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**Takings Clarified:  
U.S. Supreme Court Provides Clear Direction**

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**Abstracts:** The United States Supreme Court holding in *Lingle v. Chevron U.S.A., Inc.* clarified years of takings jurisprudence and overturned a controversial decision in the case of *Agins v. City of Tiburon*. This article discusses how the *Lingle* court denounced the "substantially advances" test created in *Agins*, as a due process inquiry rather than a proper takings test. The *Lingle* court instead opted to create a clear four-category paradigm for takings cases, which focuses on the burden the government places on private property rights in order to distinguish takings categories.

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In the Supreme Court's landmark decision *Lingle v. Chevron U.S.A. Inc.*<sup>1</sup> the Court untangled the web of regulatory taking jurisprudence. Much of the murkiness in this area of law stems from the Court's decision in *Agins v. City of Tiburon*.<sup>2</sup> In *Agins*, the Court stated that a governmental regulation could be a taking if it does not substantially advance legitimate state interests or denies an owner economically viable use of his land. This is a disjunctive test: if either prong is violated, the Court said, a taking occurs and compensation is the proper remedy.

In a unanimous decision, the Court held in *Lingle* that the *Agins* "substantially advances" formula is not an appropriate test for determining whether a regulation constitutes a taking under the Fifth Amendment. The "formula prescribes an inquiry in the nature of a due process, not a takings, test, and . . . it has no proper place in . . . takings jurisprudence."<sup>3</sup> The effect of the Court's holding and its explanatory dicta is to clarify greatly the field of regulatory takings law as applied to land use regulations and agency determinations.

In *Lingle*, Chevron challenged a Hawaii statute that placed a cap on the amount of rent an oil company may charge a lessee-dealer. Hawaii enacted Act 257 in June of 1997 in order to protect gasoline prices from inflation due to the effects of market concentration. Chevron filed suit in the United States District

Court for the District of Hawaii claiming the Act effected a taking of its property and sought a declaratory judgment and an injunction against the application of the rent cap to its stations.

The parties stipulated “that Chevron has earned in the past, and anticipates that it will continue to earn under Act 257, a return on its investment in lessee-dealer stations in Hawaii that satisfies any constitutional standard.”<sup>4</sup> Patently, Act 257 did not effect a taking because it deprived Chevron of an economically viable use of its property. After weighing the testimony of the litigants’ dueling experts, the District Court held that the statute constituted an unconstitutional taking because it did not achieve its intended objective and, therefore, did not substantially advance a legitimate state interest. The Ninth Circuit affirmed and the Supreme Court granted certiorari and reversed.

The Takings Clause of the Fifth Amendment provides that property shall not be taken for public use without just compensation. “In other words, 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.”<sup>5</sup> “The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”<sup>6</sup> “Beginning with [*Pennsylvania Coal Co. v.] Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster -- and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.”<sup>7</sup> In determining whether a regulation is a taking, the Court states that “we must remain cognizant that ‘government regulation -- by definition -- involves the adjustment of rights for the public good,’ and that ‘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.’”<sup>8</sup>

## **Four Categories of Takings Cases**

The Court in *Lingle* identifies four categories of regulatory takings cases. The tests created by the Court in each category aim 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.”<sup>9</sup> The first two categories are *per se* takings: void on their face without regard to the extent of their impact on aggrieved property owners. “First, where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation.”<sup>10</sup> “A second categorical rule applies to regulations that completely deprive an owner of ‘*all* economically beneficial use’ of her property.”<sup>11</sup> The third category, land use exactions, involves the imposition by a land use approval board of a condition requiring a landowner dedicate an easement allowing public access to her property – the effect of which is to oust

the landowner from a portion of her domain.<sup>12</sup> Within this category the Court's test is whether the condition advances the same public interest that would allow the board to deny the application. It conducts a fact-based, or as applied, inquiry to determine whether there is an essential nexus between the condition imposed and the impact of the proposed development on the community.

"Outside these two 'relatively narrow categories' (and the special context of land-use exactions . . . ) regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*."<sup>13</sup> The *Penn Central* "principal guidelines" are: the economic impact of the regulation on the claimant, particularly the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental regulation. "[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."<sup>14</sup>

In *Lingle*, the lower courts held that Act 257 is a taking because it fails to meet the *Agins* "substantially advances" test. These courts held that the Act did not substantially advance the legitimate state interest of controlling gasoline prices. In arriving at its conclusion, the District Court weighed the reasonableness of two opposing economists who testified on behalf of the litigants; it found one expert's views more persuasive than those of the other and concluded that Act 257 would not achieve the objective of controlling gasoline prices. In the Supreme Court's own words, using the *Agins* test in this way "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 often require -- the courts to substitute their predictive judgments for those of elected legislatures and expert agencies."<sup>15</sup>

According to the Court, the *Agins* test is "regrettably imprecise" and "such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."<sup>16</sup> "There is no question that the 'substantially advances' formula was derived from due process, not takings, precedents."<sup>17</sup> "[T]he 'substantially advances' inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners."<sup>18</sup> "The notion that . . . a regulation . . . 'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable."<sup>19</sup> The "takings Clause presupposes that the government has acted in pursuit of a valid public purpose."<sup>20</sup>

In reaching its conclusion to remove the *Agins* test from takings jurisprudence, the Court held that it was not necessary to disturb any prior holding because a taking has never been found based on the *Agins* inquiry. Rather, the Court "correct[ed] course" by holding that the "substantially advances" formula is not a valid taking test.

## Applicable Tests

*Per se* cases: The *Lingle* roadmap to regulatory takings provides practitioners and scholars with clear directions. There are two types of *per se* takings, where no factual investigation of the extent of the regulatory burden is required. The first of these is where a regulation invades the owner's exclusive right of possession. The seminal Supreme Court case in this category, where attorneys may turn for specific guidance, is *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>21</sup> The second *per se* category involves regulations that deny property owners all economically beneficial use of their property. The applicable test here is contained in *Lucas v. South Carolina Coastal Council.*<sup>22</sup>

As applied cases: The two other categories of regulatory takings involve "as applied" investigations where the court examines the extent of the burden imposed and the character of the regulation involved. Where land use agencies, in their adjudicative role, impose conditions that require owners to allow the public on their land, courts must determine whether there is an essential nexus and rough proportionality between the condition imposed and the impact of the proposed development on the public. Cases clarifying the rules within this category are *Nollan v. California Coastal Comm'n*<sup>23</sup> and *Dolan v. City of Tigard.*<sup>24</sup> The *Lingle* Court explains that *Nollan* and *Dolan* "involve a special application of the 'doctrine of unconstitutional conditions,' which provides that 'the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'"<sup>25</sup> "In short, *Nollan* and *Dolan* cannot be characterized as applying the 'substantially advances' test we address today, and our decision should not be read to disturb these precedents."<sup>26</sup> The second category in the "as applied" realm involves a balancing of factors, under the *Penn Central* test - notably the character of the challenged regulation and extent to which the regulation interferes with the owner's distinct investment-backed expectations.

## "Deprivation" Cases – The Due Process Clause

In *Lingle*, the Court further clarified that the Due Process Clause of the U.S. Constitution gives rise to an entirely separate body of case law, involving distinct tests, that can be used to challenge land use regulations. This clause states that no person shall be deprived of property without due process of law. In dicta, the *Lingle* Court reminds us that "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."<sup>27</sup> Since 1894, under *Lawton v. Steele*<sup>28</sup> the Court has applied a "deferential 'reasonableness' standard to determine whether a challenged regulation was a 'valid exercise of the . . . police power' under the Due Process Clause."<sup>29</sup>

In the more recent *County of Sacramento v. Lewis*<sup>30</sup> case, the Court noted that the Due Process Clause protects property owners against “the exercise of power without any reasonable justification in the service of a legitimate governmental objective.”<sup>31</sup> Justice Kennedy writes a concurring opinion in *Lingle* to emphasize that the Court’s opinion “does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.”<sup>32</sup> In *Lingle*, the due process claim had been voluntarily dismissed by Chevron, so the Court did not address whether such a case existed.

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<sup>1</sup> No. 04-163, 2005 U.S. LEXIS 4342 (May 23, 2005).

<sup>2</sup> 447 U.S. 255 (1980).

<sup>3</sup> *Lingle*, 2005 U.S. LEXIS 4342, at \*23.

<sup>4</sup> *Id.* at \*11-12.

<sup>5</sup> *Id.* at \*16 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)).

<sup>6</sup> *Id.* at \*16-17 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *United States v. General Motors Corp.*, 323 U.S. 373 (1945)).

<sup>7</sup> *Id.* at \*17.

<sup>8</sup> *Id.* at \*18 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

<sup>9</sup> *Lingle*, 2005 U.S. LEXIS 4342, at \*20-21.

<sup>10</sup> *Id.* at \*18 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

<sup>11</sup> *Id.* at \*19 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

<sup>12</sup> *Id.* at \*33 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

<sup>13</sup> *Id.* at \*19 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

<sup>14</sup> *Lingle*, 2005 U.S. LEXIS 4342, at \*21-22.

<sup>15</sup> *Id.* at \*30.

<sup>16</sup> *Id.* at \*25-26.

<sup>17</sup> *Id.* at \*23.

<sup>18</sup> *Id.* at \*26.

<sup>19</sup> *Lingle*, 2005 U.S. LEXIS 4342, at \*28.

<sup>20</sup> *Id.* at \*28.

<sup>21</sup> 458 U.S. 419 (1982).

<sup>22</sup> 505 U.S.1003 (1992).

<sup>23</sup> 483 U.S. 825 (1987).

<sup>24</sup> 512 U.S. 374 (1994).

<sup>25</sup> *Lingle*, 2005 U.S. LEXIS 4342, at \*36 (quoting *Dolan*, 512 U.S. at 385).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at \*26.

<sup>28</sup> 152 U.S. 133 (1894).

<sup>29</sup> *Lingle*, 2005 U.S. LEXIS 4342, at \*25.

<sup>30</sup> 523 U.S. 833, 846 (1998).

<sup>31</sup> *See Lingle*, 2005 U.S. LEXIS 4342, at \*26.

<sup>32</sup> *Id.* at \*37.