WHY *LINGLE* IS HALF RIGHT

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INTRODUCTION

Lingle v. Chevron U.S.A. Inc.[1] is a highly unusual decision in that it repudiated a legal doctrine that the Supreme Court itself had created. The Court was able to do this without overruling any prior decision because the repudiated doctrine—which condemned as a taking any regulation of property that fails to "substantially advance legitimate state interests"[2]—had taken hold in the lower courts but had never been applied by the Court itself in support of a judgment. *Lingle* is also unusual in that there is no indication that the Court was motivated to jettison the doctrine because it was unhappy with the result it suggested in the case before it. From all that appears, the Court was concerned solely with rationalizing the law of takings.

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."[3] 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

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1. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
2. *Id.* at 531 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
3. *Id.* at 548.

or complete eliminations of economic value, that deems a regulation that fails to substantially advance any legitimate state interest a taking. This is the way that the Ninth 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 think is not correct, or at least the Court failed to make the case for its correctness. In particular, I see no reason in principle why the question of whether a particular 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 inquiries in takings cases.[4] 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.

I. *LINGLE*

At issue in *Lingle* was a Hawaii statute that imposed a cap on the rent that retail gasoline service station dealers must pay if they lease their facilities from an oil refining company.[5] This was almost certainly a special interest law procured by one group of dealers. The competitors of these dealers—stations operated directly by refiners or by dealers who own their own stations or who lease their property from parties other than refiners—enjoyed no such ceiling on their costs of doing business. The statute proclaimed that its purpose was to counteract a concentrated retail gasoline market and to reduce prices charged to consumers.[6] But this was inherently implausible, as the lower courts found based on expert testimony, since the statute regulated the rents of only one class of dealers, did not require these dealers to pass on the savings to consumers, and did not regulate wholesale gasoline prices.[7] Thus, refiners would likely seek to offset any reduction in

4. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

5. *Lingle*, 544 U.S. at 532.

6. *See* Chevron U.S.A. Inc. v. Bronster, 363 F.3d 846, 855–56 (9th Cir. 2004), *rev'd sub nom.* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (quoting legislative findings and declarations).

7. *Id.* at 856–57.

revenue from rents to this one class of dealers by increasing the wholesale price of gasoline to all dealers, and this would likely translate into higher prices for consumers.[8]

Indeed, in the Ninth Circuit the State of Hawaii abandoned the argument that the statute would reduce prices paid by consumers. Instead, the State sought to justify the measure on the ground that it would "maintain[] the existence of an independent body of gas station operators . . . ."[9] In effect, the State conceded that the statute was a narrowly distributional measure that took money from consumers and the shareholders of refining companies and transferred it to one class of service station dealers. This is the kind of "naked preference" for one group over others that ordinarily elicits little judicial sympathy.[10]

After some back and forth, the Ninth Circuit agreed with the Federal District Court in Hawaii that the statute was unconstitutional. The stated legal ground was that the measure violated the Takings Clause because it did not "substantially advance a legitimate state interest."[11] The Ninth Circuit had previously adopted this as a facial test for identifying measures that constitute a compensable taking,[12] drawing on language in *Agins v. City of Tiburon*.[13] *Agins* cited *Penn Central Transportation Co. v. City of New York*,[14] which had in turn cited *Nectow v. Cambridge*,[15] 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. The Court announced 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

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8. Based on the summary of the evidence in the opinions, it appears that the rent cap was set above the rentals that Chevron was currently collecting on all but a minority of its stations and thus would have little immediate effect on retail gasoline prices. *Lingle*, 544 U.S. at 534. Assuming the statute would at some point have real bite in constraining rents, this would likely cause the 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. *Bronster*, 363 F.3d at 855–857. Even if dealers benefited from the rent cap, this would come at an expense to consumers in the form of slightly higher prices and to 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 that would be borne by consumers in the form of higher prices.

9. *Bronster*, 363 F.3d at 855.

10. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (developing the theory of "naked preferences").

11. *Bronster*, 363 F.3d at 855–57.

12. *See, e.g.*, Hotel & Motel Assn. of Oakland v. City of Oakland, 344 F.3d 959 (9th Cir. 2003); Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997).

13. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

14. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

15. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

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 refiners, having been misled by the Supreme Court and the Ninth Circuit into relying on the wrong constitutional clause, lost their case.

II. TWO CONCEPTIONS OF REGULATORY TAKINGS DOCTRINE

In order to explain why I think *Lingle* is only half right, it is necessary to consider two different conceptions of the purpose of the regulatory takings doctrine. The first posits that the doctrine is grounded in concerns about unfair redistribution. If the regulatory takings doctrine is based on unfair redistribution, then the *Lingle* Court was right that the "substantially advances" test should be banished from takings law. The second conception posits that the regulatory takings doctrine is necessary to maintain the boundaries between those governmental powers that require the payment of just compensation and those that do not. If the doctrine is based on boundary maintenance, then there may be a role for "substantially advances" after all. At the least, the Court failed to make the case that "substantially advances" cannot perform a useful role in the boundary maintenance process by helping to distinguish exercises in eminent domain, which require compensation, from exercises of the police power, which do not.

The unfair redistribution explanation for regulatory takings law 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."[16] Of course, different people have different ideas about what makes for unfair redistribution. Richard Epstein believes that all government redistribution is problematic, including progressive income taxes and welfare benefits.[17] More commonly, the kind of troublesome redistribution associated with the Takings Clause is what has been called "singling out"—government action that imposes high costs

16. Armstrong v. United States, 364 U.S. 40, 49 (1960). This quotation is so popular that it has been given its own name: the "*Armstrong* principle." William Michael Treanor, *The* Armstrong *Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM & MARY L. REV. 1151, 1156 (1997).

17. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN x, 295 (1985).

on a relatively small number of persons through no fault of their own.[18] The classic example would be a taking of land for a new public road.

Note that one implication of the unfair 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 many *B*s, or from many *A*s 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.[19] Why, for example, is the redistribution mandated by the 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 station dealers—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 very 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 unfair 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.[20] 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.

What I have called the boundary maintenance conception does not aspire to anything as highfalutin as a theory of distributive justice. The boundary maintenance idea is grounded in historical distinctions, and in

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18. *See, e.g.*, Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–45 (1991).

19. 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), which seeks to derive rules of thumb for assessing takings claims from utilitarianism and John Rawls's theory of justice.

20. *See, e.g.*, Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle and Its Broader Application*, 97 NW. U. L. REV. 189, 223–24 (2002) (proposing that a tax with a disproportionate burden on the extremely wealthy could be a taking).

particular in ideas about the classification of government powers.[21] These ideas, like many other important constitutional concepts, were rather imprecisely understood at the time of the founding.[22] They crystallized only later, typically in the nineteenth century. For present purposes, the 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, the Takings Clause (and parallel state constitutional provisions) requires that any exercise of the power of eminent domain be attended by the payment of just compensation to the person whose property is taken.[23] An exercise of the police power, in contrast, is understood not to require any payment of compensation. Given this critical difference, it is necessary to distinguish between exercises of eminent domain and the police power. Conceivably, courts could simply defer to the legislature's judgment about which power it is invoking. But, starting in the late nineteenth century, courts concluded that this would create too great a temptation for legislatures to engage in expropriation of the property of unpopular owners—such as investors in railroads—under the guise of police power regulation.[24] It was therefore 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 that we develop a general theory of distributive justice. 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, seizing possession of land might be regarded as a paradigmatic exercise of eminent domain, whereas 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

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21. *See generally* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 86–164 (2002) (developing the boundary maintenance theory).

22. *See id.* at 8–25 (explaining that little is known about the Founders' reasons for including the Takings Clause in the Bill of Rights).

23. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").

24. *See, e.g.*, The Minnesota Rate Cases, 230 U.S. 352 (1913); Smyth v. Ames, 169 U.S. 466 (1898); Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

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 of taxation or an exercise of eminent domain; it cannot be both.

The boundary maintenance conception, in my view, provides a better foundation for understanding and rationalizing the regulatory takings doctrine than does the unfair redistribution theory. I cannot give a full accounting of the reasons for this view here. A few suggestions will have to suffice.

First, the unfair redistribution approach, if it is to be successful, requires that the Court agree upon a theory of distributive justice. As previously suggested, judges are not well suited by training or temperament to develop such a theory. It is also unlikely 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.[25] If we expect regulatory takings doctrine to track common intuitions about unfair redistribution, these results seem "incoherent"—a constant lament in the law reviews.[26] 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 acquiring an easement, if necessary by use of eminent domain. Or, consider again the statute at issue in *Lingle*, which appears to take money from consumers and (mostly out of state) shareholders, and transfer it to a handful of gasoline dealers. This seems hard to justify as an example of principled redistribution. Yet no

25. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (cable wire); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (brickyard).

26. *See, e.g.*, Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561–62, 562 n.6 (1984).

Supreme Court Justice was prepared to call the law a taking, perhaps because it was couched in the form of a rent control measure, which the Court has come to regard as a legitimate type of police power regulation. 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 is not legitimate.[27] If we regard the regulatory takings doctrine as a prohibition on unfair 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—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 unfair redistribution concept.

III. *LINGLE*'S UNDERSTANDING OF REGULATORY TAKINGS DOCTRINE

The Supreme Court has not come down decisively in favor of either the unfair 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 ambivalence in this regard.[28] *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

27. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57–58 (1905) (striking down labor laws as infringements on the right to contract).

28. Steven Eagle likewise regards *Lingle* as an incompletely theorized decision torn between two different constitutional perspectives. Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899. We differ somewhat in our characterization of the alternative to the troublesome distribution perspective. I regard it as a search for the division between eminent domain and the police power; Eagle characterizes it as an arrogation of discrete property rights. *Id.* at 922–43.

government appropriation or physical invasion of private property,"[29] and that the rationale for applying the Takings Clause to certain regulations of property as set forth in *Pennsylvania Coal Co. v. Mahon*[30] was to extend the obligation to compensate to situations "tantamount to a direct appropriation or ouster."[31] It also observed that each of the Court's principal takings inquiries "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."[32] The search for "functional equivalents" is a concise way of describing the boundary maintenance approach.

Yet *Lingle* also includes statements that appear to equate the regulatory takings doctrine with unfair redistribution. The Court kicked off its distillation of regulatory takings law with the quotation from *Armstrong*,[33] the battle standard 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 upon private property rights."[34] 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."[35] If the Court thinks the Takings Clause is concerned solely with the distribution of burdens, then it has essentially bought into the unfair 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 boundary maintenance and unfair redistribution 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 looks to only the degree of unfair redistribution as measured by how the challenged

29. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).
30. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
31. *Lingle*, 544 U.S. at 537.
32. *Id.* at 539.
33. *Id.* at 537; *see supra* note 16 and accompanying text.
34. *Id.* at 539.
35. *Id.* at 542.

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 paradigmatic 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 reasoning 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 history, and yields 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 modern regulatory takings 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;[36] Brandeis argued it did.[37] 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*,[38] 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,[39] and a rebuttal test based on whether the regulation tracks the common law of nuisance in the jurisdiction.[40] 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 or harm prevention rationale

36. Pa. Coal Co. v. Mahon, 260 U.S. at 413–16 (1922).
37. *Id.* at 417–19 (Brandeis, J., dissenting).
38. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
39. *Id.* at 1014–19.
40. *Id.* at 1020–32.

for limiting takings liability include *Mugler v. Kansas*,[41] *Hadachek v. Sebastian*,[42] *Village of Euclid v. Ambler Realty*,[43] *Miller v. Schoene*,[44] *Keystone Bituminous Coal v. DeBenedictis*[45]—the list goes on and on. It is inconceivable that all of these decisions can be explained on the ground that they 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 paradigmatic exercise of the police power.

Doctrinally speaking, *Lingle* is correct 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 to paradigmatic exercises of eminent domain. But if we consider a broader swath of takings doctrine, we can see that there are other important rules or understandings that play a role in fixing the line between eminent domain and other government powers that are not grounded in finding a functional equivalent to eminent domain. The public nuisance analogy is just one of these. Other categorical rules of non-liability include the navigation servitude, the conflagration rule, and the rule that forfeitures cannot be challenged as takings.[46] 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[47] similarly reflects a categorization process that focuses on the other end of a pole—in this instance the spectrum that divides the power of eminent domain from the power of taxation.

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41. Mugler v. Kansas, 123 U.S. 623 (1887) (holding that a statute prohibiting distillation of alcoholic beverages did not require compensation because the legislature could conclude that production and sale of alcoholic beverages was a noxious use).

42. Hadachek v. Sebastian, 239 U.S. 394 (1915) (holding that an ordinance prohibiting the operation of a brickyard within city limits did not require compensation because the brickyard could be deemed a public nuisance).

43. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (rejecting a facial challenge to zoning ordinance because the separation of incompatible land uses was a reasonable strategy for minimizing nuisances).

44. Miller v. Schoene, 276 U.S. 272 (1928) (statute could order the destruction of cedar trees transmitting rust to apple trees because rust was harming apple growers and their activity was more valuable to the economy).

45. Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) (anti-subsidence statute did not cause a taking because it was designed to prevent harm to surface owners and occupiers).

46. DANA & MERRILL, *supra* note 21, at 115–20.

47. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("[T]his court has . . . recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example."); E. Enter. v. Apfel, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting); Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2198–99 (2004) (stating that the Supreme Court continually rejects Takings Clause challenges based on taxation).

Perhaps *Lingle*'s biggest irony is its reaffirmation of the ad hoc test of *Penn Central*. Two of the factors identified by *Penn Central* as bearing on an evaluation of regulatory takings claims are centered on the eminent domain pole, namely, diminution in value and whether the government action represents a physical invasion of the premises.[48] But the third (and in many respects most prominent) *Penn Central* factor—whether the regulation interferes with "distinct" (or "reasonable") "investment backed expectations"[49]—appears to derive from the tradition of judicial protection of vested rights, and in particular the idea that existing structures or other improvements to land should be protected against down-zoning.[50] If we engage in revisionism, this can be characterized as a particularly unfair type of burden. But the historical roots of this notion are firmly planted in due process tradition, and in particular the prohibition against retroactive legislation.[51] In other words, the disfavored status of measures that frustrate investment backed expectations is an implicit limitation on the police power derived from substantive due process law. *Penn Central* also says that it is important to consider whether the challenged regulation is part of "some public program adjusting the benefits and burdens of economic life to promote the common good,"[52] which seems like a highly generalized restatement of the police power. Finally, as previously noted, *Penn Central* is the modern decision that launched the "substantially advances" test,[53] which, as *Lingle* itself spells out, is an idea that originated in due process.

In short, *Lingle* is highly selective in its insistence that the takings tradition and the due process tradition must be rigorously separated. The need for strict separation and a singular focus on the eminent domain analogy is invoked in support of repudiating the "substantially advances" test. But these imperatives are quietly set aside in ignoring large swaths of takings law, including all the decisions from *Pennsylvania Coal* to *Lucas* that apply the nuisance exception, and in re-affirming *Penn Central*'s ad hoc approach, which rests on a mixture of takings and due process traditions.

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48. *Penn Central*, 438 U.S. at 124, 131.

49. *Penn Central* referred to "distinct" investment-backed expectations, 438 U.S. at 124, whereas later decisions speak of "reasonable" investment-backed expectations. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

50. DANA & MERRILL, *supra* note 21, at 156–63.

51. *See, e.g.*, Landgraf v. USI Film Products, 511 U.S. 244, 265–68 (1994) (discussing the constitutional underpinnings of the presumption against retroactive legislation).

52. *Penn Central*, 438 U.S. at 124.

53. *Id.* at 127.

IV. WHAT *LINGLE* SHOULD HAVE SAID

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 paradigmatic 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 facial) regulatory takings doctrine. The "substantially advances" test asks whether a particular government regulation is not an exercise of the police power because it 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, "[w]e hold that the 'substantially advances' formula is not a valid takings test" and left it at that.[54]

But it does not necessarily follow that the "substantially advances" idea "has no proper place in our takings jurisprudence."[55] The question is whether asking if a regulation substantially advances a legitimate state interest helps us in carrying out the "essentially ad hoc, factual inquiry" required by *Penn Central* when all categorical rules fail.[56] 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 that the "substantially advances" test 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.[57] Thus, 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 that 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 some probative value in

54. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005).
55. *Id.*
56. *Penn Central*, 438 U.S. at 124.
57. Kelo v. City of New London, Conn., 545 U.S. 469, 477 (2005).

telling us that it is a proper exercise of the police power. It would increase the probability that the proposition is true and hence satisfy the general test of legal relevance. I am not sure that its probative value is very high. Asking whether the regulation entails an "average reciprocity of advantage,"[58] or offers "implicit in-kind compensation,"[59] or even, to use *Penn Central*'s formulation, whether it adjusts "the benefits and burdens of economic life to promote the common good"[60] might be better formulations. But it cannot be condemned out of hand as being irrelevant to the inquiry.

CONCLUSION

This is all I wish to say. The *Lingle* Court was right to reject the idea that any regulation of property that fails to substantially advance a legitimate state interest is a taking requiring the payment of just compensation. But *Lingle* spoke too quickly and too broadly in saying that the "substantially advances" idea "has no proper place in our takings jurisprudence."[61] 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 observes: "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined."[62] The Court in *Lingle* exhibited admirable candor and even some courage in excising a verbal formula that had been created too casually and perpetuated by rote repetition. Unfortunately, *Lingle*'s truncated conception of the regulatory takings doctrine will make it more difficult to perform similar corrective surgery on another and more important takings doctrine—*Penn Central*'s ad hoc regulatory takings formula. This too was created quite casually and has gained force by simple repetition rather than careful analysis. Here, as elsewhere in

58. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
59. EPSTEIN, *supra* note 17, at 195.
60. *Penn Central*, 438 U.S. at 124.
61. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005).
62. *Id.* at 531.

constitutional adjudication, a more minimalist opinion would have better served the cause of future legal evolution.