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WHY *LINGLE* IS HALF RIGHT

by

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*Lingle v. Chevron U.S.A. Inc.*¹ is a highly unusual decision, in that it wiped out a legal doctrine the Supreme Court itself had created, without overruling the outcome of any prior Court decision. *Lingle* involved a transparent piece of special interest legislation, under which gasoline stations in Hawaii that lease their facilities from oil refining companies enjoyed a legislated cap on the rent they had to pay. Their competitors – stations operated directly by refiners and stations that owned their own property or that leased their property from parties other than refiners – enjoyed no such ceiling on their costs of doing business. The State decided that it could not defend the statute on the ground that it would benefit one class of service station relative to others. Instead, it lamely argued that the law would help protect consumers against high gasoline prices. After some back and forth between the federal district court in Hawaii and the Ninth Circuit, the courts of appeals agreed with the district court that this justification was inherently implausible, and that the statute was unconstitutional.²

¹ 544 U.S. 528 (2005).

² It appears from the Court's summary of the stipulated facts that the rent cap would have little immediate effect on retail gasoline prices, since the cap was set below the rentals that Chevron was currently collecting on all but a minority of its stations. Assuming that the statute would at some point have real bite in constraining rents, this would likely cause price of gasoline to rise, as Chevron and other refiners sought to recoup a portion of the revenue lost due to the cap on rents. (This further assumes the Robinson-Patman Act would not permit refiners to charge differential wholesale prices to different categories of service stations; if they could do this, the statute would have no effect.) If the cap did constrain rents, then the statute would succeed in its apparent objective of redistributing income to current service station operators who lease from refiners. But the redistribution would come at the expense of consumers in the form of slightly higher prices and the shareholders of the refining companies in the form of slightly lower earnings, the respective share of their losses being determined by the price elasticity of demand for gasoline. The more inelastic the demand, the higher the share of redistribution would be borne by consumers in the form of higher prices.

The stated legal ground for the Ninth Circuit decision was that the statute violated the Takings Clause, because it did not “substantially advance a legitimate state interest.” The Ninth Circuit had previously adopted this facial test for identifying measures that constitute a compensable taking, drawing on language in *Agins v. City of Tiburon*.³ *Agins* had in turn cited *Penn Central Transportation Co. v. City of New York*,⁴ which in turn cited *Nectow v. Cambridge*,⁵ a case that appeared to rely on substantive due process rather than the Takings Clause. The Supreme Court in *Lingle* sought to tidy up the constitutional pedigree of all this, announcing that on further examination the “substantially advances” test was properly grounded in the Due Process Clause, not the Takings Clause. In effect, a constitutional standard that belonged under one Clause had jumped the tracks and attached itself to another Clause. Once the test was reattached to the right Clause, the oil companies, having been misled by the Supreme Court and the Ninth Circuit into relying on the wrong Clause, lost their case.

I take as my text the following wrap up sentence from Justice O’Connor’s opinion for the Court in *Lingle*: “We hold that the ‘substantially advances’ formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.”⁶ The first half of this sentence, I think, is correct. There should be no facial takings “test,” analogous to the categorical rules for permanent occupations or complete eliminations of economic value, which deems a regulation that fails to substantially advance any legitimate state interest a taking. This is the way the Ninth

³ 447 U.S. 255, 260 (1980).

⁴ 438 U.S. 104 (1978).

⁵ 277 U.S. 183, 188 (1928).

⁶ 544 U.S. at 548.

Circuit had come to regard the substantially advances idea, and the Court was right to repudiate that approach.

The second half of the sentence, that the substantially advances inquiry has “no proper place” in takings jurisprudence, I have my doubts about. In particular, I see no reason in principle why the question whether a particular land use regulation substantially advances a legitimate governmental interest might not qualify as one of the “factors” that courts consider in conducting the “essentially ad hoc, factual inquiries” that *Penn Central* mandates as the general default inquiry in takings cases.⁷ I am not prepared to argue that the substantially advances inquiry necessarily should be adopted as a *Penn Central* factor. But substantially advances has as much of a claim to be a *Penn Central* factor as some of the other elements that are today regarded as factors. The Court has never seriously deliberated about which factors are most probative and hence most appropriate for inclusion in an ad hoc inquiry, and certainly it did not do so in *Lingle*. Absent a more sustained inquiry about the proper content of the ad hoc inquiry, I think the Court was mistaken to banish substantially advances from the world of takings jurisprudence without giving it a fair hearing, so to speak, as to whether it might be given a reprieve in this reduced role.

Let me back up and try to explain the source of my doubts. Broadly speaking, there are two explanations for why we have a regulatory takings or inverse condemnation doctrine. The first explanation posits that the doctrine is grounded in concerns about troublesome redistribution. The second explanation posits that the doctrine is necessary in order to maintain the boundaries between different governmental powers. If the

⁷ *Penn Central*, 438 U.S. at 124.

regulatory takings doctrine is based on troublesome redistribution, then substantially advances clearly has no role. If the doctrine is based on boundary maintenance, there may be a role for substantially advances after all.

The troublesome redistribution explanation is the one favored by most academics. It draws inspiration from the statement in *Armstrong v. United States* that the government should not “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁸ Of course different people have different ideas about what makes for troublesome or unfair redistribution. Richard Epstein believes that all government redistribution is troublesome, including progressive income taxes and welfare benefits.⁹ More commonly, the kind of troublesome redistribution associated with the Takings Clause is what has been called “spot redistribution” – government action that imposes high costs on a relatively small number of persons for reasons that are no fault of their own. The classic example would be a taking of land for a new highway.

Note that one implication of the troublesome redistribution explanation is that the Court will never get regulatory takings doctrine right unless and until it develops a comprehensive theory of when redistribution from A to B, or from A to lots of Bs, or from lots of As to B, is just. In order to decide takings cases we need a theory of distributive justice, or perhaps more accurately, a theory about when a system of adversarial litigation can be used to rectify departures from what a theory of distributive justice would indicate is just. Why for example, is the redistribution mandated by the

⁸ 364 U.S. 40, 49 (1960).

⁹ Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

statute in *Lingle* – which would likely take money from consumers and the shareholders of oil companies and transfer it to one class of gasoline service stations – just? Or if it is unjust, why is this type of redistribution beyond the capacity of courts to rectify under a system of adversarial adjudication? These are difficult questions for a Court to answer, especially since commentators cannot agree among themselves about a theory of distributive justice or about the proper role of the courts in addressing deviations from what a theory of distributive justice would require.

Note further that under the troublesome redistribution theory it matters not what sort of power the government is exercising in determining whether it has committed a taking. A government tax that has a sufficiently idiosyncratic distributional effect might be condemned as a taking. Similarly, an exercise of the police power can be condemned as a taking if it violates whatever norm we adopt for identifying troublesome redistributions. Conceptual distinctions grounded in history are irrelevant on this view. The task is to derive doctrinal rules and standards directly from abstract principles about just distribution and the institutional capacities of courts.¹⁰

What I have called the boundary maintenance explanation does not aspire to anything as highfalutin as a theory of distributive justice. The boundary maintenance idea is grounded in historical distinctions, and in particular in ideas about the classification of government powers. These ideas, like many other important constitutional concepts, were rather imprecisely understood at the time of the founding. They crystallized only later, typically in the nineteenth century. For present purposes, the

¹⁰ The classic example of such an attempt is Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967) (seeking to derive rules of thumb for assessing takings claims from utilitarianism and John Rawls’ theory of justice).

key distinction that eventually emerged in constitutional law was that between the power of eminent domain and the police power.

The power of eminent domain was understood to be the power to force an exchange of property rights in order to promote the public good. The police power was understood to be the power to regulate the use of property in order to forestall some public bad. Critically, an exercise of the power of eminent domain was understood to require the payment of just compensation to the person whose property was taken. An exercise of the police power was understood not to require any payment of compensation. Given this critical difference, it was necessary to distinguish between exercises of eminent domain and the police power. Conceivably, courts could have deferred to the legislature's judgment about which power it was invoking. But courts concluded in the late nineteenth century that this would create too great a temptation to engage in expropriation of the property of unpopular owners – such as investors in railroads – under the guise of police power regulation. So it was necessary to develop a doctrine that in effect required the legislature to use eminent domain, rather than police regulation, in circumstances where ordinarily one would expect the legislature to use eminent domain.

The boundary maintenance idea does not require a general theory of distributive justice. But it does require that we have in mind ideal typical situations when eminent domain should be used as well as ideal typical situations governed by the police power. For example, taking title to land might be regarded as a paradigmatic exercise of eminent domain, and ordering a landowner to stop discharging pollution on neighboring property might be regarded as a paradigmatic exercise of the police power. Armed with these ideal typical situations, we can then seek to decide disputed cases – such as whether

ordering a landowner not to fill a wetland on his property requires the exercise of eminent domain or can be justified as a police regulation – by attempting to determine whether the challenged action falls closer to the eminent domain end of the spectrum or the police power end of the spectrum.

Note that it is implicit in this approach that government powers do not overlap. Either the action is an exercise of eminent domain or an exercise of the police power; it cannot be both. (Similarly, either the action is an exercise of the power or taxation or an exercise of eminent domain; it cannot be both.)

In my view, the boundary maintenance theory provides a better foundation for understanding and rationalizing the regulatory takings doctrine than does the troublesome redistribution theory. I do not have time or space to give a full accounting of the reasons for this view. A few suggestions will have to suffice.

First, the troublesome redistribution approach, if it is to be successful, requires that the Court agree upon a theory of distributive justice. As previously suggested, I am skeptical that judges, either by training or temperament, are well suited to develop such a theory. I also find it doubtful that a diverse panel of nine Justices appointed at different times by different political coalitions can reach a consensus about such a theory. The boundary maintenance approach, in contrast, relies on analogical reasoning from ideal typical cases. This is essentially the tried-and-true method of the common law, something with which all judges are comfortable and familiar.

Second, the boundary maintenance approach is far more consistent with the pattern of outcomes reached in the decided cases. The cases tell us, for example, that brickyards can be shut down without compensation, but compensation must be paid when

a small cable TV wire is installed on top of an apartment building.¹¹ If we expect regulatory takings doctrine to track common intuitions about troublesome redistribution, these results seem “incoherent” – a constant lament in the law reviews. In contrast, these and other outcomes make complete sense under the boundary maintenance approach. The brick factory was deemed to be a nuisance, and hence could be abated under the police power. The cable TV line was analogous to other utility lines, which have always required the acquisition of an easement, if necessary by eminent domain. Or, consider again the statute at issue in *Lingle*, which seems hard to justify as an example of principled redistribution; yet no Supreme Court Justice was prepared to call it a taking. The boundary maintenance approach therefore draws strengths from a coherentist or integrity conception of legal truth, in which the generalization that provides the best fit with the data is preferred.

Third, both approaches are significantly complicated by the legal revolution of the 1930s, which validated the idea that deliberately redistributionist legislation is constitutionally permissible. Regulatory takings doctrine got its start in the late nineteenth century at a time when it was generally understood that purely redistributive legislation was illegitimate.¹² If we regard the regulatory takings doctrine as a prohibition on troublesome redistribution, then this transformation potentially puts the Takings Clause on a collision course with the activist post New Deal state. The New Deal revolution also creates a problem for the boundary maintenance approach, in that the original paradigm of the police power – the prevention of social harms like nuisances

¹¹ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (cable wire); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (brickyard).

¹² E.g. *Lochner v. New York*, 198 U. S. 45 (1905).

-- must be augmented with alternative paradigms of the police power that include things like welfare laws and housing subsidies. On balance, however, I believe the boundary maintenance approach has an easier time adjusting to this revolution in the conception of the role of government. Precisely because it is built up out of paradigm cases and analogical reasoning, the boundary maintenance approach is easier to amend than is the troublesome redistribution concept.

The Court has not come down decisively in favor of either the troublesome redistribution conception or the boundary maintenance idea, and many of its decisions contain intimations of both. *Lingle* is of a piece with the Court's schizophrenia in this regard. *Lingle* contains statements that appear to be direct endorsements of the boundary maintenance idea. The Court noted for example that the original paradigm of a taking is "a direct government appropriation or physical invasion of private property," and that the rationale for extending the Takings Clause to certain regulations of property as set forth in *Pennsylvania Coal Co. v. Mahon*¹³ was to extend the obligation to compensate to situations "tantamount to a direct appropriation or ouster."¹⁴ It also observed that each of the Court's principal takings inquires "share[s] a common touchstone," namely, "[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."¹⁵ The search for "functional equivalents" is a concise way of describing the boundary maintenance approach.

¹³ 260 U.S. 393 (1922).

¹⁴ *Lingle*, 544 U.S. at 537.

¹⁵ *Id.* at 539.

Yet *Lingle* also includes statements that appear to equate the regulatory takings doctrine with the identification of troublesome redistribution. The Court kicked off its distillation of regulatory takings law with the quotation from *Armstrong*,¹⁶ the siren song of the just distribution school. Moreover, the Court claimed that each of its principal takings inquiries – permanent occupation, total loss of economic value, and the ad hoc inquiry – “focuses directly upon the severity of the burden that government imposes on private property rights.”¹⁷ Perhaps most tellingly, the Court condemned the substantially advances formula as a takings test because it “reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights” and indeed, provides no “information about how any regulatory burden is *distributed* among property owners.”¹⁸ If the Court thinks the Takings Clause is concerned solely with the distribution of burdens, then it has essentially bought into the troublesome distribution idea.

One plausible characterization of *Lingle*'s implicit understanding of the theoretical underpinning of the regulatory takings doctrine might be that it synthesizes the troublesome redistribution and the boundary maintenance approaches in the following fashion. On the one hand, *Lingle* understands the doctrine to be an attempt to differentiate between exercises of eminent domain and the police power by reasoning from analogical cases. On the other hand, it also understands this process in a truncated fashion, as a process that reasons from only one pole – the eminent domain pole – and

¹⁶ Id. at 537.

¹⁷ Id.

¹⁸ Id. at 542 (emphasis in original).

looks to only the degree of troublesome redistribution as measured by how the challenged regulation stacks up against a direct appropriation or physical invasion, i.e., the paradigmatic case of eminent domain.

If this is *Lingle*'s vision of the Takings Clause, then it was half right. It was right to intuit that the regulatory takings doctrine can best be explained as having evolved through a process of analogical reasoning from paradigm cases designed to preserve the boundary between the power of eminent domain and the police power. But it was wrong to assume that this line drawing exercise proceeds only by moving out from the eminent domain pole. If we envision eminent domain and the police power as governmental powers arrayed along a continuum or spectrum, with the ideal typical eminent action at one end and the ideal typical police power action at the other, then logically one can classify a particular governmental action as falling closer to one pole or the other *either* by reasoning analogically from the eminent domain end of the spectrum, or from the police power end of the spectrum. *Lingle*'s implicit suggestion that the analogical process proceeds in only one direction rests on a distortion of the history of the doctrine, and yields up an impoverished conception of how the inquiry should proceed.

To see *Lingle*'s mistake we need only recall the many instances in which the Court has resolved regulatory takings disputes by considering whether the challenged action resembles the traditional power of the state to regulate public nuisances. *Pennsylvania Coal*, which inaugurates the modern doctrine, puts heavy emphasis (in both the Holmes' majority opinion and the Brandeis dissent) on the public nuisance paradigm. Holmes thought the Kohler Act did not resemble a public nuisance law; Brandeis argued it did. Both Justices implicitly assumed that the proximity of the law to the police power

end of the spectrum was critical to whether the Act was constitutional under the regulatory takings conception. Similarly, *Lucas v. South Carolina Coastal Council*, probably the Court's most important modern decision, can be read as adopting successive categorical tests, a prima facie test based on whether the regulation causes a loss of total economic value, and a rebuttal test based on whether the regulation tracks the common law of nuisance in the jurisdiction. The first is based on proximity to the eminent domain pole; the second on proximity to the police power pole. Other important decisions that invoke the nuisance regulation analogy include *Mugler v. Kansas*, *Hadachek v. Sebastian*, *Village of Euclid v. Ambler Realty*, *Miller v. Schoene*, *Keystone Bituminous Coal v. DeBenedictis*, -- list goes on and on. It is inconceivable that all these decisions can be explained on the ground that they did or did not conform to the eminent domain paradigm, or that they did nor did not entail distributional burdens analogous to eminent domain. They were resolved on the ground that the challenged action did or did not conform to a public nuisance regulation. In other words, the regulation was assessed against the police power paradigm.

Doctrinally speaking, it is true that the two most prominent categorical rules identified by the modern Court – the physical occupation rule and the total deprivation of economic value rule – are based on the close approximation between these circumstances and paradigmatic exercises of eminent domain. And it is true that some of the factors identified by *Penn Central* as bearing on an ad hoc assessment of regulatory takings claims are also centered on the eminent domain pole, most prominently diminution in value and whether the government action represents a physical invasion of the premises.

But if we consider a broader swathe of takings doctrine, we can see that other non-eminent domain paradigms – in addition to the public nuisance analogy – also play a critical role in fixing the line between eminent domain and other government powers. Although not commonly recognized, there are categorical rules of non-liability. The *Lucas* rebuttal test based on the common law of nuisance is one. Others include the navigation servitude, the conflagration rule, and the rule that forfeitures cannot be challenged as takings. The common thread in each of these situations, not surprisingly, is that the government action reflects a core exercise of the police power. The understanding that bona fide taxes cannot be challenged as takings similarly reflects a categorization process, this time along another pole – that which divides the power of eminent domain from the power of taxation. And even the *Penn Central* decision, which serves as the *locus classicus* of the ad hoc approach, does not ignore the police power. One of the factors it mentions is whether the challenged regulation is part of “some public program adjusting the benefits and burdens of economic life to promote the common good” – which seems like a fair restatement of the police power.

What then, should we make of the substantially advances test under the boundary maintenance conception of the regulatory takings doctrine, correctly understood as a two-way rather than a one-way process of reasoning from paradigm cases? *Lingle* was clearly correct to overturn the Ninth Circuit’s application of the substantially advances notion as a kind of categorical (or at least a facial) regulatory takings doctrine. Substantially advances asks whether a particular government regulation is *not* an exercise of the police power, because the regulation fails to do what every police regulation is supposed to do: substantially advance a legitimate state interest. But simply

showing that a government action does not fit neatly within the police power paradigm does not establish that it falls on the eminent domain side of the line. Proving a negative does not establish the opposite. A failed exercise of the police power could simply be innocuous, or it could perhaps be an exercise of the power of taxation. So the first half of Justice O'Connor's wrap up sentence was right. The Court should have said "We hold that the 'substantially advances' formula is not a valid takings test" and left it at that.¹⁹

But it does not necessarily follow that the substantially advances idea "has no proper place in our takings jurisprudence."²⁰ The question should be whether asking if a regulation of property substantially advances a legitimate state interests helps us in carrying out the "essentially ad hoc, factual inquiry" required by *Penn Central* when all categorical rules fail. The answer here is that I am not sure. If we pose the question as whether a *government action* substantially advances a legitimate state interest, then I agree substantially advances is useless for ad hoc adjudication purposes. Exercises of eminent domain, no less than exercises of the police power, must have a legitimate public purpose, or public use as it is called in the eminent domain context. So showing that a government action does nothing to substantially advance a public purpose would not necessarily tell us which side of the eminent domain/police power line it falls on. It might just be a private taking, and hence invalid under the Public Use Clause.

But if we assume the inquiry is limited to *regulations of the use* of property, then the test might have some probative value. If we limit the inquiry to use regulations, then surely the fact that the regulation *does* substantially advance a legitimate state interest has

¹⁹ 544 U.S. at 548.

²⁰ 544 U.S. at 548.

some probative value in telling us that it is a proper exercise of the police power. It would increase the probability that the proposition is true, and hence would satisfy the general test of legal relevance. I am not sure its probative value is very high. Asking whether the regulation entails a “fair reciprocity of advantage” or offers “implicit in kind compensation” or even, to use *Penn Central*’s formulation, whether it adjusts “the benefits and burdens of economic life to promote the common good” might be better formulations. But it cannot be condemned out of hand as being irrelevant to the inquiry.

This is all I wish to say. *Lingle* spoke too quickly and too broadly in saying that the substantially advances idea “has no proper place in our takings jurisprudence.” In this respect *Lingle* underscores a more general failing of the Court’s post-*Penn Central* takings jurisprudence. The Court since then has devoted itself to developing and fighting over the scope of categorical rules that obviate the need to engage in the *Penn Central* inquiry. The Court has paid little heed to the need to refine and adjust the *Penn Central* factors themselves, in order to assure that they channel the “essentially” factual inquiry in the right direction. *Lingle*’s unfortunately truncated conception of the regulatory takings doctrine makes a re-orientation of judicial attention even more difficult. Here as elsewhere, a more minimalist decision would have been welcome.