THE STATUS OF *NOLLAN V. CALIFORNIA COASTAL COMMISSION* AND *DOLAN V. CITY OF TIGARD* AFTER *LINGLE V. CHEVRON U.S.A., INC.*

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I. INTRODUCTION

In *Agins v. City of Tiburon*,[1] the Supreme Court of the United States held that a land-use law does not work a taking on its face if the law substantially advances a legitimate state interest (the "*Agins* test").[2] In so holding, the Court relied on two substantive due process cases.[3] Quoting the *Agins* test in *Nollan v. California Coastal Commission*[4] and *Dolan v. City of Tigard*,[5] the Court later held that an exaction[6] does not amount to a taking if the exaction

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1. 447 U.S. 255 (1980).
2. *Id.* at 260.
3. *Id.* at 260-61. Specifically, the Court cited *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), and discussed *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
4. 483 U.S. 825 (1987).
5. 512 U.S. 374 (1994).
6. For purposes of this Article, exactions are levies that the government imposes on persons developing their property as a condition of carrying out a project. *See* DANIEL L. MANDELKER, LAND USE LAW §§ 1.09, 9.11 (2003). Used to shift the costs of infrastructure to developers, exactions usually come in the form of either "a dedication of land for a public facility, or a fee in lieu of dedication that the municipality can use to provide a public facility." *Id.*; *accord* Otto J. Hetzel and Kimberly A. Gough, *Assessing the Impact of* Dolan v. City of Tigard *on Local Governments' Land-Use Powers*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 228 (David L. Callies ed., 1996); DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 37-40 (1994). Ultimately, "any requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction." Town of Flower Mound v. Stafford Estates L.P., 71 S.W.3d 18, 30 n.7 (Tex. Ct. App. 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004).

substantially advances a legitimate state interest that would justify the government's denial of development altogether (the "*Nollan* and *Dolan* test").[7] To assure that the exaction advances this particular type of interest, these cases collectively require the government to: (1) identify a legitimate state interest that would be impeded by the development and would thus justify the denial of the development;[8] (2) show that there is a "nexus" between the interest and the exaction;[9] and (3) make an individualized determination that the exaction bears a "rough proportionality" to the extent that the interest is impeded by the development.[10]

Recently, however, the Court overruled the *Agins* test in *Lingle v. Chevron U.S.A., Inc.*,[11] reasoning that the test is not a valid takings test, but is instead a substantive due process inquiry.[12] The Court explained that the test is "doctrinally untenable,"[13] because the test does not reveal the extent to which a person's property rights have been burdened by a land-use law, and because the finding of a taking presupposes that the government acted in furtherance of a valid public use or purpose.[14] Finally, since the *Agins* test is a substantive due process inquiry, the Court found that the test's heightened scrutiny was inappropriate.[15]

Recognizing that *Nollan* and *Dolan* relied to some extent on the *Agins* test, the Court carefully distinguished the *Nollan* and *Dolan* test from the *Agins* test.[16] The Court noted that the *Nollan* and *Dolan* test was a takings, not substantive due process test,

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7. *Nollan*, 483 U.S. at 836 ("The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree."); *Dolan*, 512 U.S. at 386 ("In evaluating petitioner's claim, we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." (quoting *Nollan*, 483 U.S. at 837)).

8. *Nollan*, 483 U.S. at 837.

9. *Id.*

10. *Dolan*, 512 U.S. at 391.

11. 544 U.S. 528, 548 (2005).

12. *Id.* at 542. For a thoughtful debate on the viability of the *Agins* test in the pre-*Lingle* era, compare R.S. Radford, *Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. LAW J. 353 (2004), with John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999), and John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047 (2000).

13. *Lingle*, 544 U.S. at 544 (emphasis omitted).

14. *Id.* at 2084. Public use is, of course, "coterminous" with public purpose. *See* Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

15. *Lingle*, 544 U.S. at 544-45.

16. *Id.* at 545-48.

and that it was a special application of the unconstitutional conditions doctrine.[17] Hence, the Court concluded that the *Nollan* and *Dolan* test was not "disturbed" by its decision to overrule the *Agins* test.[18]

This Article examines and reinforces the Court's conclusion that the *Nollan* and *Dolan* test remains a viable takings test after *Lingle*.[19] Part II provides background, looking to the doctrinal development of the *Nollan* and *Dolan* test. Part III examines the *Lingle* decision, focusing on the Court's reasons for overruling the *Agins* test. Part IV explores the *Lingle* Court's treatment of the *Nollan* and *Dolan* test, reaffirming that the *Lingle* Court's decision to overrule the *Agins* test did not disturb the *Nollan* and *Dolan* test.

II. BACKGROUND ON THE *NOLLAN* AND *DOLAN* TEST

A. Agins v. City of Tiburon

In *Agins*, plaintiffs "acquired five acres of unimproved land in the city of Tiburon, Cal[ifornia], for residential development."[20] Thereafter, the city adopted two ordinances which placed plaintiffs' land in a "Residential Planned Development and Open Space Zone."[21] Under this zoning classification, plaintiffs' development was limited to "one-family dwellings, accessory buildings, and open-space uses."[22] Moreover, the zoning classification's density restrictions only permitted plaintiffs to "build between one and five single-family residences on their 5-acre tract."[23] After a failed attempt to condemn their land, plaintiffs filed a complaint which sought, among other things, a declaration that "the zoning ordinances were facially unconstitutional," because, through the ordinances, "the city had taken their property without just compensation in violation of the

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17. *Id.* at 547-48.

18. *Id.* at 548.

19. *See* 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79E.03[6][a][iii] (2005) ("[The *Agins*] nexus test served as an important foundation for the 'essential nexus' test applicable to exactions, and may be subsumed into that test." (citation and footnotes omitted)); John D. Echeverria, *Lingle, Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 ENVTL. L. REP. 10577, 10580 (2005) (observing that the Court reaffirmed *Nollan* and *Dolan* in *Lingle*); Bridget Remington, *Land Use Planning and Zoning: Takings*, 35 STETSON L. REV. 706, 708 (2006) (noting the Court's assertion that the "substantially advances" language in *Nollan* and *Dolan* was used differently in *Lingle*).

20. Agins, 447 U.S. at 257 (1980).

21. *Id.*

22. *Id.*

23. *Id.*

Fifth and Fourteenth Amendments."[24] The superior court granted the city's demur,[25] and the Supreme Court of California affirmed.[26]

The Supreme Court of the United States also affirmed.[27] In an opinion by Associate Justice Lewis F. Powell, Jr., the Court framed the issue as "whether the mere enactment of the zoning ordinances constitutes a taking."[28] Citing *Nectow v. City of Cambridge*,[29] a case which involved an as-applied substantive due process challenge to a zoning ordinance,[30] the Court observed that the "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."[31] To illustrate this principle, the Court discussed *Village of Euclid v. Ambler Realty Co.*[32] as an example,[33] which, much like *Nectow*, concerned a landowner's facial substantive due process challenge to a zoning ordinance.[34] The Court explained that the zoning laws in *Euclid* withstood a facial attack because, among other things, they "bore a substantial relationship to the public welfare."[35]

Applying these principles to the ordinances at issue, the Court concluded that the "zoning ordinances substantially advance legitimate governmental goals."[36] The Court reasoned that the "State of California has determined that the development of local open-space plans will discourage the 'premature and unnecessary conversion of open-space land to urban uses.'"[37] The ordinances, which placed tight restrictions on density, were thus "exercises of the city's police power to protect [its] residents . . . from the ill effects of urbanization."[38] Protection against the ill effects of urbanization, according to the Court, was undeniably a legitimate state interest.[39] The Court held, therefore, that the city's zoning ordinances advanced the legitimate governmental goal of protecting citizens against the ill effects of urbanization by

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24. *Id.* at 258.
25. *Id.*
26. *Id.* at 258-59.
27. *Id.* at 263.
28. *Id.* at 260.
29. 277 U.S. 183 (1928).
30. *Id.* at 185.
31. *Agins*, 447 U.S. at 260 (citing *Nectow*, 277 U.S. at 188).
32. 272 U.S. 365 (1926).
33. *Agins*, 447 U.S. at 261 (citing *Euclid*, 272 U.S. at 395-97).
34. *Euclid*, 272 U.S. at 384.
35. *Agins*, 447 U.S. at 261 (citing *Euclid*, 272 U.S. at 395-97).
36. *Agins*, 447 U.S. at 261.
37. *Id.* at 261 (quoting CAL. GOV'T. CODE ANN. § 65561(b) (West. Supp. 1979)).
38. *Agins*, 447 U.S. at 261 (footnote omitted).
39. *Id.* at 261 (citations omitted).

preserving open-space.[40]

B. Nollan v. California Coastal Commission

In *Nollan*, plaintiffs sought a coastal development permit from the California Coastal Commission (the Commission) to demolish the house on their land and replace it with a "three-bedroom house in keeping with the rest of the neighborhood."[41] The Commission then informed plaintiffs that the permit would likely be granted subject to the condition that plaintiffs "allow the public an easement to pass across a portion of their property."[42] Plaintiffs protested the condition, but the Commission "overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement."[43] The Commission found that the easement would facilitate the public's access to the beach.[44] After an appeal to and remand from the superior court,[45] the Commission reaffirmed the condition's validity,[46] finding that "the new house would increase blockage of the view of the ocean, thus contributing to the development of a wall of residential structures that would prevent the public psychologically from realizing a stretch of coastline exists nearby that they have every right to visit."[47] Additionally, the Commission found that the "effects of construction of the house, along with other area development, would cumulatively burden the public's ability to traverse to and along the shorefront."[48] On these bases, the commission concluded that it could impose the easement condition to offset the public burdens imposed by the house by "providing additional lateral access to the public beaches in the form of an easement across [plaintiffs'] property."[49] Three state court appeals followed to no avail.[50]

The Supreme Court reversed.[51] In an opinion written by Associate Justice Antonin Scalia, the Court initially observed:

> Had [the Commission] simply required the [plaintiff] to make an

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40. *Id.*
41. *Nollan*, 483 U.S. at 828.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* Specifically, the superior court held that the condition could not be imposed "absent evidence that their proposed development would have a direct adverse impact on public access to the beach," and remanded the case back to the commission for a determination of that issue. *Id.*
46. *Id.*
47. *Id.* at 828-29 (quotation and ellipsis omitted).
48. *Id.* at 829 (quotation omitted).
49. *Id.*
50. *Id.* at 829-31.
51. *Id.* at 842.

> easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.[52]

Such a requirement would undoubtedly result in plaintiffs' loss of their fundamental right to exclude others, which is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" said the Court.[53] Reframing the issue, the Court stated: "Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome."[54] Quoting *Agins*, the Court reaffirmed that a "land use regulation does not effect a taking if it 'substantially advances legitimate state interests.'"[55] The Court explained that "a broad range of governmental purposes" qualify.[56]

Turning to the facts before it, the Court assumed, for the sake of argument, that the Commission's proposed purposes were indeed legitimate, i.e., "protecting the public's ability to seek the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches."[57] On this assumption, the Court conceded that the Commission "unquestionably would be able to deny the [plaintiffs] their permit outright if their new house . . . would substantially impede these purposes."[58]

Interpreting the "substantially advances" standard, the Court agreed with the Commission that "a permit condition that serves the *same* legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[59] Applying this principle to the instant case, the Court concluded that the Commission's purportedly legitimate state interest in "protect[ing] the public's ability to see the beach notwithstanding construction of the new house," would be served, for example, by "a viewing spot on [plaintiffs] property for passersby with whose sighting of the ocean

52. *Id.* at 831.
53. *Id.* (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).
54. *Id.* at 834.
55. *Id.* (quoting *Agins*, 447 U.S. at 260) (brackets omitted).
56. *Id.* at 834-35 (citations omitted).
57. *Id.* at 835.
58. *Id.* at 835-36 (footnote omitted).
59. *Id.* at 836 (emphasis added).

their new house would interfere."[60] The Court reasoned:

> Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Comission's *assumed power to forbid construction* of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the *same* end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the *same* purpose is not.[61]

On the other hand, the Court cautioned that "[t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[62] The Court observed that "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was." The original "purpose then becomes . . . the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation," said the Court.[63] "Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them."[64] Put differently, the state does not have a legitimate interest in avoiding its constitutional duty to pay just compensation. As a final admonition to local governments, the Court observed that "unless the permit condition serves the *same* governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[65]

Putting these principles into practice, the Court stated that the commission had found that plaintiffs' new house would "interfere with 'visual access' to the beach," which would in turn "interfere with the desire of people who drive past the [plaintiffs'] house to use the beach, thus creating a 'psychological barrier' to 'access.'"[66] Scoffing at the commission's finding, the Court identified two impossibilities:

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60. *Id.*
61. *Id.* at 836-37 (emphasis added).
62. *Id.* at 837.
63. *Id.*
64. *Id.*
65. *Id.* (quoting J.E.D. Assoc., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)) (emphasis added).
66. *Nollan*, 483 U.S. at 838.

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the [plaintiffs'] property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the [plaintiffs'] new house.[67]

The Court thus concluded that "the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes."[68] Because the Court reached this conclusion, it did not address the question of "how close a 'fit' between the condition and the burden is required."[69] The Court answered that question in *Dolan*.

C. Dolan v. City of Tigard

In *Dolan*, plaintiff owned a plumbing and electric supply store which covered about 9,700 square feet, and included a gravel parking lot.[70] The westerly portion of the land fell under a 100-floodplain, bordering a creek.[71] Plaintiff applied for a permit to redevelop the site, which called for nearly doubling the size of the store and paving the parking lot.[72] The city planning commission granted plaintiff's permit application subject to conditions imposed by the city's development code.[73] The city required that plaintiff dedicate the portion of her land lying within the 100-year floodplain for improvement of a storm drainage system and that she dedicate an additional fifteen-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.[74] These dedications comprised ten percent of plaintiff's property.[75] Plaintiff then applied for variances from the conditions under the development code, and the city denied her request.[76] In denying the variance, the city found that it was reasonable to assume that future use of the pathway dedication by customers and employees "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion,"[77] and that the floodplain dedication

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67. *Id.* at 838-39.
68. *Id.* at 839.
69. *Id.* at 838.
70. *Dolan*, 512 U.S. at 379.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 380.
75. *Id.*
76. *Id.* at 380-81.
77. *Id.* at 381-82 (alteration in original and internal quotation marks omitted).

would address the anticipated increased storm water flow from the anticipated increase in impervious surface area.[78] The city council then approved the city's final order.[79] The order was subsequently

affirmed by the Land Use Board of Appeals, the Court of Appeals of Oregon, and the Supreme Court of Oregon.[80]

The United States Supreme Court reversed in an opinion by Chief Justice Rehnquist.[81] Retracing its steps in *Nollan*, the Court observed that "had the city simply required petitioner to dedicate a strip of land along [the creek] for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred," because plaintiff would have lost her right to exclude others.[82] Returning to *Agins*, the Court once again declared that "[a] land use regulation does not effect a taking if it 'substantially advances legitimate state interests.'"[83]

The Court then explained that its exactions takings jurisprudence was an application of the "well-settled doctrine of 'unconstitutional conditions.'"[84] That doctrine forbids the government from requiring "a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."[85] The constitutional right at issue in the case of exactions is "the right to receive just compensation when property is taken for a public use."[86]

After finding that *Nollan*'s nexus requirement was satisfied,[87] the Court addressed the question it left unanswered in *Nollan*: "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of [plaintiff's] proposed development."[88] After reviewing the city's findings with respect to each exaction, the Court reframed the issue as whether the city's findings were "constitutionally sufficient to justify the conditions imposed by the city on [plaintiff's] building permit."[89] Consulting the considerable ex-

78. *Id.* at 382.
79. *Id.*
80. *Id.* at 382-83.
81. *Id.* at 396.
82. *Id.* at 384 (citing *Nollan*, 483 U.S. at 831).
83. *Id.* at 385 (quoting *Agins*, 447 U.S. at 260).
84. *Id.* at 385 (citations omitted).
85. *Id.*
86. *Id.*
87. *Id.* at 386-87.
88. *Id.* at 388 (citing *Nollan*, 483 U.S. at 834).
89. *Id.* at 389.

perience of the states, the Court examined the approaches the states had taken in resolving this issue.[90] Ultimately, the Court adopted the "'reasonable relationship' test," which was the prevailing law in the majority of the states, because that test was consistent with "the federal constitutional norm."[91]

However, the Court declined to adopt the reasonable relationship test's phrasing.[92] The Court reasoned that such language was "confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment."[93] Instead, the Court embraced the term "rough proportionality," since such a term encapsulated "the requirement of the Fifth Amendment."[94] By "rough," the Court meant that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[95] In the end, the Court found that both the floodplain and pedestrian/bicycle pathway exaction failed this test.[96]

In summary, if the government's exaction of a landowner's property rights would have constituted a taking of the landowner's property rights had the government taken those rights outright, then the heightened standards which the Court formulated in *Nollan* and *Dolan* apply to the government's action.[97] Taken together, *Nollan* and *Dolan*'s heightened standards require the government to make three showings in order to impose exactions and avoid a taking under the Fifth Amendment. First, the government must identify a public problem caused by the proposed development which gives rise to a legitimate state interest that would justify the government's outright denial of the development request altogether.[98] Second, the government must establish that

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90. *Id.* at 389-91.
91. *Id.* at 391.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* (footnote omitted).
96. *Id.* at 392-96. The floodplain exaction failed because the city had not explained why dedication, as opposed to merely not permitting plaintiff to build in the floodplain, was required. *Id.* at 393. The pedestrian/bicycle pathway exaction was unconstitutional since the city merely found that it "could" offset traffic congestion, not that it "*will*, or is *likely* to." *Id.* at 395 (quoting Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993) (Peterson, C.J., dissenting)).
97. *See supra* Part II.B.
98. *Id.*

the exaction imposed substantially advances the identified interest, as evidenced by the finding of a nexus between the exaction and the identified legitimate state interest.[99] Third, the government must demonstrate a rough proportionality, both in nature and extent, between the public problem and the exaction imposed.[100] The government's failure to make any one of these three showings results in a taking under the Fifth Amendment for which the government must pay just compensation.[101]

III. *LINGLE V. CHEVRON U.S.A., INC.*

In *Lingle*,[102] the State of Hawai'i enacted Act 257, which, among other things, limited "the amount of rent that an oil company may charge a lessee-dealer to [fifteen] percent of the dealer's gross profits from gasoline sales plus [fifteen] percent of gross sales of products other than gasoline."[103] Plaintiff, an oil company, then sued the State, claiming that "the statute's rent cap provision, on its face, effected a taking of [plaintiff]'s property in violation of the Fifth and Fourteenth Amendments."[104]

On cross-motions for summary judgment, the district court granted summary judgment for plaintiff.[105] The court held that "Act 257 fail[ed] to substantially advance a legitimate state interest, and as such, effect[ed] an unconstitutional taking in violation of the Fifth and Fourteenth Amendments."[106] The court reasoned that the statute was intended to serve the legitimate state interests of preventing "concentration of the retail gasoline market," and the "resultant high prices for consumers . . . by maintaining the viability of independent lessee-dealers."[107] Nonetheless, the Court found that this interest was not substantially advanced by the statute because the statute "would not actually reduce lessee-dealers' costs or retail prices" for two

99. *Id.*
100. *See supra* Part II.C.
101. U.S. CONST. amend. V.
102. For a thorough discussion of the significance of the *Lingle* Court's decision to overrule the *Agins* test, see 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 (2005), and Robert G. Dreher, Lingle's *Legacy: Untangling Substantive Due Process From Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371 (2006).
103. *Lingle*, 544 U.S. at 533 (citing HAW. REV. STAT. § 486H-10.4(c) (1998 Cum. Supp.)).
104. *Id.*
105. *Id.*
106. *Id.* at 534 (citing Chevron U.S.A. Inc. v. Cayetano, 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998)).
107. *Id.* (citing *Chevron*, 57 F. Supp. 2d at 1009-10).

reasons.[108] First, the "rent cap would allow incumbent lessee-dealers, upon transferring occupancy rights to a new lessee, to charge the incoming lessee a premium reflecting the value of the rent reduction."[109] Consequently:

> [T]he incoming lessee's overall expenses would be the same as in the absence of the rent cap, so that there would be no savings to pass along to consumers. Second, the incumbent lessees would not benefit from the statute, "because the oil company lessors would unilaterally raise wholesale fuel prices in order to offset the reduction in their rental income.[110]

After an appeal to and remand from the Ninth Circuit,[111] the district court reaffirmed these conclusions, this time with the aid of expert testimony.[112] On a second appeal, the Ninth Circuit affirmed.[113]

The Supreme Court reversed and remanded.[114] The Court began by reaffirming the principle that the Takings Clause serves 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.'"[115] The Court then reviewed its three categories of takings tests: physical, total, and partial.[116] Each test "aims to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain," i.e., the exercise of the government's eminent domain power.[117]

Concluding its review of the three valid takings tests, the Court then revisited the *Agins* test, observing that this case was its "first opportunity to consider its validity as a freestanding takings test."[118] The Court then held that the test "prescribes an inquiry in the nature of due process, not a takings, test, and that it has no proper place in [the Court's] takings jurisprudence."[119] At the outset, the Court observed that the *Agins* test had its roots in due process, since *Agins* cited two due process cases, *Euclid* and *Nectow*,[120] to create this takings standard.[121] After examining the

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108. *Id.* (citing *Chevron*, 57 F. Supp. 2d at 1010-12).
109. *Id.* at 534-35 (citing *Chevron*, 57 F. Supp. 2d at 1010-12).
110. *Id.* at 535 (citing *Chevron*, 57 F. Supp. 2d at 1012-14).
111. Chevron U.S.A. Inc. v. Cayetano, 198 F. Supp. 2d 1182 at 1183 (D. Haw. 2002).
112. *Id.*
113. *Lingle*, 544 U.S. at 536.
114. *Id.* at 548.
115. *Id.* at 537 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
116. *Id.* at 538-39.
117. *Id.* at 539.
118. *Id.* at 540.
119. *Id.*
120. *See supra* Part II.A.

historical context which gave rise to the *Agins* holding,[122] the Court observed that the *Agins* test is a means-ends test, which asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose."[123] Such an inquiry "has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."[124] However, the Court explained that "such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment[,]" for at least three reasons.[125]

First, the *Agins* test "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights,"[126] and fails to "provide any information about how any regulatory burden is *distributed* among property owners."[127] Unlike the three valid takings tests noted earlier, the *Agins* test "does not help to identify those regulations whose effects are functionally comparable to government *appropriation* or invasion of private property," and 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."[128] In reference to the basic justification for allowing regulatory actions to be challenged as takings, the Court pointed out the missing nexus between a law's effectiveness and the burden which it may impose on individuals under the *Agins* test:

> A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is

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121. *Lingle*, 544 U.S. at 540-41. For further discussion of reliance on these cases in *Agins*, see *supra* Part II.A.
122. *Lingle*, 544 U.S. at 541-42.
123. *Id.* at 542.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

untenable.[129]

Second, a regulation's failure to meet the *Agins* test presupposes a taking:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "*for public use.*" It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking." Conversely, if a government action is found to be impermissible — for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action.[130]

Putting these principles into practice, the Court observed how plaintiff's case exposed the *Agins* test's frailties.[131] The Court reasoned that it was "unclear how significantly [Act 257] actually burdens [plaintiff's] property rights."[132] Specifically, the Court explained that despite the statute's effect of reducing plaintiff's aggregate rental income, plaintiff could nonetheless expect "to receive a return on its investment in [its] stations that satisfie[d] any constitutional standard."[133] Consequently, the Court concluded that plaintiff had neither argued nor established that it had "been singled out to bear any particularly severe regulatory burden."[134] Instead, plaintiff argued that Act 257 would "not actually serve the [s]tate's legitimate interest in protecting consumers against high gasoline prices."[135] Therefore, it was clear to the Court that plaintiff's claim "[did] not sound under the Takings Clause."[136] Indeed, plaintiff sought not just compensation, but injunctive relief from a regulation which it alleged to be "fundamentally arbitrary and irrational."[137]

Third, the Court expressed practical concerns for the *Agins* test:

> The *Agins* formula can be read to demand heightened means-ends

129. *Id.*
130. *Id.* at 543 (citation omitted).
131. *Id.* at 544.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

> review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower — and might often require — courts to substitute their predictive judgments for those of elected legislatures and expert agencies.[138]

Examining the heightened scrutiny applied by the district court, the Court found those proceedings "remarkable" in view of how the Court had "long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation."[139] The Court continued, "[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here."[140]

In short, because the *Agins* test is essentially a substantive due process inquiry, because such an inquiry presupposes a takings inquiry, and because heightened scrutiny is inappropriate in such an inquiry, the Court held that "the 'substantially advances' formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation."[141] Contrary to its elimination of the *Agins* test, the Court took great care not to disturb *Nollan* and *Dolan* in any respect at all.

IV. *NOLLAN* AND *DOLAN* WERE NOT DISTURBED BY THE *LINGLE* COURT'S DECISION TO OVERRULE THE *AGINS* TEST

In the final part of the *Lingle* opinion, the Court emphasized that its decision to overrule the *Agins* test did "not require [it] to disturb any of [its] prior holdings."[142] The Court noted that although it had applied the *Agins* test in *Agins* itself as well as in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[143] in no case had it ever "found a compensable taking based on such an inquiry."[144] The Court noted that, generally, its past recitations of the *Agins* test "merely assumed its validity when referring to it in dicta."[145]

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138. *Id.*
139. *Id.* at 545 (citations omitted).
140. *Id.*
141. *Id.*
142. *Id.*
143. 480 U.S. 470 (1987).
144. *Lingle*, 544 U.S. at 546.
145. *Id.* At this point, the Court cited Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 334 (2002) ("[P]etitioners might have argued that the moratoria did not substantially advance a legitimate state interest"), City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999) ("[A]lthough this Court has [not] provided . . . a thorough explanation of the nature or applicability of the

Still, the Court acknowledged that "[i]t might be argued that [the *Agins* test] played a role in our decisions in *Nollan* . . . and *Dolan*."[146] Rejecting this contention, the Court concluded that although *Nollan* and *Dolan* quoted the *Agins* test, those cases did not apply it.[147] The Court distinguished the *Nollan* and *Dolan* test from the *Agins* on three points. First, the *Nollan* and *Dolan* test is a valid takings test because it reveals the burden on a person's property rights.[148] Second, the *Nollan* and *Dolan* test is not a substantive due process test.[149] Third, the *Nollan* and *Dolan* test is a special application of the unconstitutional conditions doctrine.[150]

This Part proceeds by examining the Court's reasoning on each of these three points in Subpart A, B, and C, respectively. Subpart D then argues that, based on these points, the *Nollan* and *Dolan* test's heightened scrutiny is appropriate. This Part concludes, in Subpart E, by testing the *Lingle* Court's statement that *Nollan* and *Dolan* did not apply the *Agins* test, by applying the *Agins* test to *Nollan*'s facts.

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requirement that a regulation substantially advance legitimate public interests . . . the trial court's instructions [we]re consistent with . . . previous general discussions of regulatory takings liability." (citing *Nollan*, 483 U.S. at 834-35 & n.3)), Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1016 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" (quoting *Agins*, 447 U.S. at 260)), Yee v. Escondido, 503 U.S. 519, 534 (1992) ("[Petitioners] allege in this Court that the ordinance does not 'substantially advance' a 'legitimate state interest' no matter how it is applied." (quoting, inter alia, *Agins*, 447 U.S. at 260)), and United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) ("[O]ur general approach was summed up in *Agins* . . . where we stated that the application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests . . . .'" (internal citation omitted)). The proposition in these cases that a land-use does not work a taking on its face if it substantially advances a legitimate state interest is invalid after *Lingle*.

Arguably, the same can be said for the Court's statement in *Penn Central Transportation Co. v. New York City* that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." 438 U.S. 104, 127 (1978) (citing, inter alia, *Nectow*, 277 U.S. 183). Interestingly, much like *Agins*, the Court cited, among other cases, *Nectow*, for this point of law. *See supra* Part II.A. Thus, *Penn Central*'s "reasonably necessary" rule will likely share the fate of the *Agins* test.

146. *Lingle*, 544 U.S. at 546; *see, e.g.*, Sarah B. Nelson, Comment, *Lingle v. Chevron USA, Inc.*, 30 HARV. ENVTL. L. REV. 281, 292 (2006) ("But even without an explicit overruling, *Lingle* fatally undercuts *Nollan* and *Dolan*.").

147. *Lingle*, 544 U.S. at 547-48.

148. *Id.* at 547.

149. *Id.*

150. *Id.*

A. *The* Nollan *and* Dolan *Test is a Valid Takings Test*

The Takings Clause serves "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."[151] Thus, a test that says "nothing about the actual burden imposed on property rights," cannot tell the courts when a taking has occurred.[152] In view of these principles, the *Lingle* Court observed, "Whereas the 'substantially advances' inquiry before us now[, i.e., the *Agins* test,] is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings."[153]

Instead, the *Agins* test focuses solely on the effectiveness of a land-use law.[154] Consequently, an ineffective regulation under *Agins* does not signal that a taking has occurred.[155] As the *Lingle* Court said, "The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation."[156] An ineffective regulation under the *Agins* test indicates, at most, that that the law has perhaps violated due process, since the test "has some logic in the context of a due process challenge."[157]

By contrast, an ineffective exaction under the *Nollan* and *Dolan* test necessarily means that a taking has in fact occurred. This is because the test begins on the premise that had the government exacted the property rights at issue outright, such action would have certainly been held a taking.[158] The test thus permits the government to avoid a compensable taking if the government can show that the exaction is effective (in advancing a legitimate state interest which would have justified the denial of development).

In short, although an ineffective regulation under the *Agins* test does not indicate that a taking has occurred, an ineffective

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151. Armstrong v. United States, 364 U.S. 40, 49 (1960).
152. *Lingle*, 544 U.S. at 542.
153. *Id.* at 547.
154. *Id.* at 542.
155. *Id.*
156. *Id.* at 543.
157. *Id.* at 542. Even this point is uncertain, because the *Agins* test prescribes a heightened form of scrutiny, which is inappropriate in a due process inquiry. *Id.* at 544-45.
158. *Id.* at 546; *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831-32 (1987); *see also supra* Part II.B-C.

exaction under the *Nollan* and *Dolan* test necessarily means that there has been a taking. Thus, unlike the *Agins* test, the *Nollan* and *Dolan* test is a valid takings test, since it reveals the burden placed on property rights. Because the *Nollan* and *Dolan* test is a valid takings test, it follows that it is not a due process test, as a taking presupposes "that the government has acted in pursuit of a valid public purpose."[159]

B. The Nollan *and* Dolan *Test is Not a Due Process Test*

As stated, the *Agins* test is a substantive due process inquiry.[160] However, the *Nollan* and *Dolan* test is not. This fact is illustrated by the differences between each test's legitimate state interest requirement.[161] The *Lingle* Court paid careful attention to this distinction,[162] stating: "In neither [*Nollan* nor *Dolan*] did the Court question whether the exaction would substantially advance *some* legitimate state interest. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether."[163] The first sentence just quoted refers to the *Agins* test, which merely requires that "a regulation of private property is effective in achieving *some* legitimate public purpose."[164] To fail this substantive due process inquiry, a regulation must not serve "any" legitimate state interest.[165]

On the other hand, the *Nollan* and *Dolan* test calls for a legitimate state interest which would have justified the government's denial of the development permit altogether.[166] The rationale for this requirement is that if the government can deny the development altogether because of a problem that the development might cause, then the government can certainly allow development and exact property rights which it will use to address the problem.[167] An exaction fails the *Nollan* and *Dolan*

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159. *Lingle*, 544 U.S. at 543.

160. *Id.* at 540.

161. For further discussion of the importance of the legitimate state interest requirement, see David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 568 (1999) ("The *Nollan/Dolan* test has three parts, not two. Before reaching nexus and proportionality, it is first necessary, according to *Dolan*, to assure that the regulation is furthering a legitimate state interest.").

162. 4 CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 64.03[2] (2005).

163. *Lingle*, 544 U.S. at 547.

164. *Id.* at 542 (emphasis omitted and added).

165. *Id.* at 543.

166. *Id.* at 547; *Nollan*, 483 U.S. at 836; *see also supra* Part II.B.

167. *Nollan*, 483 U.S. at 836.

test, then, if it fails to advance the "same" legitimate state interest which would have justified the government's denial of the development (in view of the potential public problem caused by the development).[168] The nexus requirement serves to assure that the "same"[169] legitimate state interest is substantially advanced.[170] Thus, if an exaction advances some legitimate state interest but which does not justify the denial of development, as was the case in *Nollan*,[171] then there is a taking, but not a substantive due process violation. Such a violation only occurs if the exaction fails to advance any legitimate state interest.[172]

Accordingly, the *Agins* test is essentially a substantive due process inquiry,[173] but the *Nollan* and *Dolan* test is not.[174] The Court has consistently rejected the notion that the *Nollan* and *Dolan* test sounds in substantive due process. For example, in *Dolan* the Court said:

> JUSTICE STEVENS' dissent suggests that this case is actually grounded in "substantive" due process, rather than in the view that the Takings Clause of the Fifth Amendment was made applicable to the States by the Fourteenth Amendment. But there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States.[175]

Based on the foregoing, three points are clear. First, the *Nollan* and *Dolan* test is not a due process test. Second, the *Nollan* and *Dolan* test is a valid takings test.[176] Third, if an exaction fails the *Nollan* and *Dolan* test, then the exaction is, essentially, "ineffective."[177] In the context of exactions, the upshot of ineffectiveness is that the exaction is an unconstitutional condition.

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168. *Lingle*, 544 U.S. at 547.
169. *Id.*
170. *See supra* Part I.
171. *See infra* Part IV.E.
172. *Lingle*, 544 U.S. at 534. It is, of course, conceivable that an exaction could offend due process by serving no legitimate state interest. *See id.* at 548-49 (Kennedy, J., concurring).
173. *Id.* at 540.
174. *Id.* at 547.
175. *Dolan*, 512 U.S. at 384 n.5. For further discussion of this point, see *infra* Part IV.D, where the different burdens of proof are addressed with respect to substantive due process and takings challenges.
176. *See supra* Part IV.A.
177. *Lingle*, 544 U.S. at 543.

C. Nollan *and* Dolan's *Test is a Special Application of the Unconstitutional Conditions Doctrine*

The *Nollan* and *Dolan* test falls under the unconstitutional conditions doctrine,[178] whereas the *Agins* test does not. The Court first explained that the *Nollan* and *Dolan* test is a part of the doctrine of unconstitutional conditions in *Dolan*.[179] The doctrine holds that "government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[180] In the context of exactions, the constitutional right at issue is, of course, the right "to receive just compensation when property is taken for a public use."[181] In *Nollan*, the Court's implicit reliance on this doctrine was evident when it said that "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to . . . the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."[182] The Court reaffirmed this view in *Lingle*.[183]

The principles underlying the unconstitutional conditions doctrine have a long history in the context of challenges to exactions under the Takings Clause. For instance, in the 1928 case of *Soho Park & Land Co. v. Board of Adjustment*,[184] the Supreme Court of New Jersey invalidated a public park exaction.[185] In that case, plaintiff owned a tract of land which was zoned industrial, and proposed to build a wire factory on the land.[186] One month prior to plaintiff's application for the building permit, the land was rezoned residential.[187] The board of adjustment nonetheless granted plaintiff a building permit to construct the factory.[188] The permit was, however, subject to conditions.[189] The

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178. *See* Dreher, *supra* note 102, at 393-94 ("[T]he special standards developed by the Court in *Nollan* and *Dolan* . . . reflected the Court's concern that exactions may improperly force owners to waive their constitutional rights to just compensation, and thus represent an application of the Court's 'unconstitutional conditions' doctrine." (footnotes omitted)).

179. *Dolan*, 512 U.S. at 385.

180. *Id.*

181. *Id.*

182. *Nollan*, 483 U.S. at 837. *Cf.* Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 495 (N.Y. 1994) (Levine, J., dissenting) ("[I]n *Dolan*, the majority decision justified the application of heightened scrutiny by referring to *Nollan's* adaptation of the well-settled doctrine of unconstitutional conditions . . . ." (internal quotation marks omitted)).

183. *Lingle*, 544 U.S. at 547-48.

184. 142 A. 548 (N.J. 1928).

185. *Id.* at 549.

186. *Id.* at 548-49.

187. *Id.* at 548.

188. *Id.* at 548-49.

fourth condition stated "[t]hat the plot of ground within one hundred feet radius of the Belwood Park station be retained in the B residence zone, in which no factory buildings will be erected."[190] Plaintiff challenged the conditions and appealed to the Supreme Court of New Jersey, which struck the conditions.[191] The issue before the court was "whether or not the imposition of these conditions was within the power of the board of adjustment."[192] The court explained that the board of adjustment does not have authority to impose "unreasonable" conditions on a building permit.[193] The court concluded that the condition was indeed unreasonable.[194] The court reasoned that it was *"a roundabout method of creating a park at the expense of the [plaintiff]."*[195] The court thus struck the condition from plaintiff's building permit.[196]

On the other hand, the *Agins* test is not an application of the unconstitutional conditions doctrine. Instead, it "says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest."[197] Discretionary governmental benefits are not involved. Indeed, a land-use regulation's failure of the *Agins* test certainly does not necessarily convert it into "'an out-and-out plan of extortion.'"[198] Thus, the *Nollan* and *Dolan* test is a special application of the doctrine of unconstitutional conditions, while the *Agins* test is not.

D. Because the Nollan *and* Dolan *Test is Not a Due Process Test, and Because it is a Special Application of the Unconstitutional Conditions Doctrine, Heightened Scrutiny is Appropriate*

As a practical matter, the importance of the preceding discussion is that heightened scrutiny is appropriate under the

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189. *Id.* at 549.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* (emphasis added).
196. *Id.* Likewise, in reviewing subdivision exactions, the Supreme Court of Illinois framed the issue as follows:

> Is it reasonable that a subdivider should be required under the guise of a police power regulation to dedicate a portion of his property to public use; or *does this amount to a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations*?

Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961) (emphasis added).
197. *Lingle*, 544 U.S. at 548.
198. *Nollan*, 483 U.S. at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (1981)).

Nollan and *Dolan* test, but not the *Agins* test. In the course of dismantling the *Agins* test, the Court said that the test could "be read to demand heightened means-ends review."[199] Such review is inappropriate because the Court has "long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation."[200] Thus, the *Agins* heightened scrutiny is inappropriate because it is a substantive due process inquiry.

Conversely, such heightened scrutiny is clearly appropriate under the *Nollan* and *Dolan* test. This is because the test is not a due process test,[201] and because it is a special application of the unconstitutional conditions doctrine.[202] With respect to due process, in *Nollan* the Court emphasized the differences between its takings and due process verbal formulations:

> Contrary to JUSTICE BRENNAN's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved . . . not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective." . . . *[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical*; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.[203]

It is now apparent that the "substantially advances" language in the *Agins* test was improvidently employed because, as the just quoted section clarifies, such language is suitable in a takings, not due process, test, and the *Agins* test is a due process inquiry.[204] By contrast, the "substantially advances" language found a proper home in the *Nollan* and *Dolan* test, because, as stated, it is a valid takings test.[205] Consequently, because the *Nollan* and *Dolan* test is not a due process inquiry,[206] its heightened scrutiny, inasmuch as it employs the "substantially advances" phrasing, is compatible

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199. *Lingle*, 544 U.S. at 544.
200. *Id.* at 545 (citations omitted).
201. *See supra* Part IV.B.
202. *See supra* Part IV.C.
203. *Nollan*, 483 U.S. at 834 n.3 (emphasis omitted and added) (internal citations omitted).
204. *Lingle*, 544 U.S. at 540.
205. *See supra* Part IV.A.
206. *See supra* Part IV.B.

with the Court's "verbal formulations in the takings field."[207]

Furthermore, in reference to the unconstitutional conditions doctrine, in *Dolan* the Court relied on the doctrine to justify its application of heightened scrutiny:

> JUSTICE STEVENS' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.[208]

As stated, the *Agins* test is essentially a due process inquiry derived from *Euclid*.[209] Moreover, it does not involve the unconstitutional conditions doctrine.[210] In consequence, the *Agins* test is not suited for heightened review, insofar as the plaintiff must carry the burden of proof. On the other hand, under the *Nollan* and *Dolan* test, the government must shoulder the burden.[211] Therefore, unlike the *Agins* test, heightened scrutiny is proper under the *Nollan* and *Dolan* test.

There is some concern that the application of the unconstitutional conditions doctrine in the context of exactions[212] has negative implications for private property rights.[213] Professor Jerold S. Kayden has argued that "an unconstitutional conditions analysis conflicts with Justice Scalia's property rights approach because it posits that the owner has no entitlement whatsoever to the new house."[214] The *Nollan* Court appeared to agree with this observation when it noted that "the right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.'"[215] However, the Court reversed course in *Dolan* when it explained that its holding was in fact an application of the unconstitutional conditions doctrine.[216] Certainly, the government can deny development through a valid exercise of its

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207. *Nollan*, 483 U.S. at 834 n.3 (emphasis added).
208. *Dolan*, 512 U.S. at 391 n.8 (citations omitted).
209. *See supra* Part II.A.
210. *See supra* Part IV.C.
211. *Dolan*, 512 U.S. at 391 n.8.
212. *Lingle*, 544 U.S. at 547.
213. Jerod S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 42-43 (1991).
214. *Id.* at 42.
215. *Nollan*, 483 U.S. at 833 n.2.
216. *Dolan*, 512 U.S. at 374, 385.

police power, so long as such a denial does not go "too far"[217] and require the landowner to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[218] Such a denial, of course, amounts to a taking that requires the payment of just compensation.[219]

For example, in *Nollan*, after concluding that if the commission had required plaintiffs to convey an easement outright, then such action would certainly be a taking, the Court addressed the question of whether the commission could avoid this result by conditioning a building permit on plaintiffs' concession of an exaction that would serve the same purpose of denying development altogether.[220] Answering in the affirmative, the Court noted that "the [c]ommission unquestionably would be able to deny [plaintiffs'] permit . . . unless the denial would interfere so drastically with [plaintiffs'] use of their property as to constitute a taking."[221] Thus, concern that private property rights will be compromised if developmental approval is construed as a discretionary benefit is unfounded, insofar as the government's discretion is limited by the Takings Clause.[222]

In short, the *Nollan* and *Dolan* test's heightened scrutiny is appropriate since that test does not sound in substantive due process but instead is a special application of the unconstitutional conditions doctrine.

E. Nollan *and* Dolan *did not Apply the* Agins *Test*

The *Lingle* Court clearly articulated that "*Nollan* and *Dolan* cannot be characterized as applying the 'substantially advances' test we address today," that is, the *Agins* test.[223] To be sure, the *Nollan* Court quoted the *Agins* test.[224] However, had the *Nollan* Court applied the *Agins* test, the result would have been different in *Nollan*. To review, the *Agins* test provides that a land-use law does not work a taking on its face if it substantially advances a legitimate state interest. Applying this standard to *Nollan's* facts, and to the commission's findings in particular, the state certainly

217. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
218. *Armstrong*, 364 U.S. at 49 (1960).
219. *See Penn Central*, 438 U.S. at 124; *Lucas*, 505 U.S. at 1018.
220. *Nollan*, 483 U.S. at 836-37.
221. *Id.* at 835-36 (citing *Penn Central*, 438 U.S. 104).
222. U.S. CONST. amend. V.
223. *Lingle*, 544 U.S. at 548.
224. *Id.* at 546; *see also supra* Part II.B; Dreher, *supra* note 102, at 393 (explaining that neither *Nollan* nor *Dolan* "involved a true application of the *Agins* [test]").

has a legitimate interest in providing public access to its beaches.[225] Exacting a public access easement to the beach will undeniably advance this interest. Thus, had the *Nollan* Court applied the *Agins* test to the easement exaction, the Court would probably not have held the easement to be a taking.[226]

By contrast, the easement exaction failed to pass muster under the *Nollan* and *Dolan* test because the legitimate state interest which might[227] have justified the commission's outright denial of the Nollans' request for a development permit was the state's interest in "protecting the public's ability to see the beach[,]" not access it.[228] This is the reason the *Nollan* Court found a "viewing spot" constitutionally permissible,[229] and an easement constitutionally repugnant.[230] Thus, *Nollan* did not apply the *Agins* test.

As an aside, some courts have in fact applied the *Agins* test to exactions.[231] These courts draw a curious distinction between administrative and legislatively imposed exactions.[232] The basic rationale for this approach is that the *Dolan* Court referred to the exactions at issue as having been administratively imposed.[233]

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225. *Nollan*, 483 U.S. at 828-29.

226. This conclusion is less than certain because the *Nollan* Court did not reach rough proportionality. *See id.* at 838 ("We can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.").

227. The Court assumed, "without deciding," that "protecting the public's ability to see the beach" was a legitimate state interest. *Id.* at 835.

228. *Id.*

229. *Id.* at 836.

230. *Id.* at 838-39.

231. *See* Christopher T. Goodin, Comment, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without A Constitutional Difference,"* 28 U. HAW. L. REV. 139, 148-54 (2005).

232. *Id.*

233. *See Dolan*, 512 U.S. at 385. In *Dolan*, the court stated:

> The sort of land use regulations discussed in the cases just cited . . . differ in two relevant particulars from the present case. *First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.* Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Id. (emphasis added). The Court later noted:

> [I]n evaluating *most generally applicable zoning regulations*, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel. In this

Thus, in the face of legislatively imposed exactions, these courts have applied the *Agins* test despite the fact that the *Agins* test does not remotely provide an adequate takings framework.[234] These courts must reconsider their analyses of legislative exactions now that the *Agins* test is unavailable.[235] Given that the *Nollan* and *Dolan* test is still good law, the choice is obvious: *Nollan* and *Dolan* set the constitutional floor for all exactions cases, irrespective of whether the exaction was imposed administratively or legislatively.[236]

V. ALTERNATIVES TO UNCONSTITUTIONAL CONDITIONS

There are a series of alternatives to adopting "unconstitutional conditions" as the most logical alternative to regulatory takings jurisprudence following *Lingle*'s abolition of the "furthering a legitimate state interest" prong of *Agins v. Tiburon*.[237] First, one might argue that states like California are

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situation, the burden properly rests on the city.

Id. at 391 n.8 (citing *Ambler Realty Co.*, 272 U.S. 365) (emphasis added). Professor John D. Echeverria maintains this view even after *Lingle*, basing his position on how the *Lingle* Court emphasized "the fact that [*Nollan* and *Dolan*] involved 'adjudicative' government action." *See* Echeverria, *supra* note 19, at 10583.

234. *Lingle*, 544 U.S. at 545.

235. *Id.* at 545-46.

236. Goodin, *supra* note 231, at 158-67. However, one commentator has concluded that the *Nollan* and *Dolan* test should be overruled because it cannot be validly distinguished from the *Agins* test. *See* Nelson, *supra* note 146, at 290-93. Nelson argues that the *Lingle* Court's principal distinction was that the exactions imposed in *Nollan* and *Dolan* were both "adjudicative," whereas *Agins* involved a legislative determination. *Id.* at 291. She then rightly concludes that this distinction is invalid because "a skillfully crafted 'essential nexus' does nothing to lessen a property owner's burden; nor does replacing an administrative official's signature with a legislative vote." *Id.* at 292. Absent a proper distinction, Nelson posits that agencies' judgments should be accorded the same deference as legislative judgments, that is, under rational basis review. *Id.* She then concludes that "[a]sking courts to 'substitute their predictive judgments for those of elected legislatures and expert agencies' and to 'scrutinize the efficacy of a vast array of state and federal regulations' deserves a sound and explicit justification absent from *Nollan* and *Dolan*." *Id.* (quoting *Lingle*, 544 U.S. at 544).

This argument improperly asserts that *Nollan* and *Dolan* apply to "'a vast array of state and federal regulations.'" *Id.* (quoting *Lingle*, 544 U.S. at 544). On the contrary, those cases apply instead to a limited segment of state and federal regulations, namely the regulations which impose land-use exactions. And exactions fall under the Court's unconstitutional conditions doctrine. That doctrine certainly furnishes "a sound and explicit justification" for why the *Nollan* and *Dolan* test is analytically different from the *Agins* test, *see supra* Part 0, as well as for why heightened scrutiny is appropriate to both adjudicative and legislative exactions, *see* Goodin, *supra* note 231, at 158-61.

237. *See Lingle*, 544 U.S. at 545.

free to readopt the test under their own constitution, since this prong is more protective of property rights, as the Supreme Court suggested for public purpose public use tests following its decision in *Kelo v. City of New London*.[238] Second, one might argue that Fourteenth Amendment due process use of some version of legitimate state interests is still viable, particularly given Justice Kennedy's concurrence in *Lingle*[239] and some of the language in both pre- and post-*Lingle* cases. Third, one could narrowly construe the *Lingle* decision to apply only to the precise language of *Agins*'s first prong, since courts have used different language arguably to the same effect. Last, one might argue that the Court simply got it wrong in *Lingle* and should return to its *Yee* jurisprudence by implication.[240]

A. Readoption of Agins *Prong One*

Whether or not there is anything left of the *Agins* test following the Court's unanimous opinion in *Lingle*, states are free to adopt (or readopt) it as part of their state regulatory takings jurisprudence. There is ample precedent from the Supreme Court's opinion in the recent eminent domain case of *Kelo*.[241] There, recall, the Court refused to reconsider its broad definition of public use under the Fifth Amendment, but encouraged the states to adopt a more strict standard if they so chose[242] (and indeed many did).[243] As in *Kelo*, the Court in *Lingle* removes a barrier to government taking of property without compensation. States are always free to increase — but not decrease — the level of such protection. Thus, for example, the California State Constitution's Article I, § 19 provides for compensation in the event of government taking or damaging of private property could be interpreted as requiring the substantial advancing of a legitimate state interest for regulations which restrict the use of private

238. 545 U.S. 469 (2005).

239. *See Lingle*, 544 U.S. at 548 (Kennedy, J., concurring).

240. *See Chevron USA, Inc. v. Lingle*, 363 F.3d 84, 859–60 (Fletcher, J., dissenting), *rev'd*, 544 U.S. 528 (2005).

241. 545 U.S. 469.

242. *Id.* at 498. The Court in *Kelo* stated:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised."

Id. (footnotes omitted)).

243. *See* David Schultz, *What's Yours Can be Mine: Are There Any Private Takings After* Kelo v. City of New London?, 24 UCLA J. ENVTL. L. & POL'Y 195, 223–34 (2006).

property through the exercise of the police power – in other words, in a potential regulatory taking context.[244]

B. Prong One of Agins *and Due Process*

A fair reading of the *Lingle* decision demonstrates that the Court eliminated *Agins*' "substantially advances" test only for Fifth Amendment regulatory takings cases. Both the majority opinion and Justice Kennedy's concurrence clearly mean to leave some version of the test intact in Fourteenth Amendment due process inquiries. Justice Kennedy: "This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."[245] The majority: "We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence."[246] Further support can be gleaned from Judge Fletcher's dissent in the Ninth Circuit Court of Appeals *Lingle* decision, where he states that there are two different constitutional tests ordinarily applied to rent and price control: arbitrary, capricious and unreasonable (presumably Fourteenth-Amendment due process) and the "substantially advances" test which he states is ordinarily applied to zoning and other land use regulations, by which he presumably means a Fifth Amendment test.[247] He correctly observes that applying the latter probably comes from dicta in *Yee* and laments that application and the result that "virtually all rent control laws in the Ninth Circuit are now subject to the 'substantially advances a legitimate state interest' test" after *Richardson* and the then-current *Lingle* decision, which he regards as a mistake.[248] One can certainly read two subsequent California cases, one in federal court and one in state court, that way, though the emphasis in each was on Fifth Amendment challenges rather than Fourteenth Amendment ones.[249]

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244. *See* CAL. CONST. art. I, § 19. *But see* Small Property Owners of San Francisco v. City and County of San Francisco, 47 Cal. Rptr. 3d 121, 128-29 (Cal. Ct. App. 2006) (rejecting the substantially advances test as a takings test in favor of a due process argument).

245. *Lingle*, 544 U.S. at 545 (Kennedy, J., concurring).

246. *Id.* at 540 (majority opinion).

247. *See Lingle*, 363 F.3d at 859–60 (Fletcher, J., dissenting).

248. *Id.* at 860–61.

249. *See* Los Altos El Granada Investors v. City of Capitola, No. 04-13722, 2005 WL 177427 (N.D. Cal., July 26, 2005); Los Altos El Granada Investors v. City of Capitola, 43 Cal. Rptr. 3d 434 (Cal. Ct. App. 2006); *see also* Allegretti & Co. v. County of Imperial, 42 Cal Rptr. 3d 122 (Cal. Ct. App. 2006), in which plaintiff argued that the first prong of *Agins* was still part of California taking law based on the California Supreme Court's 1998 decision in *Landgate, Inc. v.*

For example, in *Kennedy v. City of Seattle*,[250] the owners of moorage sites wanted to evict their tenant, but could not do so under a rent control ordinance. [251] The ordinance made "it unlawful for a moorage owner to give notice to a houseboat owner to remove his houseboat, or to evict a houseboat except for six specific reasons."[252] The Washington Supreme Court held that two of those reasons, the only two that appeared to permit the owner to evict through no fault of his tenant,[253] rendered the ordinance unconstitutional, because both were illusory, and consequently confiscatory under section 16 of article 1 to the Washington Constitution.[254]

The first provision in the ordinance purported to allow an owner to evict a tenant if the "owner, with 6 months' notice, wishes to occupy the moorage site and finds the displaced houseboat owner another lawful moorage site within the City of Seattle."[255] The court observed that while this provision offered an option in theory, the provision was impossible to utilize in practice, because there were no other moorage sites available within the City of Seattle.[256] "While reasonable restrictions on the use of property by an owner are proper, to require a landlord to locate a nonexistent moorage for a houseboat owner before the residence of the landlord can be moved to the property, is not reasonable."[257]

The second provision of the ordinance permitted an owner of a mooring to evict his tenant in order to make a "change in use of the moorage . . . with 6 months' advanced notice."[258] This provision was also illusory, because the permissible uses in the zone were

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California Coastal Com., 953 P.2d 1188 (Cal. 1998). The court of appeals did hold that *Landgate* required it to objectively assess whether there exists a "sufficient connection between the land use regulation in question and a legitimate governmental purpose" (which it found). *Allegretti*, 42 Cal. Rptr. 3d at 139. Again, in *Small Property Owners of San Francisco*, the court in a backhanded fashion appeared to invite due process rather than Fifth Amendment takings in challenging an ordinance requiring interest on tenant security deposits, by observing that "[i]t is far more logical to conclude that regulation of this sort might be declared invalid as violative of due process than that the government should give back the money it legitimately took." 47 Cal Rptr. 3d at 129 n.6.

250. 617 P.2d 713 (Wash. 1980).

251. *Id.* at 715.

252. *Id.* at 716.

253. The ordinance included provisions that allowed the owner to evict his tenant where the tenant failed to pay rent, breached a covenant, failed to abate a nuisance, or failed to execute a lease at a reasonable rent. *Id.*

254. *Id.* at 719–20.

255. *Id.* at 716 (emphasis omitted).

256. *Id.* at 719.

257. *Id.* (citation omitted).

258. *Id.* at 716 (emphasis omitted).

floating home moorages and nonprofit yacht clubs.[259] In other words, the provision only allowed an owner to evict his tenant if he wanted to open a yacht club.[260] The yacht club use, the court explained, was "so highly restrictive as to tilt the balance so that in fact is [was] a taking."[261] The use was unreasonable for the added reason that "the establishment of any kind of a yacht club on a small restricted moorage with difficult access is no more a reasonable possibility than finding a nonexistent moorage."[262]

Another comes from a reasonable rate of return case from the Ninth Circuit Court of Appeals, *Sierra Lake Reserve v. City of Rocklin*.[263] The ordinance only allowed rent increases for the recovery of reasonable expenditures.[264] Plaintiff, a mobile home park owner, sued alleging that the ordinance deprived it of a fair and reasonable return on its investment by limiting rent increases to capital improvements.[265]

Writing for the court, Judge Alex Kozinski recited the general rule that "every dollar the landlord puts into the property by way of capital improvements constitutes an investment in the property for which a 'fair and reasonable' return must be allowed."[266] "Breaking even is not enough; the law must provide for a profit on one's investment."[267] He reasoned that the rent control ordinance:

> must do more than simply allow plaintiff to pass through certain costs; it must ensure that plaintiff will receive a reasonable return on those expenditures. To the extent plaintiff alleges that the rent increases allowed on account of capital improvements merely offset the cost of those improvements (or less), it has stated a claim for a violation of substantive due process. . . .[268]

Of course, the burden in proving a violation of substantive due process is high for the plaintiff. Any reasonable ground for the challenged regulation will generally result in judicial deference to the state or local government which passed it. However, many if not most of the challenged land use regulations are local governmental in nature, not state, *Lingle* notwithstanding. A

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259. *Id.* at 719–20.
260. *Id.*
261. *Id.* at 720.
262. *Id.*
263. 938 F.2d 951 (9th Cir. 1991), *vacated by* 506 U.S. 802 (1992), *adhered to in part by* 987 F.2d 662 (9th Cir. 1993).
264. *Id.* at 953.
265. *Id.* at 958.
266. *See id.* (discussing Guaranty Nat'l Ins. Co. v. Gates, 916 F.2d 508, 512–14 & n.4 (9th Cir. 1990)).
267. *Id.*
268. *Id.* (internal citation omitted).

worthwhile argument, made relatively recently by Professors Dan Tarlock and Dan Mandelker in their excellent article, is to abandon such deference — or at least to vastly reduce it — for local government legislation on the ground that the local government is far more easily captured by special interests, particularly those favoring regulation of landowners who wish to develop land, than state legislators.[269]

C. Lingle *Narrowed: Apply it to "Substantially Advances a Legitimate State Interest" Verbatim*

Courts have used a variety of phrases in the application of some version (arguably) of the "substantially advances" test, including nexus-like wording in cases besides the obvious ones over exactions and impact fees as in *Nollan* and *Dolan.* Thus, for example, in *Allegretti* discussed above, the court discusses assessing whether there is a "sufficient connection between the land use regulation in question and a legitimate governmental purpose."[270]

D. The Court Got It Wrong in Lingle *and Should Reconsider*

There is commentary suggesting that the Court badly muddled the background and rationale for the "substantially advances" test.[271] This is the argument that Richard Epstein cogently makes in his article, which is part of this symposium.[272] Epstein further argues that the Court, and particularly Justice O'Connor, fails altogether to either appreciate or deal with the economic implications of *Lingle* and, for that matter, its regulatory takings jurisprudence generally.

E. Use the New Definitions of "Character of the Governmental Action" From Penn Central Transportation Co. v. City of New York

It is no secret that what everyone thought the U.S. Supreme Court meant in the "character of the governmental action" regulatory takings criteria posited in *Penn Central* has morphed into an investigation of government rationale and purpose for

269. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land Use Law*, 24 URB. LAW. 1 (1992).

270. *Allegretti & Co.*, 42 Cal. Rptr. 3d at 139.

271. *See* R.S. Radford, *Just a Flesh Wound? The Impact of* Lingle v. Chevron *on Regulatory Takings Law*, 38 URB. LAW. 437 (2006); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741 (1988); Brief of the CATO Institute as Amicus Curiae in Support of Respondent, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) (No. 04-163).

272. Richard Epstein, *From* Penn Central *to* Lingle*l: The Long Road Backward*, 40 J. MARSHALL L. REV. 601 (2007).

imposing a land use regulation in the first place. Since the *Lingle* decision purports to leave the Court's previous takings jurisprudence intact, and in particular the partial regulatory taking criteria in *Penn Central*, perhaps we should take them at their word and suggest an investigation into the equivalent of legitimate state interest under this so-called second prong or criteria in that case.[273]

Indeed, Dale Whitman in his article which is part of this symposium suggests that the third criterion for regulatory takings under *Penn Central* (the character of the governmental action) is destroyed under any "serious" reading of *Lingle*.[274] He nevertheless suggests later that the second prong of *Agins* could be construed to be alive and well under this third *Penn Central* criterion if it is read (as it is by many commentators today) as meaning to address more than simply whether the governmental action represents a physical or regulatory taking, which contextually Brennan implies in his majority opinion.[275]

VI. CONCLUSION

This Article has reviewed and supported the Supreme Court's conclusion that the *Nollan* and *Dolan* test remains a viable takings test after *Lingle*. It is clear that *Nollan* and *Dolan* quoted the *Agins* test.[276] It is equally clear that the *Nollan* and *Dolan* test is different from the *Agins* test. The *Agins* test reveals nothing about the extent to which a person's property rights are burdened by a land-use regulation.[277] On the other hand, the *Nollan* and *Dolan* test begins with the premise that the exaction would undoubtedly be a taking in any other context.[278] Both the *Agins* test and the *Nollan* and *Dolan* test gauge effectiveness.[279]

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273. Radford, *supra* note 271; R.S. Radford, *Does Rent Control Fail to Substantially Advance Legitimate State Interests — And Why Does it Matter After Lingle?*, SL012 ALI-ABA 205 (2005); Steven J. Eagle, *"Character" as "Worthiness": A New Meaning for* Penn Central's *Third Test?*, 27 No. 6 ZONING & PLANNING L. REP. (2004); Steven J. Eagle, *"Character of the Governmental Action" in takings Law: Past, Present, and Future*, SJ052 ALI-ABA 459 (2004); John D. Echeverria, *The "Character" Factor in Regulatory Takings Analysis*, SK081 ALI-ABA 143 (2005). *But see* John D. Echeverria, Lingle, *Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 ENVLT. L. REP. 10577, 10582 (2005); Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Takings Analysis*, U. HAW. L. REV. (forthcoming 2006).

274. Dale Whitman, *Deconstructing* Lingle: *Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 581, 582 (2007).

275. *Id.* at 588-89.

276. *See supra* Part II.B.

277. *See supra* Part III.

278. *See supra* Part IV.A.

279. *See supra* Part IV.B.

However, ineffectiveness under the *Agins* test means that a land-use law failed to substantially advance any legitimate state interest.[280] By contrast, ineffectiveness under the *Nollan* and *Dolan* test means that an exaction failed to substantially advance a legitimate state interest which would have justified the denial of development.[281] Moreover, whereas an ineffective regulation under the *Agins* test offends due process,[282] an ineffective regulation under the *Nollan* and *Dolan* test offends the unconstitutional conditions doctrine and thus works a taking.[283] Because the *Nollan* and *Dolan* test is not a substantive due process inquiry,[284] and because it is a special application of the unconstitutional conditions doctrine,[285] the heightened scrutiny it applies is appropriate.[286] For these reasons, *Nollan* and *Dolan* did not apply the *Agins* test.[287] Accordingly, the *Nollan* and *Dolan* test was not disturbed by the *Lingle* Court's decision to overrule the *Agins* test.

This Article has also suggested alternatives to adopting "unconstitutional conditions" as the most logical alternative to regulatory takings jurisprudence following *Lingle's* abolition of the "furthering a legitimate state interest" prong of *Agins*. The states are free to readopt the *Agins* test under their own constitution, since the states are only prohibited from diminishing, not heightening, the Federal constitutional floor.[288] Or the *Agins* test may find a proper home in the Fourteenth Amendment's Due Process Clause.[289] The Court suggested as much in *Lingle*.[290] One could argue for the application of the "substantially advances" test in the different terms used by courts across the country.[291] One might also argue that the Court reached the wrong result in *Lingle* and should return to its *Yee* jurisprudence by implication.[292] Lastly, there is the argument that the *Agins* test is effectuated through the character of the governmental action factor in a *Penn Central* analysis.[293] All of these alternatives may be viable options after *Lingle*.

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280. *Id.*
281. *Id.*
282. *Id.*
283. *See supra* Part IV.C.
284. *See supra* Part IV.B.
285. *See supra* Part IV.C.
286. *See supra* Part IV.D.
287. *See supra* Part IV.
288. *See supra* Part V.A.
289. *See supra* Part V.B.
290. *Id.*
291. *See supra* Part V.C.
292. *See supra* Part V.D.
293. *See supra* Part V.E.