *Pennsylvania Coal*’s recognition that a legitimate regulation could nonetheless have economic impact so severe as to effect a taking. It is further undercut by the Court’s more recent conclusion in *Lucas* that, at least where a regulation deprives an owner of all economically viable use, the fact that a regulation seeks to advance legitimate public purposes is no defense to a taking (unless the regulation restrains a nuisance or some other limitation on the owner’s property rights inherent in background principles of property law). Neither *Pennsylvania Coal* nor *Lucas* resolves whether the importance of the government’s purposes,

⁹⁷ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis added).

⁹⁸ 505 U.S. at 1026.

⁹⁹ *See, e.g., Brown v. Legal Found. of Wash.*, 538 U.S. 216, 232 (2003) (stating that a “condition” for any exercise of the government’s takings power is that the government action serve a “public use;” and equating this requirement with a requirement that the government action be “legitimate”).

and the effectiveness with which it achieves them, may still be a consideration in a multi-factor analysis under *Penn Central*. Nonetheless, the evolution of regulatory takings doctrine under *Pennsylvania Coal* would appear to leave these older land use cases with only limited direct relevance to takings law.

The other possible answer, and one that has proved seductive to the Court, is that its early land use cases also establish a reciprocal corollary of *great* importance to takings doctrine: that a government regulation that does *not* serve a legitimate public purpose *is* a taking—indeed, qualifies as a taking without more. That conclusion is not, of course, supported on the face of *Mugler* and the other early land use cases. As *Nectow*¹⁰⁰ confirms, those cases do indeed stand for the proposition that a government regulation that does not bear a substantial relation to a legitimate public purpose would be *unconstitutional*, but not because it would necessarily work a taking. Rather, it would violate *substantive due process*, which fundamentally focuses on protecting against arbitrary and lawless government action.¹⁰¹ At the most, *Mugler* and the other early land use cases suggest that an illegitimate government action would not benefit from the categorical exemption from takings liability that those cases viewed legitimate police power regulations as enjoying. An improper regulation thus *might* qualify as a taking, but that finding would presumably be based on other factors, such the severity of its economic impact.

A. Moore and Penn Central

Nonetheless, the continuing sense that *Mugler* and *Euclid* establish precedents of profound importance in determining the constitutionality of land use controls, combined with the apparent logical symmetry of the position that if a regulation serving legitimate public purposes is *not* a taking, a regulation that does not serve legitimate public purposes *must be* a taking, proved too powerful for the Court to withstand. The first real indication of the Court's fatal attraction to this false corollary came in Justice Stevens's concurring opinion in *Moore v. City of East Cleveland*,¹⁰² in which he suggested that the Court's due process decisions in *Euclid* and *Nectow* had "fused" the constitutional protections of property against being taken without due process and against being taken for public purpose without just compensation into a "single standard": "(B)efore (a zoning) ordinance can be declared unconstitutional, (it must be shown to be)

¹⁰⁰ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (invalidating application of zoning ordinance to particular property).

¹⁰¹ *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (concluding that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

¹⁰² 431 U.S. 494 (1977).

clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.’”¹⁰³ Because the restriction on single-family residences at issue in *Moore* had not been shown to have any “substantial relation to the public health, safety, morals, or general welfare” of the city, and cut deeply into a fundamental right of property owners to determine with whom they would reside, Justice Stevens viewed the law as “a taking of property without due process and without just compensation.”¹⁰⁴

The following year, in its landmark decision revitalizing the field of regulatory takings, the Court in *Penn Central* squarely embraced, albeit in *dicta*, the proposition that a regulation that does not serve a legitimate public purpose is a taking. After identifying the now-famous three-part standard for determining when a regulation effects a taking,¹⁰⁵ Justice Brennan discussed the Court’s early land use cases at length. He noted that these cases had upheld land use regulations that promoted the health, safety, morals or general welfare even where they destroyed or adversely affected recognized property interests.¹⁰⁶ Justice Brennan characterized the Court’s decision in *Goldblatt v. Town of Hempstead* as a “recent example” of a taking challenge in which the Court had upheld a land use prohibition because it “served a substantial public purpose.”¹⁰⁷ Invoking *Nectow* and Justice Stevens’s concurring opinion in *Moore* for that proposition,¹⁰⁸ Justice Brennan continued: “It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose”¹⁰⁹

It seems that Justice Brennan misread *Goldblatt*, however. First, he evidently did not recognize that *Goldblatt* was a *due process* case, rather than a takings decision. The plaintiff’s claim in *Goldblatt* was that the municipal ordinance “takes their property *without due process of law* in violation of the Fourteenth Amendment,”¹¹⁰ and the Court’s decision in that case, after *setting aside* the possibility that the law might be “a taking which constitutionally requires compensation,”¹¹¹ upheld the ordinance as a valid exercise of the police power under due process. For that

¹⁰³ *Id.* at 514 (Stevens, J., concurring in judgment) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

¹⁰⁴ *Id.* at 520.

¹⁰⁵ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (identifying the economic impact of a regulation on a claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action as factors of “particular significance” in determining whether a governmental action effects a taking).

¹⁰⁶ *Id.* at 125.

¹⁰⁷ *Id.* at 126–27 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)).

¹⁰⁸ *Id.* at 127.

¹⁰⁹ *Id.*

¹¹⁰ *Goldblatt*, 369 U.S. at 591 (emphasis added).

¹¹¹ *Id.* at 594.

reason, the implication that Justice Brennan read into *Goldblatt*—that an action that does not serve a substantial public purpose is a taking—simply cannot be drawn from that case. While it is indeed implicit in *Goldblatt* that a regulation of property that is not reasonably related to the public health, safety, morals or welfare would constitute a “taking of property without due process of law,” Justice Brennan’s use of the simple, but ambiguous, term “taking” suggested that such arbitrary or illegitimate government action may instead be a “taking without just compensation” in violation of the Fifth Amendment’s Takings Clause.¹¹² Nothing in *Goldblatt*, or in the Court’s earlier land use cases, supported that proposition.

Justice Brennan’s invocation of the Court’s early land use cases without identifying the constitutional basis for those decisions under the Due Process Clause, and his reading of *Goldblatt* as implicitly establishing that a regulation that was not “reasonably necessary to the effectuation of a substantial public purpose” may constitute a taking, thus created a misleading linkage between the Court’s early due process land use cases and the Court’s evolving regulatory takings doctrine. In searching for precedent for its development of modern regulatory takings law, the Court may understandably have been influenced by its well-known early cases establishing the constitutionality of zoning, rent control and urban planning. Nonetheless, the Court’s reliance on those decisions, without explanation, for principles applicable to takings analysis under the Fifth Amendment’s Takings Clause sowed confusion.

B. Agins

The Court’s intermingling of due process and takings principles was brought into vivid clarity two years after *Penn Central* in *Agins*. In reviewing the constitutionality of a zoning ordinance restricting the number of residences that a developer could build on a property, Justice Powell, writing for the Court, announced a two-part test for a regulatory taking: “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*.”¹¹³

Justice Powell’s explanation made clear that he was intentionally invoking the Court’s early cases that had reviewed, and generally sustained, land use restrictions under due process principles:

¹¹² The Court had ambiguously referred to deprivations of property without due process of law as “takings” in several prior cases. See, e.g., *Rowan v. Post Office Dep’t*, 397 U.S. 728, 740 (1970).

¹¹³ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added) (citations omitted).

The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid v. Ambler Co.* is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner.¹¹⁴

Noting that the purposes of zoning regulations "long have been recognized as legitimate," the Court in *Agins* quickly concluded that the single-home zoning ordinances at issue "substantially advance legitimate governmental goals."¹¹⁵

The two-part test for a regulatory taking announced in *Agins* marked a surprising departure for the Court. First, coming only two years after the Court's comprehensive treatment of regulatory takings in *Penn Central*, the Court in *Agins* appeared largely to ignore the three factors identified in *Penn Central* as having "particular significance."¹¹⁶ The second prong of the two-part *Agins* standard relied upon *Penn Central* for the proposition that a regulation effects a taking if it "denies an owner economically viable use of his land,"¹¹⁷ but reduced the balancing of factors called for by the Court in the earlier decision essentially to a *per se* standard applicable to a complete economic loss (presaging the Court's subsequent decision in *Lucas*). More surprising, the *first* prong of *Agins* elevated the means-end inquiry into the validity of governmental action under the police power that the Court had employed in reviewing land use regulations under the Due Process Clause into an explicit, and apparently self-sufficient, test for a taking of property without just compensation in violation of the Takings Clause of the Fifth Amendment. Justice Brennan's suggestion in *dictum* in *Penn Central* that a use restriction on property might constitute a taking "if not reasonably necessary to the effectuation of a substantial public purpose"¹¹⁸ had been erected into a bright-line test for a regulatory taking.¹¹⁹

¹¹⁴ *Id.* at 260–61 (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

¹¹⁵ *Id.* at 261.

¹¹⁶ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

¹¹⁷ 447 U.S. at 260.

¹¹⁸ 438 U.S. at 127 (citing *Nectow v. City of Cambridge*, 277 U.S. 183).

¹¹⁹ The particular language used by the Court in articulating that test in *Agins* was also a departure even from the due process precedents the Court relied upon. The Court in

The new, disjunctive test for a taking in *Agins* played very little role in the Court's subsequent decisions, though. The majority of the Court's regulatory takings decisions after *Agins* rely on the *Penn Central* framework; they either ignore *Agins* altogether,¹²⁰ or rely on *Agins* solely for the second (and unquestioned) proposition that a regulation will be deemed a taking if it denies the owner all economically viable use of property.¹²¹ Although the Court recited the "substantially advances" formulation in a number of opinions,¹²² in no case did it squarely find a compensable taking based on that test.

The Court did invoke the "substantially advances" language in two narrow cases addressing the special problem posed by government exactions of real property interests imposed as conditions of development approvals, *Nollan v. California Coastal Commission*¹²³ and *Dolan v. City of Tigard*,¹²⁴ but neither case involved a true application of the *Agins* formulation. Rather, the special standards developed by the Court in *Nollan* and *Dolan* (requiring that government officials show that exactions bear a "nexus"¹²⁵ to the government's regulatory purposes and bear a "rough proportionality"¹²⁶ to the impact of the proposed development) reflected the Court's concern that exactions may improperly force owners to waive

Agins declared that a regulation effects a taking if it "does not *substantially advance* legitimate state interests," 447 U.S. at 260 (1980) (emphasis added), possibly implying that a regulatory measure must not only further a legitimate goal but actually achieve that goal by some putatively weighty amount. The case cited by the Court for that proposition, *Nectow*, required only that a legislative measure "bear a *substantial relation* to the public health, safety, morals, or general welfare." *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (emphasis added). Other decisions in the line of due process cases leading to *Nectow* required a "real or substantial relation" or a "rational relation" to the public good, in contradistinction to a measure that was entirely arbitrary or discriminatory. *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1916). Despite the implications of the "substantially advances" language it employed, however, the Court in *Agins* did not engage in a close examination of the state's goals or the means it employed to further those goals. That the Court did not believe that it had established a new or more demanding standard in *Agins* for evaluating the legitimacy of government regulation is demonstrated in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), decided the next year, in which the Court lumped *Agins* together with due process cases as requiring only a "rational relationship" to legitimate state concerns.

¹²⁰ *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004–05 (1984).

¹²¹ *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

¹²² *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002).

¹²³ 483 U.S. 825 (1987) (holding that permit conditions requiring owner to grant, without compensation, an easement for public access must bear a nexus to government regulations).

¹²⁴ 512 U.S. 374 (1994) (holding that permit conditions requiring owner to grant, without compensation, public access to its property must be roughly proportional to the nature and extent of the impact of the proposed development).

¹²⁵ *See Nollan*, 483 U.S. at 837.

¹²⁶ *See Dolan*, 512 U.S. at 391. *See also* *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074, 2086 (2005) ("Although *Nollan* and *Dolan* quoted *Agins*' language, the rule those decisions established is entirely distinct from the 'substantially advances' test . . .") (citation omitted).

their constitutional rights to just compensation, and thus represent an application of the Court's "unconstitutional conditions" doctrine.¹²⁷

Meanwhile, doubts were growing about the validity of the *Agin*s formulation, both within academia and among the Justices. Scholars had been quick to point out the incongruity of the Court's incorporation of due process principles and precedents in takings doctrine.¹²⁸ And the Court itself began to have second thoughts about the propriety of focusing on the legitimacy of government action in assessing whether a regulation effects a regulatory taking. Chief Justice Rehnquist expressed serious misgivings in his dissent in *Keystone* over the majority's heavy reliance on the public purposes served by the statute at issue, concluding that "the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power."¹²⁹ He observed that "our inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation,"¹³⁰ a proposition with which the majority quickly agreed.¹³¹ Justice Scalia expressed similar concerns about reliance on the public purposes of a law as a shield against takings liability in *Lucas*, concluding, as had Chief Justice Rehnquist, that the existence of a legitimate public purpose was a threshold requirement for government action rather than a "touchstone" for distinguishing regulatory takings from regulatory deprivations that do not require compensation.¹³²

In the Court's fractured 1998 decision in *Eastern Enterprises v. Apfel*,¹³³ five Justices concluded that challenges to the legitimacy of governmental action properly lie under the Due Process Clause, and not under the Takings Clause.¹³⁴ *Eastern Enterprises* addressed the constitutionality of federal legislation imposing severe retrospective liability upon coal mining companies to pay for health benefits for former workers. Justices O'Connor,

¹²⁷ *Lindle*, 125 S. Ct. at 2087 (explaining that *Nollan* and *Dolan* involve a "special application of the doctrine of 'unconstitutional conditions'").

¹²⁸ For a sampling of scholarly commentary, see Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1605–14 (1987); Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 URB. LAW. 301 (1991); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695 (1993); Kenneth Bley, *Substantive Due Process and Land Use: the Alternative to a Takings Claim*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 289, 291 (David L. Callies ed., 1996); Kenneth Salzberg, "Takings" as Due Process, or Due Process as "Takings"?, 36 VAL. U. L. REV. 413 (2002); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004).

¹²⁹ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 511 (1987) (Rehnquist, J., dissenting).

¹³⁰ *Id.* at 511 n.3.

¹³¹ *Id.* at 487 n.16.

¹³² *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022–26 (1992).

¹³³ 524 U.S. 498 (1998).

¹³⁴ *Id.* at 545–47 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554–57 (Breyer, J., dissenting).

Scalia, Thomas, and Rehnquist concluded that the law worked an unconstitutional taking, and did not reach the companies' due process claims, in part because of concerns with the unbounded nature of substantive due process.¹³⁵ Justice Kennedy concurred in the judgment that the retroactive legislation was unconstitutional, but did so under due process principles, expressly rejecting the applicability of the Takings Clause to the companies' claims.¹³⁶ Justices Breyer, Stevens, Souter, and Ginsburg dissented from the holding that the statute was unconstitutional, but agreed with Justice Kennedy that takings analysis was improper, and that the appropriate framework of constitutional analysis for the challenged statute lay under the Due Process Clause.¹³⁷

Justice Kennedy concluded that application of the Takings Clause in the circumstances presented in *Eastern Enterprises* was inappropriate in part because the federal statute in that case imposed a general financial liability, rather than taking a defined property interest.¹³⁸ Justice Kennedy's concurring opinion, however, also expressly focused on the incongruity of hearing substantive challenges to the wisdom of governmental actions under the Takings Clause:

The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. *See, e.g., Agins v. City of Tiburon*, 447 U.S. at 260 (zoning constitutes a taking if it does not "substantially advance legitimate state interests"). This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional

Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.¹³⁹

Justice Breyer, writing in dissent for Justices Stevens, Souter, and Ginsburg, agreed with Justice Kennedy that the Takings Clause should not apply

¹³⁵ *Id.* at 528–37 (plurality opinion).

¹³⁶ *Id.* at 545–47 (Kennedy, J., concurring in judgment and dissenting in part).

¹³⁷ *Id.* at 554–57 (Breyer, J., dissenting).

¹³⁸ *Id.* at 540–44 (Kennedy, J., concurring in judgment and dissenting in part).

¹³⁹ *Id.* at 545 (citations omitted).

to general financial liabilities.¹⁴⁰ As a threshold matter, however, the four dissenting Justices also explicitly agreed with Justice Kennedy's concern about reviewing the substantive validity of legislation under the Takings Clause:

[T]he plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply. That Clause refers to the taking of "private property . . . for public use, without just compensation." U.S. Const., Amdt. 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes "private property" to serve the "public" good.¹⁴¹

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,¹⁴² decided the following year, the Court underlined its doubts concerning the viability of the "substantially advances" theory, with all of the Justices joining in opinions that reserved the question of the validity of the formulation. In *Del Monte Dunes*, the Court affirmed a jury finding of a taking reached upon instructions that had included the theory that the city's repeated rejection of a development proposal failed to "substantially advance a legitimate public purpose."¹⁴³ The Court did not reach the issue of the validity of that theory, however, finding that the defendant city had waived any objection to the instructions it had itself proposed.¹⁴⁴ The Court therefore rejected the urging of the United States, as *amicus*, that it declare definitively that the "substantially advances" test is not a takings test, observing that this test was "consistent with our previous general discussions of regulatory takings liability."¹⁴⁵ The Court acknowledged, however, that it had never provided "a thorough explanation of the *nature or applicability* of the requirement that a regulation substantially advance legitimate public interests,"¹⁴⁶ and five Justices went out of their way, in separate opinions, to make clear that they were not affirming the correctness of that theory of takings liability.¹⁴⁷ Thus, by the end of the 1990s, there was considerable question concerning the Court's commitment to the "substantially advances" test.

¹⁴⁰ *Id.* at 554–56 (Breyer, J., dissenting).

¹⁴¹ *Id.* at 554.

¹⁴² 526 U.S. 687 (1999).

¹⁴³ *Id.* at 700 (internal citation omitted).

¹⁴⁴ *Id.* at 704.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (emphasis added).

¹⁴⁷ *Id.* at 732 n.2 (Scalia, J., concurring); *id.* at 753 n.12 (Souter, J., dissenting).

V. LINGLE

Lingle finally presented the question of the validity of the “substantially advances” test to the Court in stark outline.¹⁴⁸ In *Lingle*, the Ninth Circuit confronted a claim that a Hawaii statute controlling rents for gas stations effected a taking because it would not achieve the state’s objectives of protecting consumers from high gasoline prices, and thus did not “substantially advance” the state’s interests.¹⁴⁹ The plaintiff in the case, Chevron USA, Inc., made no claim that it had suffered significant economic injury; indeed, Chevron stipulated that its return on its investment in its gas stations under the law “satisfies any Constitutional standard.”¹⁵⁰ Chevron thus evidently sought only to use the Takings Clause to invalidate the statute because of disagreement with the state’s economic policy, and did so in deliberate preference to seeking review of the law under more traditional constitutional frameworks, holding in reserve and then dismissing its due process and equal protection claims once it had obtained its takings judgment.

In its initial decision in the case, the Ninth Circuit held that Chevron’s “substantially advances” claim should be decided without any deference to the state legislature’s judgment on economic matters,¹⁵¹ a dramatic departure from long-settled principles of deferential constitutional review of state economic and social legislation. The district court therefore conducted a trial to determine the likely efficacy of the Hawaii law, and even attempted to weigh the demeanor of the parties’ expert witnesses as a factor in determining the constitutionality of the statute,¹⁵² vividly illustrating the risk of intrusive judicial review inherent in the *Agins* test. The Ninth Circuit affirmed the district court’s judgment, rejecting the state’s plea that it reconsider its early rulings regarding the standard of review.¹⁵³

Confronted by this anomalous and troubling example of the “substantially advances” test in practice, the Supreme Court granted review, and unanimously reversed. In doing so, the Court not only laid to rest the short-lived “substantially advances” theory of takings liability; it also essentially brought to a close the Court’s prolonged period of uncertainty and conflict regarding the proper meaning of its early land use decisions for modern takings jurisprudence.

¹⁴⁸ *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074 (2005). See Sarah B. Nelson, Comment, *Lingle v. Chevron USA, Inc.*, 30 HARV. ENVTL. L. REV. 281, 281–86 (2006) (summarizing the factual background and procedural history of *Lingle*).

¹⁴⁹ *Chevron USA, Inc. v. Lingle*, 363 F.3d 846 (9th Cir. 2004), *aff’g* 198 F. Supp. 2d 1182 (D. Haw. 2002), *rev’d sub nom.* *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074 (2005).

¹⁵⁰ *Lingle*, 125 S. Ct. at 2079 (2005).

¹⁵¹ *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000) (vacating summary judgment entered by the district court because issues of fact remained in dispute, and remanding case for trial).

¹⁵² *Chevron USA, Inc. v. Cayetano*, 198 F. Supp. 2d at 1182, 1189 (D. Haw. 2002).

¹⁵³ *Lingle*, 363 F.3d at 846.

Writing for the Court, Justice O'Connor began her analysis by restating with particular clarity the principles that define regulatory takings. Endorsing the paradigm for the Fifth Amendment articulated by Chief Justice Rehnquist in *First English*, Justice O'Connor observed that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."¹⁵⁴ She also invoked the concept of distributive fairness embodied in the oft-quoted principle in *Armstrong v. United States*¹⁵⁵ that the role of the Takings Clause is 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."¹⁵⁶

Justice O'Connor then briefly traced the evolution of regulatory takings doctrine from *Pennsylvania Coal* to the present, noting that the Court has established two categories of *per se* takings—permanent physical occupations and regulations that eliminate all economically beneficial use of real property—and otherwise relies generally upon the multi-factor analysis of *Penn Central*.¹⁵⁷ In addition to describing the Court's jurisprudence, Justice O'Connor offered the most coherent explanation for its central meaning that the Court has ever articulated:

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries . . . 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.¹⁵⁸

Measured against this clear paradigm, the Court readily concluded that the "substantially advances" test did not fit within regulatory takings doctrine. Justice O'Connor first squarely acknowledged that "[t]here is no question that the 'substantially advances' formula was derived from due process, not takings, precedents."¹⁵⁹ Although Justice O'Connor noted that *Agins*'s reliance on due process precedents was "understandable" when viewed in historic context, she frankly labeled its language "regrettably

¹⁵⁴ *Lingle*, 125 S. Ct. at 2080 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987)).

¹⁵⁵ 364 U.S. 40 (1960) (holding that transfer of ship hulls, from builder to the U.S., effected a taking of materialmen's liens on the uncompleted vessels).

¹⁵⁶ *Lingle*, 125 S. Ct. at 2080 (citing *Armstrong*, 364 U.S. at 49).

¹⁵⁷ *Id.* at 2081.

¹⁵⁸ *Id.* at 2082 (emphases added).

¹⁵⁹ *Id.* at 2083.

imprecise.”¹⁶⁰ The “substantially advances” formula, she observed, suggests a means-ends test into the effectiveness of a regulation. Such “an inquiry has some logic in the context of a due process challenge,” for the Due Process Clause is intended, in part, to protect against arbitrary government conduct.¹⁶¹ But it “reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights,” nor about “how any regulatory burden is *distributed* among property owners.”¹⁶² Justice O’Connor concluded:

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.¹⁶³

Moreover, inquiry into a regulation’s underlying validity 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.”¹⁶⁴ If a government action fails to meet the “public use” requirement or is so arbitrary as to violate due process, Justice O’Connor noted, “that is the end of the inquiry. No amount of compensation can authorize such action.”¹⁶⁵

Finally, the “substantially advances” formula is not only “doctrinally untenable”—its application would present “serious practical difficulties”:¹⁶⁶

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 the courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which the 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.¹⁶⁷

The instant case, Justice O’Connor observed, “foreshadows the hazards of placing courts in this role.”¹⁶⁸ Terming the trial proceedings below “remarkable, to say the least,” Justice O’Connor emphasized that “[t]he reasons for deference to legislative judgments about the need for, and

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 2084.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2085 (emphasis omitted).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.”¹⁶⁹

For all of these reasons, Justice O’Connor concluded that the Court must “correct course.”¹⁷⁰ “We hold that the ‘substantially advances’ formula is not a valid takings test,” she declared, “and indeed conclude that it has no proper place in our takings jurisprudence.”¹⁷¹ Justice Kennedy wrote separately to note that the Court’s decision did 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,” he observed, “would be relevant to that inquiry.”¹⁷²

VI. *LINGLE*’S MEANING FOR TAKINGS LAW

Lingle’s first significance, obviously, is the Court’s repudiation of a dangerously open-ended theory of takings liability. Although the “substantially advances” formulation had played virtually no role in the Court’s own jurisprudence, and relatively few lower courts had embraced it, the theory plainly invited the sort of searching judicial inquiry into matters of social and economic policy that the Court had eschewed since the substantive due process era typified by the infamous *Lochner v. New York*.¹⁷³

The Ninth Circuit’s rapidly expanding case law giving sympathetic hearing to “substantially advances” claims demonstrated that the risk of wide-ranging judicial inquiry into the purposes and efficacy of government regulations was not merely hypothetical. The Ninth Circuit’s original adoption of the “substantially advances” test in *Lingle* and a prior case, *Richardson v. City and County of Honolulu*,¹⁷⁴ was rapidly burgeoning into a cottage industry of property owners’ challenges to restrictive land use ordinances, particularly regulations governing rents in mobile home parks. A few months after the Ninth Circuit’s *Lingle* decision, for example, a panel of the Ninth Circuit headed by the judge who wrote the majority opinions in both appellate decisions in *Lingle* dramatically expanded the intrusiveness of the judiciary’s role under the “substantially advances” test. Previous Ninth Circuit decisions invoking that theory, including *Lingle*, had focused on an argument that rent control ordinances that freely permit incumbent tenants to sublet their premises could be rendered ineffectual by the ability of such tenants to demand a “premium” from subtenants, negating the presumptive societal benefit from controlled

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 2087.

¹⁷¹ *Id.*

¹⁷² *Id.* (Kennedy, J., concurring).

¹⁷³ 198 U.S. 45 (1905).

¹⁷⁴ 124 F.3d 1150 (9th Cir. 1997) (holding that municipal rent control ordinance did not substantially advance the government’s interest in creating affordable housing, and thus was an unconstitutional regulatory taking).

rent. That issue, like other questions regarding the likely efficacy of a challenged law, was presumably subject to proof at trial, even if the proof amounted to little more, as it did in *Lingle*, than the speculations of economists. In *Cashman v. City of Cotati*,¹⁷⁵ however, the Ninth Circuit, in an opinion by Judge Robert Beezer, held that even *record evidence* demonstrating to a district court's satisfaction that a municipal trailer park ordinance does not create such a "premium" in practice could not overcome the court's presumption that a statute that does not expressly prohibit subleasing at a premium is unconstitutionally defective under the "substantially advances" test. The Ninth Circuit had thus taken away even the opportunity to present factual evidence concerning challenged laws, allowing the judges virtual impunity to substitute their judgment regarding sound economic policy for that of the legislature or municipality. Plainly, it was high time for the "substantially advances" theory to go.

Lingle's larger value may lie in the coherence it brings to the very confused area of regulatory takings. Justice O'Connor's unifying vision of the basic foundation for regulatory takings—their functional equivalence to physical expropriations of property—necessarily directs the courts' inquiry to a single factor of paramount importance: "the severity of the burden that the government imposes upon private property rights."¹⁷⁶ Moreover, the clear import from the functional equivalence notion is that the economic burden must be very substantial indeed, approaching if not equaling the total loss that physical expropriation would entail. There remain a multitude of nagging questions in regulatory takings law, but the Court's articulation in *Lingle* of a clear model for what constitutes a regulatory taking will go far to simplify the tangled jurisprudence in the field.

Finally, *Lingle* effectively severs the last links between the Court's old cases reviewing the constitutionality of land use regulations under due process and modern regulatory takings doctrine. The Court's sober acknowledgement that it had erred in *Agins* by relying upon *Nectow* and *Euclid*, and its explicit recognition of the fundamental difference in nature and purpose of the judicial inquiry under due process from that under the Takings Clause, draws a sharp line between due process precedents and modern takings doctrine. The Court's long historic struggle to define the continuing meaning and role of its early land use cases for takings law, leading to such landmark precedents as *Lucas* and *First English*, seems finally now to have come to an end.

These points suggest several further implications. First, there is no doubt who won and who lost in *Lingle*. *Lingle* frees government authorities from the looming nightmare of defending the merits of every economic and social policy that impinges in any way on private property before

¹⁷⁵ 374 F.3d 887 (9th Cir. 2004), *withdrawn on reh'g following Lingle*, 415 F.3d 1027 (9th Cir. 2005).

¹⁷⁶ *Lingle*, 125 S. Ct. at 2082.

skeptical federal judges. Conversely, the total collapse of the “substantially advances” theory has to represent a devastating setback for those in the property rights movement who have long sought to use the Takings Clause as a substantive check on government regulation. The original concept, acknowledged by prominent conservatives early in the movement, was that merely increasing the range of circumstances in which government is obligated to pay compensation for economically burdensome regulations would serve as a substantial check on government’s inherent tendency to regulate.¹⁷⁷ But the “substantially advances” formulation offered conservatives much more: an opportunity to challenge *directly* the economic underpinnings of liberal government regulation, free from the suffocating deference to legislative judgment that would otherwise apply if such a challenge were mounted under due process. No wonder the Pacific Legal Foundation, a conservative public interest law firm that has taken the lead in articulating the property rights agenda, made the “substantially advances” theory a centerpiece in its campaign to rein in regulatory takings.¹⁷⁸

But *Lingle* not only casts the “substantially advances” theory from the takings garden, it rejects *any* normative component to takings law based on considerations of the efficacy or wisdom of the government’s actions. Justice O’Connor’s opinion flatly declares that “[t]he notion that . . . a regulation . . . ‘takes’ private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.”¹⁷⁹ Such challenges, the Court makes clear, belong instead under due process, where the traditional framework of deferential review provides a substantial shield for government policy-makers.

Moreover, and perhaps more importantly in the long run, by providing a clear, and quite narrow, vision of the nature of a regulatory taking, *Lingle* may go far to reduce the incidence of takings claims generally, undercutting even the modest hope of property rights advocates that increased financial exposure to takings liability will rein in government regulation. *Lingle* makes clear that the “basic justification for allowing regulatory actions to be challenged under the [Takings] Clause” is the fact that regulations can impose impacts so severe as to be the “functional[] equivalent” of physical expropriation or invasion.¹⁸⁰ After *Lingle*, takings claimants (except for the few who can invoke the Court’s *per se* rules for permanent physical occupations or total economic wipeouts) must expect to have to demonstrate economic burdens on their property that are so se-

¹⁷⁷ See CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 183 (1991).

¹⁷⁸ See R. S. Radford, *Of Course Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353 (2004).

¹⁷⁹ *Lingle*, 125 S. Ct. at 2084.

¹⁸⁰ *Id.* at 2081–82, 2084.

vere that they are the functional equivalent of physical dispossession. Relatively few government regulations are likely to result in such severe impacts.

The Court's severance of its early due process cases from modern takings doctrine may cut in some respects, however, against the defenders of government regulations. Government advocates have grown accustomed to invoking such cases as *Mugler*, *Euclid*, and *Hadacheck* for the proposition that even very severe diminutions in economic value may not constitute compensable takings. As recently as 1993, the Supreme Court relied upon these cases to observe that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."¹⁸¹ The Court's recognition in *Lingle* that its due process precedents are largely inapposite to takings doctrine will likely undercut their value for this proposition. For this reason, one commentator has concluded that *Lingle* "may have long-term benefits for the property rights advocates who were the putative losers in the case, because property rights advocates have more to gain than takings opponents from the clear separation of substantive due process and takings law."¹⁸²

But the relevance of the Court's early land use cases to the issue of the extent of economic loss that might pass constitutional muster has long been subject to doubt, since the reasoning of those cases so plainly conflicts with both *Pennsylvania Coal* and *Lucas*. The framework of analysis in the Court's early land use cases, in which a valid police power regulation was simply considered to be free from any requirement of compensation, is so far from the modern understanding of regulatory takings doctrine that it is difficult to see how those early cases can provide much useful guidance as to the degree of economic loss that might constitute a taking. It is not clear how much *Lingle* adds to the cloud surrounding these cases.

More importantly, the defenders of government regulation have no need to turn to these old and arguably inapposite cases to support the proposition that very severe economic loss is required to demonstrate a regulatory taking. The stronger doctrinal argument for a narrow version of regulatory takings doctrine rests on the language and original understanding of the Takings Clause and the idea that regulatory takings analysis focuses on regulations that are equivalent, in terms of their impact, to direct expropriations or invasions. By defining the very concept of a regulatory taking in terms of its equivalence to physical appropriation or ouster of possession, *Lingle* provides the clearest and most principled basis for that

¹⁸¹ *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915)).

¹⁸² D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 345 (2005–2006).

argument. In addition, in terms of economic policy, a narrow version of regulatory takings doctrine is justified based on the reciprocity of advantage created by most regulatory regimes.¹⁸³

Similarly, despite the Court's rejection of a broad "harm prevention" exception in *Lucas*, some defenders of government regulatory authority continue to cherish the hope that the *importance* of the government's purposes can still somehow be weighed in the balance to help avert a finding of a taking, perhaps under the amorphous *Penn Central* "character of the government action" factor.¹⁸⁴ The Court's unequivocal repudiation of the "substantially advances" test in *Lingle* would seem to rule out that possibility, since the importance of the governmental purpose, like its effectiveness or legitimacy, may "reveal[] nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."¹⁸⁵ Moreover, simple parity would seem to argue that if challengers cannot raise a regulation's *lack* of redeeming societal value, proponents should not be able to raise its importance in that respect. To the extent that a regulation seems the functional equivalent of a physical appropriation, it should be recognized as a taking. As John Echeverria has noted:

Just as the government could not deny liability in an eminent domain proceeding on the ground that the government is planning to build a very important school or road, the government could not deny liability in an inverse condemnation case on the ground that the government is seeking to accomplish some very important regulatory objective.¹⁸⁶

In one important respect, however, the societal value of the government's actions may still properly weigh within the *Penn Central* balance. A government regulation that achieves substantial public benefits, and that distributes those benefits widely across the population, will be most likely to be recognized as providing an "average reciprocity of advantage"¹⁸⁷ that offsets, to some perhaps considerable degree, the economic burdens

¹⁸³ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (recognizing that generally applicable government regulations create an "average reciprocity of advantage" among all parties subject to regulation); *Agins v. City of Tiburon*, 447 U.S. 252, 262 (1980) (noting that zoning ordinances benefit regulated property owners by ensuring careful and orderly development, and stating that such benefits must be considered along with any diminution of market value property owners may suffer in evaluation fairness of such ordinances); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by restrictions we, in turn, benefit greatly from the restrictions that are placed on others.").

¹⁸⁴ See *supra* note 105.

¹⁸⁵ 125 S. Ct. at 2084.

¹⁸⁶ Echeverria, *supra* note 3, at 10,582.

¹⁸⁷ *Pennsylvania Coal*, 260 U.S. at 415.

it creates. Courts are increasingly sensitive to the fact that government regulation provides important benefits to the regulated property owners themselves, by ensuring reciprocal compliance by other similarly situated property owners.¹⁸⁸ To the extent a government program works well, and generates significant societal benefits, that factor may thus still be of importance to the *Penn Central* balance without the need to rely upon the Court's early and inapposite due process cases.

Finally, there is the nagging question of where the property rights movement will focus its abundant energy next, now that its effort to obtain *de novo* review of the wisdom of government economic and social policies under the Takings Clause has been so conclusively thwarted. One possibility, of course, is an effort to rejuvenate substantive due process itself. *Lingle* certainly makes clear that that is where such substantive challenge to the merits of government policy-making belongs. Justice Kennedy's separate concurrence in *Lingle*, pointing out that the Court's decision "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process,"¹⁸⁹ may be read as encouraging at least some modest attempt to revive the field. Justice Kennedy's concurrence in *Lingle* cited only his concurring opinion in *Eastern Enterprises*,¹⁹⁰ which he recently described as employing "heightened scrutiny" to conclude that a retroactive statute violated due process.¹⁹¹ Justice Kennedy pointedly added, in his concurrence in *Lingle*, that "the failure of a regulation to accomplish a stated or obvious objective," essentially the claim advanced by *Chevron* in *Lingle* under the Takings Clause, "would be relevant" to that due process inquiry.¹⁹²

But on the whole, *Lingle* offers cold comfort for those who would challenge government policies on their merits. Justice O'Connor's opinion for the unanimous Court flatly rejects the intrusive judicial role implied by the "substantially advances" test, and embraces the traditional framework of highly deferential review for government economic and social policies. There is no indication that a majority of the Court is prepared to follow even Justice Kennedy's modest suggestion for more robust scrutiny of such laws under due process, much less permit the sort of free-wheeling second-guessing of the wisdom of government decisions that briefly flourished under the late "substantially advances" test.

¹⁸⁸ See *supra* note 183 and accompanying text.

¹⁸⁹ 125 S. Ct. at 2087 (Kennedy, J., concurring).

¹⁹⁰ *Eastern Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

¹⁹¹ *Kelo v. City of New London*, 125 S. Ct. 2655, 2670 (2005) (Kennedy, J., concurring).

¹⁹² *Lingle*, 125 S. Ct. at 2087 (Kennedy, J., concurring).

CONCLUSION

For most of the twentieth century, the Court's regulatory takings doctrine has been tormented by the fundamental question of how to treat its early, but famous, cases reviewing land use controls under due process. The analytic framework embodied in those cases—which reject any notion that valid police power regulations can be burdened with the requirement to compensate affected property owners—is in inherent tension with modern understandings of regulatory takings, and has been since Justice Holmes wrote *Pennsylvania Coal*. Yet the perception that these due process cases offer valid guidance for modern takings law has persisted, and has only slowly been pushed back by the Court in landmark decisions such as *Lucas* and *First English*.

Lingle marks another, and perhaps the final, milestone in the halting evolution of modern takings doctrine away from these due process precedents. The Court's recognition in *Lingle* that the nature and purpose of the judicial inquiry in substantive due process differs fundamentally from that under the Takings Clause, and its confession of error in having relied upon these old due process precedents as a touchstone for determining when a regulation may effect a taking, draws a sharp line between due process and takings doctrine for the first time. The implications for takings law are profound: a simpler, clearer model of regulatory takings, focused on the "functional equivalence" of such takings to physical appropriation, without extraneous consideration of the government's purposes or the efficiency with which those purposes are achieved. *Lingle* returns regulatory takings doctrine to the fundamentally compensatory purpose of the Takings Clause, recognized by Justice Rehnquist in *First English*, without the political agenda superimposed on that Clause by the property rights movement.