

FRIDAY SESSION: 8:45–10:15 AM

Takings: Lingle v. Chevron and the Future of Regulatory Takings in Land Use Law

8:45—10:15 a.m.

Friday, March 10, 2006

Sturm College of Law/Frank J. Ricketson Law Building

With Justice O'Connor writing one of her final opinions, last year the Supreme Court held in *Lingle v. Chevron* that the Fifth Amendment's Takings Clause could not be invoked to challenge land-use regulation on the ground that such regulation fails to substantially advance legitimate state interests. This panel will probe the history of such challenges and the *Lingle* litigation itself and then focus on the future of regulatory takings challenges in the wake of *Lingle*.

Moderator: **Nestor Davidson**
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The Pragmatics of *Penn Central*

Rocky Mountain Land Use Institute 15th Annual Land Use Conference

March 10, 2006

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Why “Pragmatics”?

- “[I]f a policeman must know the Constitution, then why not a planner?” Justice Brennan, dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981)

Penn Central and its Discontents

- “Ad hoc” balancing versus categorical Takings and heightened scrutiny
- *Lingle* and the *Penn Central* test – narrowing the focus?

“Vexing subsidiary questions...”

- The “Three” Factors
 - Economic Impact
 - Distinct Investment-Backed Expectations
 - Character of the Government Action
- Other Factors

Economic Impact

- Extent of diminution
 - On the claimant?
 - In general?

Expectations and the Regulatory State

- “Distinct” vs. “reasonable”
- *Palazzolo* and background principles of state nuisance and property law
- Other regulations

Character of the Government Action

- *Loretto* and physical occupation
- *Lingle* and “character” as the public interest

Other Factors

- *Armstrong* and fundamental fairness
- Average reciprocity of advantage

Pragmatics Revisited

- *Penn Central* after *Lingle*:
 - “*Magnitude or character of the burden a particular regulation imposes on private property.*”
 - How the “regulatory burden is *distributed* among property owners.”
- The virtues of vagueness?
- Planning, discretion, and impact.

An Advocate's Perspective on *Lingle v. Chevron USA, Inc.*
Meriem L. Hubbard, Principal Attorney
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1. In *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005), the Supreme Court endorsed four regulatory takings tests:

- a. Physical invasion. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
- b. *Nollan* and *Dolan* in the context of exactions. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
- c. Denial of all economically viable use of property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- d. Balancing of particularly significant factors. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

2. The Court decided that the “failure to substantially advance legitimate state interests” test is no longer a Takings test, it is a due process test. But the Court did not address the *Nollan* type cause-effect test argued and decided in the *Richardson* line of cases:

- a. *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997).
- b. *Chevron USA, Inc. v. Cayetano*, 57 F. Supp. 2d 1003 (D. Haw. 1998).
- c. *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004).
- d. *Cashman v. City of Cotati*, 415 F.3d 1027 (9th Cir. 2005).

3. More questions are raised than are answered by the Court's decision to remove the *Agins* “failure to substantially advance” test from a Takings analysis.

Agins v. City of Tiburon, 447 U.S. 255 (1980).

a. **Does *Lingle* invigorate the role of substantive due process in property rights cases?**

See Berger, Michael M., *Recent Case Developments*, SL012 ALI-ABA 45 (2005); and Eagle, Steven J., *Lingle v. Chevron and Its Effect on Regulatory Takings*, SL012 ALI-ABA 167 (2005).

b. What happens in circuits such as the Ninth and Tenth, which do not allow substantive due process claims in property rights cases?

See Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996). Also see *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997). *Armandariz* is followed in the Tenth Circuit. *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

c. What is the standard of review in a due process property rights case after *Lingle*?

See County of Sacramento v. Lewis, 523 U.S. 833 (1998), and Eagle, Steven J., *Lingle v. Chevron and Its Effect on Regulatory Takings*, SL012 ALI-ABA 167 (2005).

d. Does a “failure to substantially advance” claim fit within the framework of *Penn Central*?

See Radford, R.S., Just a Flesh Wound? The Impact of Lingle v. Chevron on Regulatory Takings Law, Social Science Research Network Electronic Paper Collection (www.ssrn.com). Copies of this article are also available from Cindy Thompson at clt@pacificlegal.org.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Gene Cashman and Eugenia Guinn respectfully file this reply to the opposition to Petition for Writ of Certiorari (Opp.).

I

**THIS COURT’S DECISION IN *LINGLE* v.
CHEVRON U.S.A. INC. CREATED IMPORTANT CONSTITUTIONAL
QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT**

Respondent City of Cotati argues that Petitioners do not raise an issue appropriate for resolution by this Court. Opp. at 13-14. That argument ignores the important questions of federal regulatory takings law that arose in Petitioners’ case after this Court’s decision in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005). In *Lingle*, this Court repudiated a means-ends substantial advancement analysis as a Takings test. *Id.* at 2083-84. This Court did not address the viability of, or even mention, the cause-effect substantial advancement analysis presented in Petitioners’ case. Yet, the Ninth Circuit Court of Appeals relied on the *Lingle* decision to withdraw its judgment for Petitioners. Appendix B-1.

Only this Court can clarify whether a cause-effect test—unrelated to the *Lingle* ends-means test—is properly an independent Takings test. The cause-effect test advanced by Petitioners requires a close connection between the effect of an ordinance—here, the transfer of an interest in property—and the objectives sought to be achieved by the rent control ordinance. See Petition for Writ of Certiorari (Petition) at 9-11. This test, whether or not properly characterized as a substantially advances test, is not the test analyzed in *Lingle*. Cotati agrees, complaining in several spots that Petitioners did not seek to prove, or in fact prove, a *Lingle*-type means-ends substantial advancement test. See, e.g., Opp. at 7.¹ The fact is that evidence regarding the effectiveness or ineffectiveness of Cotati’s rent control ordinance in “protect[ing] mobilehome park residents from excessive space rents, while guaranteeing parkowners a fair, just and reasonable return” (Opp. at 4) is irrelevant to the Takings claim advanced by Petitioners.

Cotati is wrong when it says that Petitioners’ case is indistinguishable from the challenge to Hawaii’s ordinance in *Lingle*. Opp. at 15-16. In their facial challenge to Cotati’s rent control ordinance, Petitioners successfully argued that the ordinance creates a situation where universal economic principles establish that property will be transferred from the park owners to their tenants. See *Cashman v. City of Cotati*, 374 F.3d 887, 899 (9th Cir. 2004). Unlike the property owner in *Lingle*, Petitioners did not present experts to offer opinions on whether the ordinance would fulfill its purposes. In this case, expert testimony was utilized by Petitioners for the limited purpose of establishing the economic principle that provides for the likelihood of a wealth

¹ Throughout the long course of this litigation, Cotati has used the words “substantially advances a legitimate state interest” to describe an ends-means analysis. Cotati continues to do so in its opposition brief.

transfer. *See Cashman v. Cotati*, 374 F.3d at 899. In fact, the economic principle upon which Petitioners relied is so widely recognized and well-established, that the Ninth Circuit Court would not even require expert testimony on this point. *Id.*

Once the economic principle was established, the court only needed to look to the ordinance's general scope and dominant features, and not to the effect of the application of the ordinance in specific circumstances. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987) (A court must determine the true nature and effect of a regulation by "examin[ing] the operative provisions of a statute, not just its stated purpose."). *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922). And if the true nature or effect of an ordinance is to facilitate the transfer of private property without compensation, the essential nexus or cause-and-effect relationship required by takings law is absent—regardless of whether the measure will or will not achieve any of its stated objectives (such as controlling rents). In this case, the ordinance created a wealth transfer, and that wealth transfer does not advance any legitimate government interest.

The cause-effect test argued by Petitioners, like the Takings tests endorsed in *Lingle*, focuses on the "magnitude or character of the burden a particular regulation imposes upon private property rights." *Lingle*, 125 S. Ct. at 2084. Cotati argues otherwise. *Opp.* at 16. But the cause-effect test, like the Takings Clause, "does not concern itself with the underlying legitimacy of the governmental action—which is presupposed in a takings challenge—but rather, examines whether fairness requires compensating a property owner because the nature of the regulatory taking is 'functionally comparable to government appropriation or invasion of private property.'" *The Supreme Court, 2004 Term; Regulatory Takings—"Substantially Advances" Test*, 119 Harv. L. Rev. 297, 301 (2005) (footnote omitted).

The substantially advances test, formulated as a means-ends test, conflated due process and takings and allowed the courts to second-guess legislative action. Steven J. Eagle, Professor of Law at George Mason University in Virginia, wrote that "[t]he problem highlighted by *Lingle*, then, is not that the 'substantially advances' test is a bad one, but that clarity in takings jurisprudence would be greatly enhanced by one more attuned to traditional property law concepts." Steven J. Eagle, *Lingle v. Chevron and Its Effect on Regulatory Takings*, SL012 ALI-ABA 167, 170 (2005).

The test advanced by Petitioners creates none of the problems inherent in an ends-means analysis, and fits clearly within the Takings theory endorsed in *Lingle*. *Lingle* is but one step in the process of developing a coherent body of takings jurisprudence; this case provides an opportunity for the Court to come one step closer to that goal. Review is necessary to provide a clear statement that *Lingle* did not affect the validity of the cause-effect Takings test argued by Petitioners.

II
IF THE NINTH CIRCUIT COURT'S
PRE-LINGLE JUDGMENT FOR PETITIONERS IS
NOT REINSTATED, PETITIONERS SHOULD BE ALLOWED
TO PROVE THEIR CASE UNDER A DUE PROCESS THEORY

Cotati claims that Ninth Circuit precedent did not prevent the park owners from alleging a due process violation but, rather, park owners could not allege such a violation because rent control is rationally related to a legitimate government purpose. Opp. at 12. Cotati's statement emphasizes the need for this Court to resolve (or remand the case so that a lower court can resolve) questions raised by the circumstances of this case. These are questions not addressed in *Lingle*.²

More than six years ago, Petitioners filed the lawsuit in this case. They plead a takings claim, but were precluded from bringing a substantive due process claim instead of, or in addition to, the takings claim. In *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996), the Ninth Circuit Court held that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." See *Weinberg v. Whatcom County*, 241 F.3d 746, 749 n.1 (9th Cir. 2001); *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999). The Takings Clause provides an explicit textual provision that subsumes any due process claims in land use cases. *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997).

The *Armendariz* line of cases cannot control in cases where a substantial advancement Takings claim is no longer recognized. Petitioners should be allowed to prove a due process claim, if *Lingle* precludes their cause-effect takings claim.

Cotati's predictions of Petitioners' chances of success on a substantive due process claim are without merit (Opp. at 14), because the standard of review applied to a substantive due process claim involving the deprivation of a property interest after *Lingle* is uncertain. Cotati cites *Lingle* for application of a standard that decides whether government action is "so arbitrary as to violate due process." Opp. at 12. Although the Ninth Circuit Court applied an arbitrary and capricious standard ten years ago when it still entertained substantive due process claims, it is not possible to know what standard that court would apply today under the new, post-*Lingle* formulation of property rights issues as due process claims. As Professor Eagle correctly notes, "[t]he adoption of some form of heightened scrutiny in property deprivation cases would go a long way towards placing property rights on a par with other individual rights." Eagle, *supra*, at 184.

² Cotati misrepresents the due process claim presented by the facts of this case. Property owners do not claim that rent control, in and of itself, violates due process. This case raises the question whether due process is violated by the effect of Cotati's rent control ordinance—to compel the transfer of a valuable property interest from the park owners to their tenants.

These are all issues that raise important federal questions that can be examined if Petitioners are given the chance to litigate a due process claim.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, the Petition for Writ of Certiorari should be granted.