

ESSAY

AT LAST, SOME CLARITY: THE POTENTIAL LONG-TERM IMPACT OF *LINGLE V. CHEVRON* AND THE SEPARATION OF TAKINGS AND SUBSTANTIVE DUE PROCESS

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I. INTRODUCTION

Regulatory takings often is considered one of the most doctrinally confused areas of constitutional law. Bucking its general habit of adding to this confusion with every takings case that it hears, the Supreme Court recently provided some clarity to takings doctrine in *Lingle v. Chevron U.S.A. Inc.*¹ Indeed, this clarity has the potential to make *Lingle* far more significant than *Kelo v. City of New London*,² which has dominated the commentary about the Court's

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¹ 125 S. Ct. 2074 (2005). One of the reasons that Justice O'Connor's opinion of the Court in *Lingle* provided clarity rather than adding to the disarray of takings law is that, generally speaking, it addressed the question presented, and only the question presented. As such, it represents a pleasant truce in the recent dicta war between Justice Stevens, on the one hand, and Justices Rehnquist, Scalia, and Thomas, on the other, in which the side controlling the majority in any given takings case uses the opinion of the Court as a venue for furthering its vision of what regulatory takings law should be. For example, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, Justice Stevens used dicta in a very narrow case (considering whether a development moratorium could be considered a temporary taking) to argue that the so-called denominator problem had been fully and finally resolved in favor of his desired position. 535 U.S. 302, 331 (2002). Justice Thomas found this position "puzzling," because the issue had expressly been left open in an opinion issued just one year earlier. See *Tahoe-Sierra*, 535 U.S. at 355 n.* (Thomas, J., dissenting). The clarity and brevity of *Lingle* suggests that the Court might do well in the future to follow Justice O'Connor's model and focus only on the issues at hand in future regulatory takings cases.

² 125 S. Ct. 2655 (2005).

recent takings decisions.³ This clarity may also have the counter-intuitive effect of helping property rights advocates more than the short-term defeat in *Lingle* hurt them.⁴

Lingle involved a narrow (though important) issue of takings law, and the degree of clarity it provided is, on the surface, modest. The Court had suggested in dicta in prior takings cases that a regulation may violate the Just Compensation Clause⁵ if it does not substantially advance a state interest. The core question presented in *Lingle* was whether this “substantially advance” test was a takings test or a substantive due process test. The Court answered that the substantially advance test is a substantive due process test that has no place in takings doctrine.⁶ On initial inspection, therefore, *Lingle* simply ties up one relatively small loose end in takings law. Part II of this Essay discusses this narrow issue at the core of *Lingle*, and concludes that the Court’s holding on this issue was correct.

The primary purpose of this Essay, however, is to argue that a closer look at *Lingle* reveals that it has tremendous potential to clarify takings doctrine more broadly. Part III discusses this potential, which largely comes from *Lingle*’s recognition that many of the Court’s early cases involving what today look like regulatory takings issues were in fact concerned with substantive due process issues. Citation to these older cases has caused substantive due

³ *Kelo* concerned New London’s attempt to use eminent domain to take private property and then transfer it to a private developer. The stated purpose of the taking was to spur economic development, and the core legal issue in the case was whether this type of economic development taking satisfied the public use requirement of the Just Compensation Clause. The Court answered affirmatively and allowed the taking to proceed. Although the issue in *Kelo* is undoubtedly an important one, the case is not likely to be particularly significant in a doctrinal sense because its core holding is consistent with the Court’s prior public use cases. See *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). In *Midkiff* and *Berman*, the Court effectively had written the public use clause out of the Constitution, and the practical issue in *Kelo* was whether the Court would blanche at the degree to which municipalities had pushed the use of eminent domain to transfer property from one private party to the other. Although a majority of the Court did not adversely react to the use in *Kelo*, the public reaction to the case has been negative and legislators around the country have proposed legislation aimed at limiting the scope of permissible uses of eminent domain. *Kelo* therefore may have a significant long-term political impact, but its addition to the Court’s takings doctrine is minimal.

⁴ In this Essay, I use “property rights advocates” to refer to those who tend to favor the interests of private property owners and who therefore tend to favor a broader application of the takings clause. I use “takings opponents” to refer to those who tend to favor the interest of the larger community in imposing regulation, and who therefore tend to argue for a narrower application of the takings clause. I do not intend these labels to have broader normative meaning, or to suggest that one group is more virtuous than the other.

⁵ U.S. CONST. amend. V.

⁶ *Lingle*, 125 S. Ct. at 2083.

process concepts, like the substantially advance test, to bleed into takings law. This cross-pollination has caused difficulty for courts and commentators who have attempted to square these older cases with contemporary takings doctrine. Part III argues that the simple recognition that cases like *Village of Euclid v. Ambler Realty Co.*⁷ and *Nectow v. City of Cambridge*⁸ were substantive due process cases that should have no meaningful role in takings law goes a long way in clarifying what has been a confusing mass of contradictory caselaw. Part III further argues that the recognition that the substantive due process and regulatory takings doctrines ask different questions leads to the conclusion that the character of the government act should have little or no role in regulatory takings analysis. Taking this broader view of *Lingle*'s significance suggests that *Lingle* may have long-term benefits for the property rights advocates who were the putative losers in the case, because property rights advocates have more to gain than takings opponents from the clear separation of substantive due process and takings law.

This Essay concludes that by drawing a clear line between substantive due process and takings doctrine, *Lingle* has the potential to become a very influential decision and to bring a degree of clarity to a muddled area of law.

II. THE TIMELY END OF THE SUBSTANTIALLY ADVANCE TEST

Lingle's core doctrinal holding is a rejection of the substantially advance test as a part of takings doctrine. The test is generally attributed to the 1980 case *Agins v. City of Tiburon*,⁹ but has its origins in the *Penn Central Transportation Co. v. City of New York* case decided two years earlier.¹⁰ As articulated in *Agins*, the test suggested that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”¹¹ This formulation, which was dicta in both *Penn Central* and *Agins*, was repeated as dicta in a number of subsequent regulatory takings

⁷ 272 U.S. 365 (1926).

⁸ 277 U.S. 183 (1928).

⁹ 447 U.S. 255 (1980).

¹⁰ 438 U.S. 104, 127 (1978) (“[A] use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose.”).

¹¹ *Agins*, 447 U.S. at 260.

cases.¹² Prior to *Lingle*, however, the Court never had the opportunity to address the substantially advance test on the merits.¹³

Lingle, which squarely presented the validity of the substantially advance test, involved Chevron's challenge to a Hawaii rent control law that limited the rent charged by oil companies to the operators of service stations.¹⁴ Chevron conceded that its return on investment under the Hawaii statute satisfied any constitutional standard,¹⁵ and instead based its taking argument exclusively on the argument that the statute failed to substantially advance a legitimate state interest.

The gist of Chevron's substantially advance argument was that the Hawaii statute simply would not work as intended. Hawaii argued to the district court that "the rent cap was intended to prevent concentration of the retail gasoline market—and, more importantly, resultant high prices for consumers—by maintaining the viability of independent lessee-dealers."¹⁶ The district court accepted Hawaii's argument about the intent of the statute, but also accepted Chevron's argument that the statute would not be effective in achieving its asserted goal. The district court therefore granted summary judgment to Chevron on the basis that the statute did not "substantially advance a legitimate state interest, and as such, effect[ed] an unconstitutional taking in violation of the Fifth and Fourteenth Amendments."¹⁷

On appeal, the Ninth Circuit vacated the grant of summary judgment on the basis that the efficacy of the statute presented a genuine issue of material fact and remanded to the district court for a trial on the merits.¹⁸ The trial was limited to the testimony of competing economics experts.¹⁹ After hearing this testimony, the district court entered judgment for Chevron, again concluding that the statute simply wouldn't work as intended.²⁰ The Ninth Circuit

¹² See *Lingle*, 125 S. Ct. at 2077–78; see also *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) (citing Supreme Court cases that support the substantially advance formulation).

¹³ *Lingle*, 125 S. Ct. at 2082–83.

¹⁴ *Id.* at 2078.

¹⁵ *Id.* at 2079.

¹⁶ *Id.*

¹⁷ *Id.* (quoting *Chevron U.S.A. Inc. v. Cayetano*, 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998)).

¹⁸ *Id.* at 2079–80 (citing *Chevron U.S.A. Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000)).

¹⁹ *Id.* at 2080.

²⁰ *Id.*

affirmed over the dissent of one judge.²¹

Thus, by the time the case reached the Supreme Court, the Hawaii statute had been held to be an unconstitutional taking because the trial court concluded, based on its finding that one economics expert was more credible than the other, that the Hawaii legislature had done something stupid.²² The Supreme Court, understandably unimpressed with the proceedings below, concluded that the district court, based on a battle of expert economists, had improperly substituted its judgment for that of the Hawaii legislature.²³

After seeing the substantially advance test in action, the Court had little difficulty concluding that it was a substantive due process test that has no place in takings doctrine.²⁴ Indeed, the substantially advance test had its roots in three cases involving substantive due process review of land-use regulations: *Village of Euclid v. Ambler Realty Co.*, *Nectow v. City of Cambridge*, and *Goldblatt v. Town of Hempstead*.²⁵ As the Court explained in *Lingle*, the citation of *Nectow* and *Goldblatt* in *Agins* was understandable.²⁶ After deciding that zoning was not a facial violation of substantive due process in *Euclid*, but that zoning could violate substantive due process as applied in *Nectow*, the Court had largely stayed out of the land-use business for fifty years, with *Goldblatt* being the only notable exception. Left with little guidance from Justice Holmes' "cryptic opinion"²⁷ in the seminal regulatory takings case *Pennsylvania Coal Co. v. Mahon*,²⁸ the substantive due process precedents were a likely place to look for authority on the

²¹ *Id.*

²² The act, like most rent-control laws, probably was a silly and misguided intervention in the market. The Court has long held, however, that silliness or stupidity (short of pure irrationality) on the part of a legislature is not a legitimate ground for invalidating economic legislation. See *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487–88 (1955).

²³ *Lingle*, 125 S. Ct. at 2085. Based on my pre-academic life as a corporate litigator, I have my doubts about whether *any* dispute should be resolved solely on the competing testimony of economics experts. This view is not the result of doubts about the value or merit of economic testimony. Rather, in my experience it is not hard to find credible-sounding experts on both sides of most economic issues, and I do not think that legal decisionmakers are particularly well-equipped to decide which of two competing economic experts is correct. The trial judge in *Lingle* may well have been unusually sophisticated in economics matters, but if so it would have represented the exception, not the rule.

²⁴ *Id.* at 2083.

²⁵ *Id.* (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)).

²⁶ *Id.* at 2083.

²⁷ See D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 517 (2004).

²⁸ 260 U.S. 393 (1922).

constitutionality of zoning laws. The result of this citation to *Euclid*, *Nectow*, and *Goldblatt*, however, was the accidental incorporation of the substantive due process substantially advance standard into takings law.²⁹

While acknowledging that its regulatory takings precedents “cannot be characterized as unified,”³⁰ the Court in *Lingle* did draw out the essential characteristics of the takings inquiry. The Court described the regulatory takings question as whether the regulation is “so onerous that its effect is tantamount to a direct appropriation or ouster.”³¹ As a result, the various takings tests have focused on identifying “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.”³²

The regulatory takings inquiry, in other words, focuses on the regulation’s effect on the private property at issue and asks whether that effect is functionally equivalent to a physical taking. The substantially advance test, in contrast, “reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights.”³³ Instead, consistent with its substantive due process roots, the substantially advance test asks whether the government act advances a legitimate state interest—the functional equivalent of the substantive due process question of whether a state action is a legitimate exercise of the state’s police power.³⁴

The Court’s analysis in *Lingle* is convincing. The Court’s description of how the substantially advance test bled into takings law through careless citation to substantive due process precedent is correct, and can be easily traced by following the citation paths back in time.³⁵ I have previously argued that the fundamental difference between takings and substantive due process inquiries is that the former focuses on the effect on the property owner while the latter focuses on the legitimacy of the government exercise of

²⁹ *Lingle*, 125 S. Ct. at 2082–83.

³⁰ *Id.* at 2082.

³¹ *Id.* at 2076.

³² *Id.* at 2082.

³³ *Id.* at 2084.

³⁴ See *Lochner v. New York*, 198 U.S. 45, 57 (1905) (making substantive due process inquiry of whether the contested act was “within the police power of the State”).

³⁵ See Barros, *supra* note 27, at 519–20.

power.³⁶ Therefore, I believe the Court correctly concluded that the substantially advance test belongs in the substantive due process category.

Even if one disagrees with *Lingle* on the merits, it is undeniable that by eliminating the substantially advance standard the Court took at least a modest step in clarifying its regulatory takings doctrine. However, beyond resolving the substantially advance dispute, *Lingle*'s clear separation of takings and substantive due process generally has great potential for further clarifying takings doctrine.

III. TAKINGS, SUBSTANTIVE DUE PROCESS AND THE FUTURE INTERPRETATION OF PAST CASES

The broad significance of *Lingle* is tied to four related points made in the Court's opinion. First, the Court recognized in the opening sentence of its opinion that it occasionally makes mistakes, and that the mere repetition of a principle in a series of opinions does not mean that the Court necessarily has thought through the validity or ramifications of the stated principle.³⁷ Second, the Court recognized that *Euclid*, *Nectow*, and *Goldblatt* were substantive due process cases (or at least, in the case of *Goldblatt*, principally involved substantive due process analysis).³⁸ Third, the Court recognized that the substantially advance principle had bled into its takings analysis through mistaken citation to the substantive due process analysis in these three cases.³⁹ Fourth, the Court recognized that the takings and substantive due process analyses ask fundamentally different questions, with the former focused on the effect of the government action on the property owner and the latter focused on the legitimacy of the government's exercise of power.⁴⁰

Taken together, these points mean that prior cases, especially older cases decided before regulatory takings jurisprudence fully

³⁶ See *id.* at 519–20.

³⁷ *Lingle*, 125 S. Ct. at 2077.

³⁸ *Id.* at 2083. Unlike *Euclid* and *Nectow*, *Goldblatt* recognized the distinction between the takings and substantive due process analyses. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594–96 (1962); Barros, *supra* note 27, at 519–20 n.243. Most of the analysis in *Goldblatt*, however, concerned substantive due process issues, and the Court did not consider the takings issue in depth because there was no evidence in the record that the regulation reduced the value of the property at issue. *Goldblatt*, 369 U.S. at 594–96; see Barros, *supra* note 27, at 519–20 n. 243.

³⁹ *Lingle*, 125 S. Ct. at 2083.

⁴⁰ *Id.* at 2083–84.

developed in the post-*Penn Central* era, have problematic substantive due process baggage. This baggage is due to more than mistaken citation to *Euclid*, *Nectow*, and *Goldblatt*. In the foundational *Pennsylvania Coal Co. v. Mahon*, Justice Holmes authored a revolutionary decision holding that a regulation could in some circumstances be an unconstitutional taking of private property.⁴¹ This holding broke with the rule articulated in *Mugler v. Kansas* that a regulation could never constitute a taking.⁴² Because Justice Holmes was charting new ground, it is not surprising that his opinion is rife with references to substantive due process doctrine—just as it was not surprising that in the absence of other applicable precedent, the Court in *Penn Central* and *Agins* looked to *Euclid*, *Nectow*, and *Goldblatt*.⁴³

In the time since *Penn Central*, however, regulatory takings doctrine has crystallized into an analysis clearly independent and distinct from substantive due process. Simply put, the takings analysis asks whether the government act has taken property, while the substantive due process analysis asks whether the government act is within the scope of the government's power.⁴⁴ As the Court recognized in *Lingle*, it is now clear that many prior cases were not concerned with the regulatory takings issue as currently conceived. It may seem obvious, but lack of consistency between cases is one of the greatest obstacles to coherence in regulatory takings doctrine.

⁴¹ 260 U.S. 393, 415 (1922).

⁴² *Mugler v. Kansas*, 123 U.S. 623, 669 (1887).

⁴³ See *supra* notes 26–29 and accompanying text. I am close to being convinced by conversations with Bill Treanor and Brad Karkkainen that Holmes grounded the regulatory takings inquiry that he articulated in *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) in the broad concept of substantive due process rather than in the Just Compensation Clause. That said, I continue to believe that the impact of the government act on a property owner was a major factor in Holmes's analysis, and that Holmes therefore was engaged in a fundamentally different inquiry that that applied by Justice Harlan in *Mugler*. In any event, Holmes undeniably used a great deal of substantive due process language in *Mahon*. Post-*Lingle*, this suggests that *Mahon* should now be discounted as a takings precedent. Put another way, post-*Lingle* we should be less concerned with what *Mahon* means and more concerned with whether *Mahon* matters anymore.

⁴⁴ See *Lingle*, 125 S. Ct. at 2084; Barros, *supra* note 27, at 515–18. By recognizing that the regulatory takings question asks whether the government act is “so onerous that its effect is tantamount to a direct appropriation or ouster,” *Lingle*, 125 S. Ct. at 2081, the Court focused the regulatory takings inquiry on the impact on the property owner. With the same language, the Court also came close to recognizing that takings should only be found for total or near-total diminutions in value, because a lesser diminution in value is not likely to be equivalent to a physical expropriation. See Barros, *supra* note 27, at 515–17 (arguing that the Just Compensation Clause should be read to require compensation for total regulatory diminutions in value, but not for lesser diminutions, because total diminutions in value are equivalent to physical expropriation). The thorny issue of what to use as the denominator in the diminution in value equation, however, remains open.

The recognition that some of the inconsistency is due to the improper melding of the takings and substantive due process analyses is a significant step towards achieving that coherence. At minimum, caution must be exercised before early cases—such as *Hadacheck v. Sebastian*⁴⁵ and *Miller v. Schoene*⁴⁶—are used as

⁴⁵ 239 U.S. 394 (1915).

⁴⁶ 276 U.S. 272 (1928). *Schoene* has been of interest to takings scholars because Justice Holmes, the author of *Mahon*, joined in *Schoene*'s denial of a takings claim without comment. As part of a larger research project into the Court's internal documents in major takings cases, I found a relevant slip of paper of the type used to circulate draft opinions to members of the Court in the files of Justice Harlan Fiske Stone, the author of the Court's opinion in *Schoene*. These slips most often simply told the author of the draft whether the replying justice was willing to join in the proposed opinion. In *Schoene*, various justices wrote "yes", "I agree", or "I acquiesce" (the last from Justice Butler). Justice Holmes's slip, however, included a short note to Justice Stone:

Good [illegible; presumably something like "I agree"]
OWH

It has been argued that destruction is not a taking. Answered in *U.S. v. Welch*, 217 U.S. 333, 339 [(1910)] in which I cite a Mass case where I [four more words that are hard to read; first appears to be "discussed" or "dismissed"; last appears to be "notion" or "motion"]

Harlan Fiske Stone Papers, Manuscript Division, Library of Congress, Washington, D.C., Box 55 Folder 199 (*Miller v. Schoene*). *Welch* involved the destruction of a right-of-way easement by flooding caused by a government dam. At page 339 of the U.S. Reports, Holmes wrote:

A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as an incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end.

As support for this proposition, Holmes cites the "Mass case" referenced in his note to Justice Stone, *Miller v. Horton*, 26 N.E. 100 (Mass. 1891). *Miller v. Horton* involved the destruction of plaintiff's horse, which was suspected of having a disease called glanders. It turned out that the horse was not in fact infected, and the plaintiff claimed compensation. Holmes, writing the opinion for the Massachusetts Supreme Court, recognized throughout his discussion that an infected horse was a nuisance, and could be destroyed without compensation to the owner. But what about a horse that was destroyed on the good faith belief that it was infected? Holmes wrote:

We cannot admit that the legislature has an unlimited right to destroy property without compensation, on the ground that destruction is not an appropriation to public use within article 10 of the declaration of rights. When a healthy horse is killed by a public officer, acting under a general statute, for fear that it should spread disease, the horse certainly would seem to be taken for public use as truly as if it were seized to drag an artillery wagon. The public equally appropriates it, whatever they do with it afterwards. Certainly the legislature could not declare all cattle to be nuisances, and order them to be killed without compensation. It does not attempt to do so. As we have said, it only declares certain diseased animals to be nuisances.

Miller v. Horton, 100 N.E. at 102 (citation omitted). Holmes therefore concluded that the government had failed to establish a justification for their destruction of plaintiff's property.

Reading *Schoene* and *Miller v. Horton* together, it seems apparent that Holmes thought that the destruction of an actually diseased animal or plant was a taking of property but that no compensation was required because the government was acting to abate a nuisance. Where the property was not in fact a nuisance, compensation was due even if the government acted reasonably and in good faith. Holmes, therefore, held a narrow view of the nuisance exception that is much closer to that articulated by Justice Scalia in the opinion of the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), than that articulated by

authority in contemporary regulatory takings cases. Indeed, the time may have come for the Court to recognize that the analysis in all of its early regulatory takings cases—including the foundational *Mahon*—should not be treated as binding in the contemporary regulatory takings context.

Similar caution must be used with many of the Court's more recent regulatory takings precedents, which in some circumstances have been infected with substantive due process analysis. Indeed, the holding in *Lingle* that *Euclid*, *Nectow*, and *Goldblatt* should not be treated as regulatory takings authority effectively erases several pages in the U.S. Reports of a number of more recent takings cases. The Court's discussion of the substantive due process constitutionality of zoning laws in *Penn Central* should now be seen as irrelevant to the regulatory takings analysis.⁴⁷ More importantly, *Penn Central's* discussion of *Euclid* as standing for the proposition that "diminution in property value, standing alone, [cannot] establish a 'taking,'"⁴⁸ does not survive *Lingle's* rejection of *Euclid* as a regulatory takings precedent.⁴⁹ Likewise, beyond the rejection of the substantially advance test, *Lingle* highlights the error of the following description of the regulatory takings issue in *Agins*:

[The takings] question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid* is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a

Justice Blackmun in dissent in that case.

And what of *Mahon*? On one level, it can be seen as consistent with Holmes' non-deferential approach to exercises of the police power in the takings context. It is interesting, though, that Holmes did not reference *Mahon* in his note to Justice Stone, leaving open the possibility that Holmes saw *Mahon* and *Schoene* as presenting distinct issues.

⁴⁷ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125–27 (1978).

⁴⁸ See *id.* at 131.

⁴⁹ See *Lingle*, 125 S. Ct. at 2083. The *Penn Central* Court's citation to *Hadacheck* for the same proposition is similarly suspect. See *supra* note 45 and accompanying text. Likewise, the *Tahoe-Sierra* Court's citation to *Euclid* for the proposition that the Court previously had "rejected takings challenges to regulations . . . restricting the type of 'use' across the breadth of the property" should not be seen to survive *Lingle*. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 319 n.15 (2002). Commentators have also made the understandable mistake of treating *Euclid* and *Nectow* as takings cases. See, e.g., 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, 524, 530 (1999).

substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner.⁵⁰

More broadly, the analysis in *Lingle* illustrates why the character of the government act generally should have no role in the takings analysis.⁵¹ *Penn Central* described the character of the government act as being relevant to the takings analysis, noting that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”⁵² This, of course, is an uncontroversial statement as made: physical invasions are now seen as *per se* takings, where most regulatory actions are not.⁵³ Similarly, government actions that can be characterized as abatement of common law nuisances are *per se* not takings.⁵⁴ Beyond these relatively narrow circumstances,

⁵⁰ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citation omitted).

⁵¹ R.S. Radford has argued in the context of defending the legitimacy of takings claims based on the substantially advance test that the test was an alternative expression of *Penn Central*'s character of the government action inquiry. 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. L.J. 353, 364–65 (2004); see also R.S. Radford, *Regulatory Takings Law in the 1990s: The Death of Rent Control?*, 21 SW. U. L. REV. 1019, 1025–26 (1992).

⁵² *Penn Central*, 438 U.S. at 124 (citation omitted); see Gary Lawson, Katharine Ferguson & Guillermo A. Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: Rediscovering the Mathews v. Eldridge and Penn Central Frameworks, 81 NOTRE DAME L. REV. (forthcoming 2005) (manuscript at 143–44, on file with The Notre Dame Law Review) (discussing the significance of the character of the government act to the *Penn Central* takings analysis).

⁵³ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that a government act that amounts to a physical invasion of property is a *per se* taking).

⁵⁴ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–32 (1992) (holding that a government act that prohibits a use of land that would not be allowed by the state’s background principles of nuisance laws will not be a taking). Recognition that the character of the government action is a substantive due process concept clarifies the discussion of the Court’s early caselaw in *Lucas*. Early cases such as *Mugler*, *Hadacheck*, and *Miller* had suggested that a regulation that prevents a harmful use could not be a taking. See *id.* at 1022–24. In *Lucas*, Justice Scalia stated that this “prevention of harmful use” language should be understood to be “merely [the Court’s] early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value.” *Id.* at 1026. This statement comes close to recognizing that the early cases rested on a different analytical footing than the Court’s contemporary takings cases. Justice Scalia’s unfortunate inclusion of the parenthetical “without compensation,” however, clouds the distinction between the substantive due process and takings analyses. A better statement of the same point would have been that the “prevention of harmful use” language should be understood to be “merely the Court’s early formulation of the police power justification necessary to sustain any regulation against a substantive due process challenge.” As progenitors of the rule that a regulation that abates a common law nuisance is not a taking, these early cases do have some impact on contemporary takings law. See *id.* at 1023–24. But

however, the character of the government act should have no role in the takings analysis whatsoever.⁵⁵

As *Lingle* explained, the focus of the takings analysis is on whether the government act takes property, not on whether the government has a good or bad reason for its action.⁵⁶ This

the nuisance exception is now seen to rest on the ground that a property owner does not own a property right to engage in a common law nuisance. *Id.* at 1027. The harm-preventing character of the regulation therefore should not be relevant at all to the contemporary takings analysis.

⁵⁵ Lawson, Ferguson & Montero argue, and I agree, that the most plausible interpretation of the intended meaning of the character of government action factor in *Penn Central* “is that it is designed to evaluate the extent to which the government action resembles what has been uncontroversially understood to constitute a taking.” Lawson, Ferguson & Montero, *supra* note 52 (manuscript at 44). They then go on to argue that the *Penn Central* takings analysis should be viewed as having two factors: “(1) the extent of the harm suffered by the property owner *in view of* the owner’s investment-backed expectations and (2) the character of the governmental action *in view of* the paradigmatic takings status of permanent physical invasions (or, perhaps even more paradigmatically, formal transfers of title).” *Id.* (manuscript at 45). In my view, the recognition in *Lingle* that the regulatory takings analysis asks whether the regulation is “so onerous that its effect is tantamount to a direct appropriation or ouster,” *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2081 (2005), collapses these two factors into one: whether the impact on the property owner is so severe that it is functionally equivalent to a classic exercise of eminent domain.

⁵⁶ *Lingle*, 125 S. Ct. at 2083–84. The Court’s opinion in *Lingle* regrettably preserved the suggestion from prior caselaw that a taking is more likely to be found if the government act singles out a relatively small number of property owners. *See Lingle*, 125 S. Ct. at 2084. Because the focus of the regulatory takings analysis is on the impact of the government act on the property owner (or, put simply, whether the government through regulation effectively has *taken* property), it should not matter whether the government has taken property for a good or bad reason, or whether the government has taken property from many owners or few. Rather, if property has been taken, then what should matter is whether compensation has been paid. If a local municipality took 90% of its residents’ property through an explicit exercise of eminent domain, compensation clearly would be due. The result should not be different if the local municipality effectively took 90% of its residents’ property through regulation. It may be that in the case of a broadly applicable regulation, property owners are more likely to benefit from the restrictions placed on their neighbors. But in many circumstances, the affected property owner will not obtain a proportional benefit from the regulation.

Indeed, the fallacy of the argument that a broadly applicable regulation will benefit the affected property owner is well illustrated by the Michigan Court of Appeals’ analysis in its recent *K & K Construction, Inc. v. Department of Environmental Equality* decision. No. 244455, 2005 WL 1753805 (Mich. Ct. App. July 26, 2005). *K & K* involved a property owner’s challenge to Michigan’s wetland regulations. In rejecting that challenge, the court made the following unsupported assertion: “All property owners in this state share these benefits relatively equally, and all property owners, and, importantly, all prospective owners, are relatively equally subject to the burdens placed on much of the property in this state by the wetlands regulations.” *Id.* at *15; *see also* *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 298 (Alaska 2001) (rejecting a challenge to a wetlands regulation “which applies broadly to all landowners and which benefits both the public generally and the landowners in particular”). This assertion is complete bunk. The regulations certainly create a public benefit to the environment, but the burden is not shared equally by all property owners. Rather, the burden is imposed only on property owners who have wetlands. These property owners bear all of the burdens of the regulation while obtaining only a fraction of the public benefit.

recognition that the character of the government act in the latter sense—whether the government is acting for a really important reason as opposed to a really silly reason—is a substantive due process question, not a takings question, further clarifies existing takings precedent. Indeed, this recognition effectively requires the deletion of eight pages from Justice Stevens' opinion in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, where the Court held that the government act was not a taking because it furthered such a *really important* public purpose.⁵⁷ Justice Stevens' analysis is rife with citation to *Euclid* and *Goldblatt*,⁵⁸ and post-*Lingle* it is clear that takings law presumes that the government will not affect property for really silly reasons.

Lingle dealt a blow to property rights advocates who had hoped to use the substantially advance test as a tool to attack government regulation of private property. The case nevertheless contains a silver lining for property rights advocates. By recognizing that the character of the government act is largely irrelevant to the takings analysis,⁵⁹ *Lingle* represents a setback to takings opponents who, like Justice Stevens, tend to argue that a government act should not be found to be a taking when it furthers a *really important* public purpose. Largely because the substantive due process cases are more helpful to them, takings opponents are far more likely than property rights advocates to appeal to substantive due process authority. For example, *Hadacheck* and *Mugler* often are cited by takings opponents as examples of near-total diminutions in value that have been found to not constitute takings. Such citations will be much weaker post-*Lingle* because cases like *Hadacheck* and *Mugler* now have greatly diminished authority in the regulatory takings context. Indeed, *Lingle* may represent the final stake in the argument that *Mugler*, a favorite case of takings opponents, remains a viable and meaningful precedent in contemporary takings

In any event, if a regulatory impact is so severe that it actually constitutes the equivalent of a physical expropriation, the owners are not going to be in a position to benefit from such an average reciprocity of advantage. Political process theorists would argue that singling out makes it more likely that a process failure has occurred. See Barros, *supra* note 27, at 514 & n.228. But any time the government takes property (through regulation or otherwise) without compensation, the political process has failed. The Just Compensation Clause provides a remedy for such process failures, and compensation should be due regardless of how narrowly or broadly the government focused its action. See *id.* at 515–17.

⁵⁷ 480 U.S. 470, 492, 506 (1987).

⁵⁸ See *id.* at 487–90 & nn. 16 & 18.

⁵⁹ *Lingle*, 125 Sup. Ct. at 2083–84.

law.⁶⁰

IV. CONCLUSION

Despite its surface modesty, *Lingle* has tremendous potential to clarify regulatory takings law through its doctrinal separation of substantive due process and regulatory takings. Indeed, if the Court fulfills the potential of this doctrinal separation, and recognizes that its previous regulatory takings cases are neither consistent nor correct, commentators might have to begin their regulatory takings articles with something other than the ritual incantation that the doctrine is a hopeless mess.

⁶⁰ Leaving aside the issue of whether early cases should have any bearing on contemporary regulatory takings law post-*Lingle*, *Mugler* can be fairly seen to stand for three propositions related to regulatory takings law: (1) that an exercise of the police power can never be a taking; (2) that a government action that abates a nuisance is not a taking; and (3) that the legislature has the power to define what constitutes a nuisance. See *Mugler v. Kansas*, 123 U.S. 623, 669, 671 (1887). *Mugler* was implicitly overruled as to the first proposition in *Mahon* and the third proposition in *Lucas*. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (“Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”). This leaves the second proposition that abatement of a common law nuisance is not a taking. This proposition now is a well-established and non-controversial part of contemporary takings doctrine. As a consequence, *Mugler* really adds nothing of substance to the regulatory takings picture. In both *Mahon* and *Lucas*, the opinions of the Court stated positions clearly contrary to *Mugler*, but did not address *Mugler* head on, even though in each case the dissenting justices clearly and prominently cited the case. See *Lucas*, 505 U.S. at 1047–51, 1052–53 (Blackmun, J., dissenting); *id.* at 1068 (Stevens, J., dissenting); *Mahon*, 260 U.S. at 418 (Brandeis, J., dissenting). One admirable trait of the Court’s opinion in *Lingle* is its recognition that its precedents in this area are not holy writ. The Court should continue this trend, stop pretending that cases are consistent when they are not, and explicitly overrule cases that are no longer viable.