Twenty-Five Years Of The Substantial Advancement Doctrine Applied to Regulatory Takings: From *Agins* To *Lingle v. Chevron*

by Larry Salzman[1]

ABSTRACT

Beginning with *Agins v. City of Tiburon*, and continuing for 25 years, the United States Supreme Court has held that regulation effects a taking when it does not substantially advance legitimate state interests. Throughout this period, many have criticized this standard as "a return to *Lochner*," opposed to the extreme deference accorded economic and property regulation since the New Deal.

A careful review of cases reveals, however, that the "substantial advancement" doctrine is not simply a means-ends review of the efficacy of economic legislation. Rather, the doctrine was initially conceived, and has been applied, as a cause-effect test to ensure that restrictive land-use regulations are designed to mitigate social costs that would be caused by the unregulated use of the property in question. Although no return to *Lochner*, in some cases (most recently in *Lingle v. Chevron*) the doctrine confronts the need to set limits to the proper exercise of the police power – a function that has been abdicated by the judiciary since *Nebbia v. New York*. This deeper conflict explains the vehemence of *Agins*' critics and, the article concludes, must be resolved if takings law is to shed its post-New Deal ambiguity and function effectively in the unending struggle of constitutional principle against legislative will.

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INTRODUCTION

In *Agins v. City of Tiburon*[2] the United States Supreme Court stated that a zoning regulation "effects a taking if the ordinance does not substantially advance legitimate state interests."[3] The essence of a taking, wrote Justice Powell, was the "determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[4] Since that time, the Court has cited or discussed this standard[5] in nine cases during the past 25 years.[6]

Nonetheless, many commentators have argued that *Agins* should not be taken too seriously: that its substantial advancement language is a return to abandoned standards of judicial review typified by *Lochner v. New York*[7] or a sloppy injection of economic due

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[2] 447 U.S. 255 (1980)

[3] *Id.* at 260.

[4] *Id.*

[5] The Court's inquiry as to whether or not a regulation "does not substantially advance legitimate state interests" is variously referred to throughout this paper as the substantial advancement doctrine or the first prong of the *Agins* test.

[6] See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 704 (2002); *Pennell v. City of San Jose*, 485 U.S. 1, 19 (1988)(Scalia, J., concurring in part and dissenting in part); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Assn. v. DeBenedictus*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

[7] 198 U.S. 45 (1905). *See, e.g.,* Ronald H. Rosenberg and Nancy Stroud, *When Lochner Met Dolan: The Attempted Transformation Of American Land-Use Law By Constitutional Interpretation*, 33 Urb. Law 663, 669-70 (2001).

process doctrine into takings law; an ill-considered means/ends test out of step with the logic of the takings clause.[8] This is argued despite the fact that the Court continues to discuss it and has declined to disavow the doctrine.[9] The recent grant of certiorari in *Lingle v. Chevron*,[10] however, provides the Court with a clear opportunity to clarify the meaning and use of the *Agins* standard in regulatory takings cases.

In the *Chevron* case,[11] the Ninth Circuit was called on to determine whether a rent control regulation capping the rent at which oil companies could lease gas stations to independent dealer-operators took the oil companies' property for public use without compensation. The stated purpose of the law was to reduce consumer gasoline prices.[12] The court applied the *Agins* test as a straightforward means-ends review of economic regulation, finding that it effected a regulatory taking. The key to the judgment was a

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[8] John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 Envtl. L. 853, 858 (1999); Brief For Petitioners, Lingle v. Chevron, No. 04-163, 2004 WL 2811060 (December 3, 2004), at 23-28.

[9] See R.S. Radford, *Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham L. Rev. 353, 369-72 (2004) (discussing the court's refusal to disclaim the standard in Del Monte Dunes despite the urging of the Solicitor General of the United States to do so).

[10] *Lingle v. Chevron*, 125 S. Ct. 314 (Mem.) (Oct. 12. 2004) (*granting cert*).

[11] The case was lodged in the U.S. District Court for the District of Hawaii as *Chevron v. Cayetano*, 57 F. Supp. 2d 1003 (1998). Durings its appeals in the Ninth Circuit it was styled as *Chevron v. Lingle*, reflecting the change in Hawaii's governorship.

[12] *See* Haw. Rev. Stat. § 257(4)(1997) (stating "In a highly concentrated market, market prices tend to rise above competitive levels. Market prices persistently above competitive levels are harmful to consumers and the public"); *Chevron v. Cayetano*, 57 F. Supp. 2d at 1010 (finding "that while the legislature was mindful of the need to protect lessee dealers, this consideration was essentially a step toward the ultimate goal of (continued…)

determination that the design of the statute rendered it incapable of substantially advancing the goal of lower consumer gasoline prices. I review the context of *Chevron* in Part I of this article and argue that the Ninth Circuit has misapplied the *Agins* test.[13]

Whatever the ultimate outcome of *Chevron* before the Supreme Court, however, this case is a good place to begin a wider investigation into the meaning of the substantial advancement test in takings law. The Ninth Circuit and many commentators believe that the test weighs (rightly or wrongly) the efficacy of regulation;[14] that it applies heightened judicial scrutiny to regulations in order to determine whether they will succeed in achieving the stated purpose for which they were enacted. In addition to supporting the idea that *Agins* is an accidental lumping together of takings and due process concerns, this view leads to odd results. Why, for instance, would a regulation that substantially advances a public purpose, while disproportionately burdening an individual property owner, not be a taking?[15] If the effect of the regulation causes an individual to bear alone

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reducing gasoline prices for Hawaii's consumers.").

[13] *See infra*, text at notes 59-67

[14] *See* Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine And Its Impact On Economic Legislation*, 76 B.U.L. Rev. 605, 636 (1996); Frank Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1604-05 (1988)

[15] A plausible response might be that such a regulation could be struck down under *Agins' second* prong, for depriving the owner of economically viable use of the property. *See Agins*, 447 U.S. at 260. This element of the Agins test derives from *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104 (1978), where it referred to depriving commercial rental property of a competitive rate of return. *Id.* at 138, n.36. Since the Court's decision in *Lucas v. South Carolina Coastal Council*, 512 U.S. 374 (1994), however, *Agins*' second prong has almost invariably been misstated as requiring deprivation of *all* economically viable use – which the Court recently redefined as loss of all value. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, (continued…)

costs that should be borne by the public, it would appear to be just the sort of circumstance the takings clause was meant to remedy.[16] Further, the Supreme Court has not shown any general inclination to reverse its long standing policy of extreme deference to legislatures enacting economic regulation.[17]

In part II of this Article, I argue that the Supreme Court does not conceive the *Agins* test to measure the efficacy of a regulation in achieving alleged state interests or as second-guessing legislative judgments in that regard.[18] Rather, members of the Court who have spoken to the issue have a narrower concern: whether a regulation justly mitigates an alleged "social cost"[19] caused by the unregulated use of property. Where the

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535 U.S. at 332. Consequently, the second prong of *Agins* no longer retains any content as an independent, substantive takings test.

[16] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) is, in my opinion, a case in which such a result was in fact reached. In dissent, Chief Justice Rehnquist noted that previous cases "have never found it sufficient that legislation efficiently achieves its desired objectives to hold that the compensation required by the Fifth Amendment is unavailable." *Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissenting). For a further discussion of the "paradox of efficient regulation" *see* William A. Fischel, *Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent L. Rev. 865 (1991).

[17] *Cf. Concrete Pipe & Prods. Of Ca., Inc. v. Constr'n Laborers Pension Trust*, 508 U.S. 602, 637 (1993) (noting the continuing policy that regulations "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.")

[18] *See infra*, text at notes 146-169.

[19] "Social costs" are typically understood as actions by firms or individuals that have harmful effects on others. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ 1-44 (1960). The term "social cost" is used reluctantly, but made necessary by the imprecision at the heart of the substantial advancement doctrine. Society is merely a large collection of individuals; there is no "entity apart from and superior to the sum of its individual members." *See* Ayn Rand, *Collectivized Rights*, in the VIRTUE OF SELFISHNESS 118, 120 (1964). Where nuisances or other potentially improper uses of (continued…)

burden imposed on a property owner is divorced from or disproportionate to the social costs his property causes, a taking is likely to be found. I suggest that the substantial advancement test functions to channel the regulation of property between the poles of judicial review established by *Nebbia v. New York*[20] and *Lochner v. New York*.[21] *Nebbia*-style deference to property regulation would undermine the operative principle of the takings clause, which is to "bar Government from forcing some people alone to bear public burdens."[22] Strict adherence to that principle, however, would breach modern sensibilities about judicial restraint, represented by widespread hostility to the Court's judgment in *Lochner*.[23] The Court therefore applies the substantial advancement standard not as a mean/ends inquiry but as a *cause-effect test*, in an effort to unmoor takings jurisprudence from any particular theory of rights or economics. It does so to escape the

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property impose unjust burdens on others, those costs are borne not by "society," but by particular persons. The term "social costs" serves to blur the rights involved when conflicts arise and confer standing on parties who ought have no interest in the controversy. Furthermore, one consequence of the term's widespread use is to maintain an ambiguous definition of "harm" in the property rights context, which is a basic cause of its muddled jurisprudence.

[20] 291 U.S. 505 (1934).

[21] 198 U.S. 45.

[22] *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

[23] *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 Geo. L. J. 1, 1-5 and n. 12 (2003) (describing the typical view of *Lochner* and noting that the case "was so reviled that as far as this Author can determine, between the demise of *Lochner* in *West Coast Hotel v. Parrish* in 1937 and publication of Bernard Siegan's *Economic Liberties and the Constitution* in 1980, hundreds of passages appeared, but only a single article that expressed even mild support for *Lochner* was published").

criticisms of *Lochner* while upholding what it regards as the essence of the takings clause. This approach is employed to cope with precedent and other institutional constraints.[24]

I argue in Part III, however, that this attempt to find a doctrinal middle ground is fundamentally flawed.[25] The substantial advancement test purports to protect the rights of property owners by raising the level of judicial scrutiny applied to property regulations. Since the Court often fails to precisely identify the object of scrutiny, however, the test invites misapplication as a displaced due process standard. On the surface, a cause-effect test deflects critics who decry the intrusion of allegedly due process concerns into takings law. A shift from a means-ends to cause-effect analysis of property regulations, however, does not eliminate the need for judges to determine the Constitutional legitimacy of regulatory ends. I argue that the substantial advancement test protects property rights only insofar as it incorporates individualist values concerning the legitimate ends of property regulation. My conclusion is that *Agins* does not mistakenly apply due process standards to takings law, but does mask old and necessary questions concerning the rightful scope of legislative authority—questions once considered in due process cases, but that have been evaded since *Lochner*'s repudiation.

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[24] *See infra*, Part II; *see generally* Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591 (1998).

[25] *See infra*, text at notes 176-198.

I. *AGINS*, THE SUBSTANTIAL ADVANCEMENT DOCTRINE, AND *LINGLE v. CHEVRON*

The roles of due process and takings analysis are often distinguished on the basis that, unlike a concern for due process, the takings clause "is designed not to limit the governmental interference with property rights *per se* but rather to *secure compensation* in the event of otherwise proper interference amounting to a taking."[26] Were the Court to invalidate a general economic regulation on the premise that it insufficiently advances a legislative goal, it would be in "uneasy tension with [the Court's] understanding of the Takings Clause,"[27] because it would "open the door to normative considerations about the wisdom of government decisions."[28] The classic form of judging the wisdom of government decisions is a determination that the objective of the regulation is insufficiently related to the means employed to achieve it.[29] This is why commentators view "the rationale for applying a means-ends test in challenges under the Takings Clause

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[26] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 554 (1998) (Breyer, J., *dissenting*) (noting that unlike the due process clause, the takings clause did not concern the "prevent[ion] of arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good."). *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (implying that a regulation warranting compensation under the takings clause is valid under the due process clause since it "presupposes that it is wanted for public use").

[27] *Eastern Enterprises v. Apf*el, 524 U.S. at 545 (Kennedy, J., *concurring in the judgment and dissenting in part*).

[28] *Id.*

[29] *Lochner*, 198 U.S. at 56 (holding that a regulation "must have a more direct relation, as a means to an end . . . to be valid").

[as] suspect."[30] The analysis of rent control statutes in three recent Ninth Circuit cases exhibits elements of this tension between Due Process and Takings doctrine.

A. *Agins* Applied To Rent Control

Richardson v. City and County of Honolulu ,[31] *Chevron v. Lingle*,[32] and *Cashman v. City of Cotati*[33] each involve challenges to regulations aimed at lowering rents of varying types, and the Ninth Circuit has found a taking in each case because the regulations failed to substantially advance legitimate governmental interests. In each of these cases the Court of Appeals invoked *Agins* in applying heightened scrutiny to the rent control measure in question. The key to finding a taking in each case was that the benefits of reduced rents could be capitalized by the initial tenants and sold to their successors in interest. The general rule enunciated by the Ninth Circuit is that rent regulations of this type are unconstitutional on their face under *Agins*, absent some mechanism or market feature that could prevent tenants from simply cashing out the expected monetary value of rent control by collecting a "premium" on the sale of their tenancies to third parties.[34]

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[30] John D. Echeverriea, *Does a Regulation That Fails To Advance A Legitimate Governmental Interest Result In A Regulatory Takings?*, at 857-59; *see also* Jerold S. Kayden, *Land Use Regulation, Rationality and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 Urb. Law. 301, 316-320 (1991).

[31] 124 F.3d 1150 (9th Cir. 1997).

[32] 363 F.3d 846 (9th Cir. 2004).

[33] 374 F.3d 887 (9th Cir. 2004).

[34] *See Cashman*, 374 F.3d at 897.

The Ninth Circuit's reasoning in these cases descends from the Supreme Court's observation in another rent control case, *Yee v. City of Escondido.*[35] There Justice O'Connor wrote that the financial capitalization of the value of rent control by tenants "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."[36] *Yee* was brought to the Court on the theory that an Escondido, California, rent control ordinance (in conjunction with statewide eviction controls) was tantamount to a permanent physical occupation of the park owners' property interest. A regulatory takings inquiry, therefore, did not arise.[37] Justice O'Connor's dicta, however, was taken as an invitation to bring a regulatory takings challenge to this type of rent control under *Agins*.

1. Richardson

Richardson, the first *Yee* follow-up case to be heard by the Ninth Circuit on its merits,[38] challenged two ordinances affecting rental property in Honolulu.[39] The

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[35] 503 U.S. 519 (1992).

[36] *Id.* at 530.

[37] *Id.* at 533 (the question of whether a regulatory taking occurred was not "properly before [the Court].").

[38] A number of cases germane to *Yee* were appealed to the Ninth Circuit, but were settled on procedural grounds. *See* e.g., *Carson Harbor Village, Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994); *Levald, Inc. v City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993); Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359 (9th Cir. 1993); Palomar Mobilehome Park Assoc. v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993); Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704 (9th Cir. 1992).

[39] *See Richardson*, 124 F.3d at 1153 (describing Honolulu City & County, Haw. (continued…)

stated purpose of these measures was to remedy certain alleged failures of Hawaii's real estate market, including a concentration of land ownership and property prices deemed excessive.[40] One effect of the high concentration of land ownership is that a significant percentage of Honolulu's condominiums are owned in fee simple, but the land on which the condominium buildings are constructed is held under a long-term lease.[41]

Ordinance 91-95 authorized the use of the state's condemnation power to convert the lessees' leasehold estates into fee simple interests.[42] The second measure, Ordinance 91-96, capped increases in ground rents according to a formula calculated to hold these rents below market levels.[43] The ordinance further specified that the below-market ground leases must be transferred without modification to the new owner-occupants whenever a condominium was sold.[44] The Ninth Circuit upheld Ordinance 91-95 was upheld by the Ninth Circuit under the Supreme Court's precedent in *Hawaii Housing Authority v. Midkiff*.[45] *Midkiff* approved a similar lease-to-fee transfer law in

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Ordinance 91-95 and 91-96 (1991)).

[40] *See id.* at 1154.

[41] *See id.* at 1159 (citing legislative finding that in 1987, 50.4% of all Honolulu condominium units were situated on leased land owned by 60 persons).

[42] Ord. 91-95 § 5.2.

[43] *Id.* § 1.5(b).

[44] *Id.* § 1.10.

[45] See *Richardson*, 124 F.3d at 1157 (citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)).

1984 against a takings clause challenge.[46] Ordinance 91-96, however, was held to be a taking without compensation and the law was set aside.[47]

The key to the Ninth Circuit's ruling lies in the unique circumstances of what Professor Hirsch refers to as "immobile housing assets under divided ownership."[48] In Hawaii's condominium market, as with the California mobile home parks at issue in *Yee*, one party commonly owns a residential structure situated on land that is leased or rented from someone else. The cost of housing in such markets is the sum of two variables: the price of the structure (the condominium or mobile home coach), plus the discounted value of the stream of ground rent payments over the life of the structure.[49] Other things equal, changes in the actual or expected amount of the ground lease will have an inverse impact on the price of the structure.[50]

In this market environment, the imposition of rent control creates opportunities for windfalls that can be captured by tenants in occupancy at the time the regulations are adopted.[51] From the viewpoint of prospective buyers of condominiums or mobile home

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[46] *Id.* at 245. Unlike the more current Ninth Circuit cases, *Midkiff* was not an action for compensation but sought to enjoin implementation of the transfer law on the basis that it was not a Taking for public use.

[47] *Richardson*, 124 F.3d at 1166 ("We accordingly hold that Ordinance 91-96 violates the Fifth Amendment to the Constitution of the United States.").

[48] *See* Werner Z.Hirsch & Anthony M. Rufolo, *The Regulation of Immobile Housing Assets under Divided Ownership*, 19 Int'l Rev. L. & Econ. 383 (1999).

[49] *See id.* at 384-87.

[50] *See id.*

[51] This opportunity for tenants to directly convert the benefits of the regulations to (continued…)

coaches, the prospect of reduced ground rents increases the price they are willing to pay for the structure. Incoming tenants pay at the margin the discounted present value of reduced rents in the form of a "premium," or increment to the price paid for the condominium or coach. Outgoing tenants would pocket the full economic value of the regulations, incoming tenants would enjoy no reduction in the net cost of housing, and land owners would be saddled with below-market returns on their investment solely to facilitate a one-time wealth transfer between third parties. This is the regulatory scenario that both the United States District Court for the District of Hawaii[52] and the Ninth Circuit determined did not comprise a substantial advancement of legitimate state interests in *Richardson*.[53]

2. Cashman

A closely analogous regulatory scheme played out to the same result in *Cashman*.[54] California mobile home park owners are prevented by state law from having any voice in the in-site sale of their tenants' coaches,[55] and local rent control ordinances like the City of Cotati's prohibit them from raising space rents upon the sale of a coach in

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cash is what distinguishes rent control under divided asset ownership from garden-variety apartment rent control. *See* Fischel, *supra* note 15, at 873-76.

[52] *See Richardson v. City and County of Honolulu*, 802 F.Supp. 326 (D. Hawaii, 1992).

[53] *See* 124 F.3d 1166.

[54] *See Cashman*, 374 F.3d at 899.

[55] Cal Civ. Code §§ 789-99.7.

their park to a new tenant.[56] Exactly as in the case of Honolulu's condominiums, the tenants who occupied Cotati's mobile home parks at the time rent control was imposed were able to capture a regulatory windfall by selling their coaches at a premium, keeping the affordability of Cotati's housing the same but forcing park owners to bear the burden of facilitating a private wealth transfer.[57] In *Cashman* the California city of Cotati's mobile home rent control program was held to be a taking.[58] Although the ordinance stated seven goals, summarized by the District Court as the city's "interest in maintaining affordable rent, lessening inequality of bargaining power and permitting landlords a reasonable rate of return,"[59] the Ninth Circuit focused on the program's operative effect of enabling tenants to capitalize the value of the regulations into premiums in the resale price of their coaches.[60] Because it perceived Cotati's rent ordinance as merely facilitating a private wealth transfer, the Court of Appeals followed its holding in

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[56] *See* Mobilehome Park Space Rent Stabilization Program, City of Cotati Ordinance No. 680 (1998), at § 19.14.150 (2)(c).

[57] *See e.g.*, R.S. Radford, *Why Rent Control is* Still *a Regulatory Taking*, Program for Judicial Awareness Working Paper No. 05-0001 9-16 (Jan. 12, 2005) (*citing* Werner Z. Hirsch & Joel C. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 423-24 (1988)).

[58] *Cashman v. City of Cotati*, 374 F.3d 887, 899 (2004) ("The district court holds that summary judgment is appropriate because this possibility of a premium prevented Hawaii's rent control ordinance from substantially advancing its purpose. We affirm.") (internal citation omitted).

[59] *Cashman*, 374 F. 3d at 896.

[60] *See id.* at 897.

Richardson and struck down the regulations for failing to substantially advance legitimate state interests.[61]

3. Chevron

Chevron, which was decided between *Richardson* and *Cashman*, is in many ways the most problematic of the three cases. Like *Richardson*, *Chevron* springs from a Hawaii rent control ordinance, albeit commercial rather than residential. Many of Hawaii's gasoline stations are owned by major oil companies and leased to independent dealers who operate them. In an effort to lower gasoline prices, the Hawaii legislature enacted Act 257 to cap the rents which oil companies can charge lessee-dealers.[62] Alternative objectives of the Act have been argued at various times during litigation, but the Hawaii legislature apparently attempted to lower gasoline prices by either: 1) lowering the rents to lessee-dealers, which would then be able to pass that savings along to consumers, 2) bolstering the profits of lessee-dealers, thereby ensuring the long-term survival of a robust network of independent gasoline dealers in the state, or 3) frustrating alleged oil company intent to drive lessee-dealers out of the business with excessive rents.[63] The premise behind this latter goal is that having many independent dealers enhances competition among gas stations, including corporate-owned stations, which leads to lower prices.

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[61] *See Cashman*, 374 F. 3d at 889 (citing to *Richardson*).

[62] Haw. Rev. Stat. § 486H-10.4 (1997).

[63] *Chevron v. Cayetano*, 198 F. Supp. 2d. 1182, 1191 (2002) (describing the goals of Act 257).

The Ninth Circuit saw the state's regulation of gas station rents as analogous to *Richardson*, reasoning that Act 257 would enable independent dealers to capture the value of the controls by selling their dealerships to new owners.[64] As the District Court explained, rather than lower gasoline prices, the rent cap would simply lower the dealer's cost of doing business, allowing the dealer's profits to increase over what they would have been without the regulation.[65] Oil companies like Chevron would be forced to bear the burden of this cost reduction and, since the economic benefits of the regulation could be captured by the dealers upon the sale of their business, the rent cap "will generate a premium [in the resale price of dealerships] that reflects the difference between the incumbent dealer's expected market rent and the lower rent."[66] Accordingly, the District Court found that the Act was a taking under the first prong of *Agins*, and the Ninth Circuit affirmed.[67]

On closer examination, though, the regulatory scheme at issue in *Chevron* differs in significant ways from both *Richardson* and *Cashman*. Most essentially, the characteristic of divided asset ownership is entirely missing. The independent dealers are merely commercial tenants like any others, paying rent on their place of business. And for its part, Chevron does not own the land on which the stations are located – the oil

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[64] *Chevron v. Cayetano*, 224 F.3d 1030, 34 (9th Cir. 2000).

[65] *Chevron*, 198 F. Supp. 2d. at 1187.

[66] *Id.* at 1189-90.

[67] *Id.* at 1992, *aff'd, Chevron v. Lingle*, 363 F.3d 846, 858 (9th Cir. 2004).

companies themselves pay ground rent to third parties.[68] Thus, if the dealers in *Chevron* do realize a "premium" on the sale of their dealerships, it is not because the asset value of their real property has been enhanced by a corresponding reduction in the value of the landowners' estate, as is the case in *Richardson* and *Cashman*..

But the differences do not stop there. Unlike the situation in both *Richardson* and *Cashman*, Chevron is not forced to stand aside while its tenants freely negotiate the sale of their structures to third parties; the contracts between Chevron and its commercial tenants "permit the dealer to transfer his or her occupancy rights *upon obtaining Chevron's written consent and paying a transfer fee set by Chevron.*"[69] Finally, in both *Cashman* and *Richardson*, the landowners' only commercial dealings with their tenants was via the ground lease that was the subject of the regulation. Once rent control was adopted, it imposed a clearly defined and measurable burden on the landowners, and delivered an identical financial benefit, readily capable of capitalization, to their tenants. In *Chevron*, however, the oil company's leases with its independent dealers are combined with oil supply contracts requiring that the gasoline sold at the dealers' service stations be purchased from Chevron. Thus, wholly unlike *Cashman* and *Richardson*, the commercial landlords in *Chevron* may be able to recover their reduced rent revenues in the form of higher oil prices under the supply contracts. This would eliminate any possibility of premiums in the resale price of dealerships, regardless of what those premiums might actually represent. In such a case, Chevron would not suffer a financial harm due to the

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[68] *Id.* at 1185.

imposition of rent control, although of course this mitigation would also negate the regulation's intended objective of lowering gasoline prices. The Act would thereby be an unjust imposition on Chevron and feckless intervention in the market by regulators, but distinguished from the takings in *Richardso*n and *Cashman*.

Despite the serious economic and legal distinctions between *Chevron* on the one hand, and *Richardson* and *Cashman* on the other, the three decisions have been linked together by critics of *Agins*, who claim that these rent control cases are an example of judicial authority substituting its judgment for that of the legislature. To some extent, particularly in *Chevron*, the Ninth Circuit has left itself open to this criticism by seeming to reduce the substantial advancement analysis to a simple means/ends test. For the reasons set out in Part III I think this criticism is misplaced, but it is first worth considering why means/ends analysis of economic regulation is so widely regarded as problematic.

B. *Lochner* and *Nebbia* Frame the Judicial Review of Economic and Property Regulation

The Supreme Court faces a tension in reviewing property regulations due to the post-New Deal conception of "judicial restraint." Any sensible meaning of the takings clause requires the Court to be concerned with abridgements of property rights, but what sort of abridgments and of what type of property are questions the Court does not answer by reference to Constitutional text alone.

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[69] *Chevron v. Cayetano*, 224 F.3d 1030, 1032 (9th Cir. 2000) (emphasis added).

Judicial attempts to proscribe the limits of legislative authority with respect to property regulations are typically tarred as akin to *Lochner v. New York*,[70] which is raised as self-evident proof of imprudence. As is well known, the Court's mode of analysis in *Lochner* was to determine "which of two powers or rights shall prevail–the power of the state to legislate or the right of the individual to liberty of person and freedom of contract."[71] The labor law regulating the hours of bakers involved in that case was invalidated as beyond the police power because it did not bear "a more direct relation, as a means to an end"[72] to the workers' health and safety. Hostility to this approach to constitutional adjudication is fairly represented by the assertion that it allows "Supreme Court justices [to let] their 'subjective' and 'political' passions draw them into a kind of judicial review that is both anti-democratic and institutionally suicidal."[73]

The Court subsequently abandoned not merely the factual premises supporting the *Lochner* decision, but its entire mode of analysis. Instead of a close means/ends scrutiny of economic regulation, the Court announced a new policy to steer it clear of charges of subjectivity or political bias. In *Nebbia v. New York*,[74] the Court held that "[a] state is

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[70] 198 U.S. 45.

[71] *Id*. at 57.

[72] *Id.*

[73] Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 1850-1940, 3 Res. L. & Soc. 3, 10 (1980). *See also*, *Planned Parenthood v. Casey*, 505 U.S. 833, 861-62 (O'Conner, J., plurality opinion) (describing the court's loss or "lack of prescience" by adopting *Lochner's* standards of review in cases involving economic regulation).

[74] 291 U.S. 502.

free to adopt whatever economic policy may be reasonably deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it."[75]

If it is understood as a means/ends test, *Agins* has an obvious relation to the mode of analysis forgone by *Nebbia*. Members of the Court demonstrate their wariness of the connection by frequently defending or criticizing takings decisions by reference to *Lochner*. In *Eastern Enterprises v. Apfel*,[76] for example, Justice Kennedy implores other Members to invalidate a pension regulation on the basis of the Due Process Clause rather than the Takings Clause. He assures them that "[i]nsofar as the plurality avoids reliance upon the Due Process Clause for fear of resurrecting *Lochner*[], and related doctrines of 'substantive due process,' that fear is misplaced."[77] In *Dolan v. City of Tigard*,[78] Justice Stevens warned that "[t]he so-called 'regulatory takings' doctrine . . . has an obvious kinship with . . . *Lochner*. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair."[79] Once again, in *Lucas v. South*

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[75] *Id*. at 516.

[76] 524 U.S. 498 (Kennedy, J., concurring in the judgment and dissenting in part).

[77] *Id.* at 556 (Breyer, J., *dissenting*).

[78] 512 U.S. 374.

[79] *Id.* at 407 (Stevens, J., *dissentin*g).

Carolina Coastal Council,[80] Justice Stevens fears a return to *Lochner* and laments that he "had thought that we had long abandoned this approach to constitutional law."[81] Earlier, in *Pruneyard Shopping Center v. Robins*,[82] Justice Marshall warned against "a return to the era of *Lochner*"[83] in takings law–a sentiment echoed by Justice Blackman in *Loretto v. Teleprompter Manhattan CATV Corp*.[84]

Nebbia is the archetype of contemporary judicial policy: courts defer to legislative judgment concerning the constitutionality of regulatory restraints on economic liberty and property rights. This policy is in direct conflict with the previous view that a basic function of the court is to maintain the "limit to the valid exercise of the police power by the state."[85] The Court had always acknowledged the existence of a "police power" under which "the government is free to adopt such laws as are necessary and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal."[86] It warned, however, that "under the pretense of prescribing a police regulation the State cannot be permitted to encroach upon

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[80] 505 U.S. 1003 (1992).

[81] *Id.* at 1069 (Stevens, J., *dissenting*).

[82] 447 U.S. 74 (1980).

[83] *Id.* at 93 (Marshall, J., *concurring*).

[84] 458 U.S. 419, 455 (1982) (Blackman, J., *dissenting*).

[85] *Lochner*, 198 U.S. at 56.

[86] *Slaughter-House Case*s, 83 U.S. 36, 86 (1872) (Field, J., *dissenting*).

any of the just rights of the citizen, which the Constitution intended to secure against abridgment."[87]

Although reviewing the constitutional propriety of legislation is a core element of the separation of powers, the post-*Nebbia* view is that deference to economic regulation is required since "[a]ny departure from . . . judicial restraint would result in courts deciding on what is and is not a government function; a practice which has proved impracticable in other fields."[88] Yet, the imperative of the takings clause is compensation for government takings of property. It is nearly redundant to point out that the judiciary's obligation to safeguard the liberties protected by the takings clause could not countenance "any economic policy [that] may be reasonably deemed to promote the public welfare,"[89] where that policy is implemented by regulations that take a property interest from individuals for the alleged welfare of the public.[90]

In order to avoid the charge of "Lochnerism," the modern Court has adopted an expansive conception of the police power such that it will rarely, if ever, distinguish between things legislatures may do and things they may not do in the area of economic legislation.

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[87] *Id.*

[88] *United States v. ex rel TVA v. Welch*, 327 U.S. 546, 552 (1946).

[89] *Nebbia*, 291 U.S. at 516.

[90] For a discussion of the history and background rights protected by the takings clause, *see generally*, Bernard Siegan, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 108-116 (2001).

Although the term "Lochnerism" is used here to indicate the charges made by many commentators,[91] it must be noted that term itself evades any consistent definition. It is a classic instance of the fallacy of "package-dealing," which is understood to be "the fallacy of failing to discriminate crucial differences. It consists of treating together, as parts of a single conceptual whole or 'package,' elements which different essentially in nature, truth-status, importance or value."[92] In this instance, "*Lochner*ism" wrongly treats as the same the valid principle of judicial review, arising from legal duties implied by the Constitution's separation of powers, with judicial subjectivism, which is an instance of setting aside Constitutional values in favor of personal ones. The apparent purpose of the term is to blur the distinction, leaving it unclear whether the criticism applies to the latter or the former. It thus serves the same function as, e.g., the term "McCarthyism," which fails to discriminate between a valid inquiry into the existence of communist agents in positions of the government and the unjust smearing of innocent individuals as communist, contrary to or in the absence of evidence. The function of the

[91] A Westlaw search by the author found the term employed in 204 law review and journal articles recent enough to be included in the database.

[92] Leonard Peikoff, editor's footnote to Ayn Rand, *The Metaphysical Versus the Man-Made*, in PHILOSOPHY: WHO NEEDS IT? 24 (Leonard Peikoff, ed., Bobbs-Merrill, 1982). The fallacy of the package-deal is related to what Ayn Rand designated "anti-concepts." "An anti-concept is an unnecessary and rationally unusable term designed to replace or obliterate some legitimate concept. The use of anti-concepts gives the listener a sense of approximate understanding. But in the real of cognition, nothing is as bad as the approximate . . . ." Ayn Rand, THE AYN RAND LEXICON 23 (Harry Binswanger, ed., Meridian Books, 1988) (quoting Ayn Rand, *Credibility and Polarization*, in 1 The Ayn Rand Letter 1 (1971).

term "*Lochner*ism" is to undermine judicial review by obliterating the distinction between it and judicial subjectivism, against which there is properly widespread outrage.

Nevertheless, since the Court has accepted this package-deal as valid criticism, charges of "Lochnerism" exert substantial force on legal doctrine relating to economic liberties and property rights. Since all economic regulation "adjust[s] the benefits and burdens of economic life,"[93] taking from some and giving to others, however, the court is left with the question of when a property owner is entitled to compensation for such burdens. It is routinely stated that compensation is owed when the regulation "force[s] some people along to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[94] But the court has had to develop a standard of determining what is "fair and just" within boundaries marked by *Lochner* and *Nebbia*. The *Agins* test can be understood as the Court's means of giving the takings clause more effect than an application of *Nebbia*-style deference allows, while attempting to avoid the charge that it is proscribing the limits of the police power.

II. Substantial Advancement Is More Than A Means/Ends Test

Agins cited *Nectow v. City of Cambridge*,[95] a due process challenge to a zoning ordinance, in articulating the substantial advancement test.[96] At least some arguments that *Agins* mistakenly injected due process language into takings law relate to the *Nectow*

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

94 *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

95 277 U.S. 183 (1928).

96 *Agins*, 447 U.S. at 260 (citing *Nectow*, 277 U.S. 188)..

connection.[97] This argument is challenged, however, by the fact that *Nectow* was also cited in support of the balancing test established by the *Penn Central* decision.[98] In fact, subsequent cases have stated that *Agins* is the Court's "general approach" to regulatory takings[99] and even that the differing language of *Agins* and *Penn Central* "cannot . . . obscure the fact that the inquiry in each case is the same."[100] The purpose of this section is to take a brief tour of the Supreme Court cases establishing the *Agins* test in order to determine what it has come to mean.

A. A Short History of the Substantial Advancement Doctrine

Agins itself states that the zoning ordinance at issue in that case would have effected a taking if "it [did] not substantially advance legitimate state interests." Further language that could be interpreted as restating the same standard creates ambiguity as to exactly what Justice Powell might have meant. The context is set by the general policy that a finding of takings liability "is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[101] On the one hand, the "ad hoc," essentially unprincipled balancing test

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[97] See Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow*: A Procedural Loose End*, 24 U. Haw. L. Rev. 623, 640 (2002); Jerold S. Kayden, *Land-use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 Urb. Law. 301, 314-15 (1991).

[98] *Penn Central*, 438 U.S. at 125.

[99] *Riverside Bayview Homes*, 474 U.S. at 126.

[100] *Lucas*, 505 U.S. at 1024.

[101] *Agins*, 447 U.S. at 260.

ascribed to *Penn Central* is implicated by *Agins*' statement that the determination "requires a weighing of public and private interests."[102]

The holding, however, also relies on a cause and effect relationship between the zoning ordinance and the alleged burdens that, but for the ordinance, the community might bear as a result of Agins' real estate development: "The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization."[103] The City argued that intensive development of housing on a large parcel previously devoted to open space would have "adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl."[104] Whether the property owner ought to be burdened with the maintenance of the status quo is a separate question, but the point for purposes of this Article is that the ordinance at issue in *Agins* bore a cause and effect relationship to these alleged state interests: the implementation of the ordinance was directly related to eliminating the impact feared by the City.

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[102] See *Penn Central*, 438 U.S. at 124 (describing past takings cases as "essentially ad hoc, factual inquiries, [by which] the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.") (internal citation omitted).

[103] *Agins*, 447 U.S. at 255.

[104] *Id*. at 262 n.8.

The phrase "substantially advances legitimate state interests" was repeated next in *United States v. Riverside Bayview Homes*.[105] That case considered the scope of the Army Corp of Engineers' jurisdiction under the Clean Water Act and concluded that a particular Corps regulation did not constitute a taking. The Court's discussion of the doctrine was limited to noting that land-use regulation could constitute a taking in "extreme circumstances" and referenced *Agins*' second prong requiring the denial of economically viable use.[106] Oddly, after quoting the first prong of *Agins*, acknowledging its continued viability and relevance to the case at hand, the *Riverside Bayview* Court failed to include any consideration of that element of *Agins* in its analysis.

The analysis of a building permit exaction in *Nollan v. California Coastal Commission* [107] began with the recognition that land use regulation must substantially advance legitimate state interests to avoid a taking.[108] Although Justice Scalia noted that "cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advances' the latter,"[109] a cause and effect relationship between the regulation and the interest is part of the required connection. This aspect of the connection is clear from Justice Scalia's further analysis,

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[105] 474 U.S. at 126.

[106] *Id.*

[107] 483 U.S. 825.

[108] *Id.* at 834.

[109] I*d.*

in which he assents to the premise that "we may sustain the condition at issue here by finding that it is reasonably related to the . . . . burden that the Nollan's new house creates or to which it contributes."[110] In fact, however, the *specific* condition the Commission imposed – conveying lateral beach access to the public – was found to be unrelated to the *specific* burdens the Commission claimed would be created by enlarging the Nollans' house: interference with passing motorists' "visual access" to the beach,[111] and the creation (in conjunction with other proposed building activity) of a "psychological barrier" between viewers and the sea.[112] Because the Nollans' project in no way encumbered the public's *lateral access* to the beach, there was no cause and effect relationship between the condition and any public burden actually created by the enlargement of the home.

Pursuing the cause-and-effect analysis even further, Justice Scalia added, "If the Nollans were being singled out to bear the burden of California's attempt to remedy [the 'psychological barrier' to public beach access allegedly created by intensive beachfront development], *although they had not contributed to it more than other coastal landowners*, the State's action, even if otherwise valid, might violate either . . . the Takings Clause or the Equal Protection Clause."[113] That issue was not necessary to decide, however, as the case was resolved on other grounds. In addition, Justice Scalia

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[110] *Id.* at 838.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 836 n. 4 (emphasis added).

pointedly distinguished the substantial advancement doctrine from traditional due process analysis: "We have required that the regulation 'substantially advance' the 'legitimate state interest," and not merely that "the state 'could rationally have decided' that the measure adopted might achieve the State's objective."[114]

Keystone Bituminous Coal Association v. DeBenedictus raised the substantial advancement doctrine again, citing to both *Agins* and *Penn Central*.[115] The Court held that a regulation prohibiting a company from mining certain underground coal was not a taking. The Court relied on the fact that mining would cause subsidence of land above the mines and, therefore, the regulation"abate[d] activity akin to a public nuisance."[116] While Justice Stevens attempted a "balancing" analysis,[117] the holding appears to truly rest on the Court's recognition of the proper bounds of the police power. Although the private individuals who owned the land above the mining operations contractually bargained for the risk of subsidence, the Court held that "they erred in taking a risk"[118] which was not exclusively theirs to accept. Private bargaining, according to the *Keystone* majority, "cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance."[119]

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[114] *Id.* at n.3.

[115] 480 U.S. 470.

[116] *Id.* at 488.

[117] *Id.* at 495-499.

[118] *Id.* at 488.

[119] *Id.*

This holding was obviously at odds with the Court's judgment 75 years earlier, in which a nearly identical scenario resulted in a taking,[120] but which the *Keystone* Court now regarded as a "prime example" of valid expansion of the police power to meet "changed circumstances."[121] Except to reinforce the Court's view that *Agins* remained the general test for takings, in application *Keystone* did little more than reiterate a truism: that the state is not liable for a taking when it restricts nuisances or other uses of property that violate the rights of others.[122] The fact that the activity abated in *Keystone* was not in fact a nuisance[123] indicates the judicial discretion inherent in the substantial advancement doctrine and relates to Part III of this article.

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[120] *See Pennsylvania Coal*, 260 U.S. at 413.

[121] *Keystone*, 480 U.S. at 488. Justice Sutherland's criticism of the notion that constitutional rights change with circumstances is worth noting: "[I]t is urged that the question invovled should now receive fresh consideration, among other reasons, because of the 'economic conditions which have supervened'; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is menat that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written–that is, that they do not apply to a situation now to which they would have applied then–is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise." *West Coast Hotel v. Parrish*, 300 U.S. 379, 402-03 (1937) (Sutherland, J., *dissenting*).

[122] This was duly noted by the dissent: "a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." 480 U.S. at 511 (Rehnquist, C.J., dissenting).

[123] *Id.* at 512 ("This statute is not the type of regulation that our precedents have held to be within the "nuisance exception" to takings analysis.")

The court once again reiterated its commitment to the *Agins* test without applying it in *Yee*.[124] The case was brought to the Court on a theory that a rent control regulation constituted a permanent physical occupation of a mobile home park owner's property, and was considered under the principles for physical occupation developed in *Loretto*.[125] As has already been mentioned, however, Justice O'Connor's invocation of the *Agins* test in *Yee* has triggered a number of challenges to similar rent control ordinances under the substantial advancement standard.[126]

Lucas[127] was a substantive application of the second prong of the *Agins* test, wherein a coastal land use regulation not only denied a land owner economically viable use of his property, but foreclosed *any* beneficial or productive use of the land. The connection between the substantial advancement doctrine and nuisance raised in *Keystone* was discussed by Justice Scalia, who observed that cases focused on the "harmful and noxious" use of property were "the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'"[128] South Carolina's regulation prohibited development of coastal lands on the avowed basis of "protecting life and property."[129] For the Court to simply negate that

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[124] 503 U.S. 519.

[125] *Id.* at 534.

[126] *See supra*, text at note 36.

[127] 505 U.S. 1003.

[128] *Id*. at 1025

[129] S.C. Code 1976, §§ 48-39-250 (1)(a) (1993).

judgment would be to impose an independent view of the importance of coastal preservation, subjecting it to the criticism associated with *Lochner*. It is evident, however, that deference to laws that do not fall within any traditional standard of harm or nuisance prevention provides little judicial protection against state abridgments of property rights. Furthermore, the "life and liberty" rationale advanced in *Lucas* could reasonably be regarded as mere pretext. As the Court noted, the dissenting South Carolina Supreme Court Justices reasoned that "the chief purposes of the legislation, among them the promotion of tourism and the creation of a 'habitat for indigenous flora and fauna,' could not fairly be compared to nuisance abatement."[130]

Nevertheless, since the Court is unwilling to expressly proscribe a limit to the police power or assert independent judgment as to what constitutes a nuisance (e.g. what sort of uses of property interfere with the bona fide rights of others), it disavows these considerations as standards for takings liability. This disavowal removes the necessity for the Court to formally rule on what is or is not a "harm" and has become a central aspect of the substantial advancement doctrine. The "distinction between 'harm-preventing' and 'benefit-conferring' regulation," according to the *Lucas* Court, "is often in the eye of the beholder."[131]

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power

[130] *Id.* at 1010 (quoting *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 396, 404 S.E.2d 896, 906 (1991)).

[131] *Id.* at 1024.

> justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"--which require compensation–from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.[132]

As applied in *Lucas*, the disavowal favored property rights since it stripped the declaration of harm by the State of legal significance. Without a coherent standard of individual rights, however, the disavowal is just as likely to disadvantage property rights.

In *Dolan v. City of Tigard*,[133] the Court built on *Nollan*. "We must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city,"[134] wrote Chief Justice Rehnquist. If such a nexus is found, the Court "must then decide the required degree of connection between

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[132] *Id.*

[133] 512 U.S. 374.

[134] *Id.* at 386.

the exactions and the projected impact of the proposed development."[135] For the first time, however, *Dolan* made explicit the type of government interests that must be substantially advanced to comply with *Agins*. Reflecting on *Nollan*, the Court noted the tenuous relationship in that case between the preservation of ocean visibility and the California Coastal Commission's requirement of a lateral easement across the Nollan's property. "How enhancing the public's ability to 'traverse to and along the shorefront' served the same governmental purpose of 'visual access to the ocean' from the roadway was beyond [the Court's] ability to countenance."[136] *Dolan* further emphasizes the causal nature of the *Agins* test. The Court's role is to review the regulation to determine whether "the required dedication is related both in nature and extent to the impact of the proposed development."[137]

Justice Scalia reaffirmed this understanding of the substantial advancement doctrine in his concurring and dissenting opinion in *Pennell v. City of San Jose*.[138] There, he stated that to avoid takings liability, property regulations must have "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy."[139] Where no cause and effect relationship

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[135] *Id.*

[136] *Id.* at 387.

[137] *Id.* at 391.

[138] 485 U.S. 1.

[139] *Id.* at 20 (Scalia, J., concurring in part and dissenting in part).

exists, there is no governmental interest "legitimately furthered by regulating the use of property."[140]

City of Monterey v. Del Monte Dunes[141] again reaffirmed the substantial advancement doctrine, but did not apply it directly. Rather, the Court considered the propriety of jury instructions including the first prong of *Agins* in a case to determine takings liability for repeatedly withholding a building permit. Justice Kennedy cited seven cases invoking the substantial advancement standard and noted that "concerns for proportionality animate the Takings Clause,"[142] concluding that the jury instruction was "consistent with our previous general discussions of regulatory takings liability."[143]

Finally, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[144] the Court decided that a temporary development moratoria did not constitute a categorical taking under *Lucas*. The Court acknowledged the "District Court's finding that the [agency's] actions represented a proportional response to a serious risk of harm to [Lake Tahoe]," without which "petitioners might have argued that the moratoria did not substantially advance a legitimate state interest."[145] This statement explains why

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[140] *Id. at 18.*

[141] 526 U.S. 687.

[142] *Id.* at 702.

[143] *Id.* at 704.

[144] 535 U.S. 302 (2002).

[145] *Id.* at 334.

the substantial advancement test had no role in *Tahoe-Sierra* although its mention reaffirms the test's continued viability.

B. Cause and Effect As a Solution To the Problems of *Lochner* and Extreme Deference To Legislation

To the extent the Ninth Circuit applies the *Agins* standard merely to scrutinize the efficacy of property regulation in achieving any State interest, it fails to address the core, cause and effect nature of the test. Simple means/ends scrutiny is not evident in the cases that have established the substantial advancement standard and would clash with post-*Nebbia* notions of judicial restraint. It has been recognized by some commentators that what appears to be in some cases a means/ends analysis is in fact a cause and effect model for reviewing legislation that impinges on the right to use or exclude others from using certain types property.[146] Professor Molly McUsic comments: "Its animating principle is that no value can be taken from the owner and given to the public; the public is only permitted to recoup what the owners themselves take by imposing harm."[147]

That principle is consistent with the foregoing review of the cases. If the Court applied this principle consistently, however, it would have an equivalent effect on property–and perhaps all economic regulation–as *Lochner*'s forbidden due process analysis. The principle has not been applied consistently, however, as is clear from the many cases in which opposite results would have been found were it operative. As I describe below, the Court employs various limiting principles as barriers against taking

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[146] *See, e.g.*, Radford, *supra* note 8, at 390-391; McUsic, *supra* note 13, at 639.

[147] McUsic, *supra* note 13, at 645.

the principle so far as to be, as its critics accuse, a return to abandoned standards of judicial review in property rights cases. In *Nollan* the Court stated that a "permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[148]

"Unless the permit condition serves the same governmental purpose as the development ban," however, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[149] The latter is a case in which the "evident constitutional propriety disappears" because "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[150] Two points are notable from that statement.

First, it appears that a regulation conditioning the development of the Nollans' property would have been legitimate only to the extent that it served the same ends as the prohibition. Second, said prohibition would be a taking if it was not a proper exercise of the police power. This is clearly a cause and effect, rather than a mean/ends concern. One can also conclude from *Nollan* that the review for whether regulations substantially

[148] *Nollan*, 483 U.S. 836.

[149] *Id*. at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (1981)).

[150] *Id.*

advance legitimate governmental interests includes an assumption that only regulations that implement relatively traditional police powers are legitimate.[151]

The dissents in *Nollan* show that not only is a cause and effect understanding of the *Agins* test logical, it is in fact the meaning the Court intended. Justice Blackmun described the Court's interpretation of the takings clause as requiring a "necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden."[152] Justice Brennan likewise objects to the "Court's unusual demand for a precise match between the condition imposed [by the Coastal Commission in exchange for a building permit] and the specific type of burden on [public beach] access created by the"[153] development. He contrasts this approach to the general policy of judicial deference to legislative determinations in economic liberty cases, citing a line of cases descending directly from

[151] The phrase the "police power" is nebulous and the source of much trouble in takings jurisprudence due to the Court's unwillingness to establish any firm definition. As is discussed in part III, however, despite the Court's disavowal it must import some elements of a physical invasion test for nuisance: uses of property which physically invade, or destroy the quiet use and enjoyment in an equivalent manner, cannot be protected.

[152] *Nollan*, 483 U.S. 825, 865 (Blackmun, J., dissenting).

[153] *Id*. at 842.

the policies announced in *Nebbia*.[154] As Justice Blackmun describes it, the substantial advancement doctrine applied in *Nollan* is an "eye for an eye mentality."[155]

This point is made again by Justice Scalia's concurrence and dissent in *Pennell*. Appellants in that case argued that a rent control ordinance "that provid[ed] financial assistance [in the form of reduced rent] to impecunious renters is not a state interest that can be legitimately furthered by regulating the use of property."[156] This type of regulation is distinguished from zoning restrictions, asserts Justice Scalia, because when such regulations do not eliminate the economic use of property, "there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy."[157] The relationship described here is not merely

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[154] In support of the appeal for more judicial deference, Justice Brennan cites *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (noting "this Court's review of the rationality of a State's exercise of its police power demands only that the State '*could rationally have decided*' that the measure might achieve the State's objective"); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *Day-Bright Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) ("[S]tate legislatures have new techniques; they are entitled to their own standard of the public welfare."); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (noting "that the exercise of police power will be upheld 'if any state of facts either known or which could reasonably assumed affords support for it.").

[155] This understanding of *Nollan* is affirmed and repeated by Justice Scalia in his dissent from denial of cert. in *Lambert v. City and County of San Francisco*, 529 U.S. 1045, 45 (2000) (citing *Nollan* and *Dolan* for the proposition that "a burden imposed as a condition of permit approval must be related to the public harm that would justify denying the permit, and must be roughly proportional to what is needed to eliminate that harm.).

[156] *Pennell*, 485 U.S. at 18 (Scalia, J., concurring in part and dissenting in part).

[157] *Id.* at 20.

means/ends, or the relationship between a regulation and its goal. Rather, it is the relationship between the property's use and the goal of the regulation. "Since the owner's use of the property is (or, but for the regulation would be) the source of the social problem, it cannot be said that he has been singled out unfairly."[158] It follows that since a renter's poverty is "no more caused or exploited by landlords"[159] than anyone else, it is unfair to force them to accept lesser rent for their housing in order to aid them. This idea is in accord with Professor McUsic's statement that "the public is only permitted to recoup what the owners themselves take by imposing harm."[160]

In contrast to means/ends analysis, a cause and effect analysis is more appropriate for the takings clause. Whereas legislation judged outside the bounds of legislative authority was struck under *Lochner*,[161] the substantial advancement inquiry leaves the legislation in place but requires compensation when the legislation burdens individuals with costs properly borne by the public as a whole.

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[158] *Id.*

[159] *Id.* at 21.

[160] McUsic, *supra* note 13, at 645.

[161] One might get the impression from the rhetoric surrounding *Lochner* that the Court's scrutiny of economic legislation brought the federal government to a halt. In fact, commentators most opposed to *Lochner* number the statutes struck down on substantive due process grounds at something less than 5 per year from the 1890s to the 1930s, whereas more careful analysis shows that "only by greatly stretching the definition of substantive due process does the figure reach 160. Under a more restricted conception of the term, the Supreme Court invalidated slightly over fifty laws on substantive due process grounds during the *Lochner* era." *See* Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, Mercer L. Rev. 1049 (1997).

A literal cause and effect requirement, however, would place limits on legislative action similar to those imposed by strict means/ends analysis, inviting the same criticisms as *Lochner*. In practice, if compensation is required to the degree that a close causal nexus is lacking, the cost would be so high as to discourage many currently accepted types of regulation. The very nature of the regulatory state is to "adjust the benefits and burdens of economic life"[162] and, according to the Court, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[163] The Court therefore employs various limiting principles and one ambiguity to restrain the "eye for an eye" principle from becoming a general standard of review of economic regulation.

First, the Court limits the application of the regulatory takings doctrine to cases in which it finds regulations that affect "specific and identified"[164] property rights deemed, for various reasons, worthy or protection.[165] Once the prerequisite property interest is

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[162] *Penn Central*, 438 U.S. at 124.

[163] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922).

[164] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., *concurring* and dissenting in part).

[165] *Id*. (citing categories of property interests protected by the takings clause in prior cases: air rights for high-rise buildings, *Penn Central*, 438 U.S. at 124*;* zoning on parcels of real property, *e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); trade secrets, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); right of access to property, *e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna;* right to affix on structures, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); right to transfer property by devise or intestacy, *e.g., Hodel v. Irving*, 481 U.S. 704 (1987); creation of an easement, *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal* (continued…)

established, the general framework for a substantial advancement inquiry begins with the presumption of constitutionality. In short, regulation does not effect a taking unless it fails to evince a cause and effect relationship between the regulation and some "social evil" stemming from the use of that property. Within the context of a valid cause and effect relationship, a means/ends inquiry is applied to ensure that there is a close fit: an "essential nexus," or a "rough proportionality" between the burdens of the governmental restriction and the property's contribution to the "social evil."[166] Where no such fit exists, or no cause and effect relationship can be established, the regulation is susceptible to takings liability.

This framework limits the "eye for an eye" principle to a small class of property interests that do not significantly conflict with the precedent established since *Nebbia* and exempts from takings scrutiny the vast majority of economic regulations.[167] Further

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Comm'n, 483 U.S. 825 (1987); right to build or improve, *Lucas;* liens on real property, *Armstrong v. United States,* 364 U.S. 40 (1960); right to mine coal, *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470 (1987); right to sell personal property, *Andrus v. Allard,* 444 U.S. 51 (1979); and the right to extract mineral deposits, *Goldblatt v. Hempstead,* 369 U.S. 590 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

[166] If one disregards the cause and effect context of the substantial advancement inquiry, one may misconstrue cases with a means/ends component, such as *Nollan* and *Dolan*, as intruding into Due Process territory.

[167] Professor McUsic's thesis concerning the class of property interests protected is compelling: in essence, land use and environmental regulations are the subject of the Court's heightened takings scrutiny because they were not "previously adjudicated and whose form can be distinguished from the laws" invalidated under the standards of *Nebbia* and its progeny. As a consequence, the *Agins* test is highly unlikely to migrate to broader economic regulation related to the concerns of the New Deal, such as wage and hour laws. *See* McUsic, *supra* note 22, at 595.

removed from this category are regulations abating nuisances, activities judged sufficiently akin to nuisances, or rights for which the Court can allegedly find no clear tradition. It was a breach of these principles that most concerned Justice Kennedy in *Eastern Enterprises*, causing him to make the observation that "[a]fter the decision in *Pennsylvania Coal Co. v. Mahon*, we confronted cases where specific and identified properties or property rights were alleged to come within the regulatory takings prohibition."[168]

A test founded on the relationship between regulation and the mitigation of social costs, however, allows the Court to scrutinize the form of regulation rather its ends. It is able, thereby, to claim to meet the Constitutional demands of "fairness and justice" by protecting individuals from being singled out to disproportionately bear public burdens, while escaping criticism that it is overriding the will of the legislature.

With the cause-and-effect framework in mind, it is worth returning to the three recent Ninth Circuit rent control cases that apply the substantial advancement doctrine. The fact that the doctrine can include a means/ends component in any particular case makes it easy to misapply, as the Ninth Circuit may have done in the *Chevron* case, inviting charges that the judiciary is "scrutin[izing] the reasonableness or efficacy of legislation."[169] To the extent that the Court finds it prudent to preserve protections for property rights that have been secured in recent years by the *Agins* test, it is likely to

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[168] *Eastern Enterprises v. Apfel*, 524 U.S. at 541.

[169] *Lingle v. Chevron*, 2004 WL 1745842 (Petition for Writ of Certiorari, filed, July 30, 2004).

maintain the distinction between *Agins* and *Lochner*. Distinguishing *Chevron* from *Richardson* and *Cashman* is one way to do so.

C. The Ninth Circuit Applied the Substantial Advancement Test Differently in *Lingle* Than It Did in *Richardson* and *Cashman*

On their face the three Ninth Circuit cases bear an easy similarity. Hawaii's Ordinance 91-95 was held to be a taking in *Richardson* because condominium owners can "captur[e] the net present value of the reduced land rent in the form of a premium, mean[ing] that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu."[170] In *Cashman*, Cotati's Ordinance 680 was held unconstitutional because it allows the mobile home owner to capture the benefit of the regulation as a premium upon sale of the coach, "which undermines the City's interest in creating or maintaining affordable housing."[171] In *Chevron*, "the reduced rent mandated by [Act 257] will not flow to consumers in the form of reduced retail prices but instead will allow lesee-dealers to capture a premium on their leaseholds."[172]

But what does this mean, in terms of a proper application of the substantial advancement standard as a cause-effect test? The "social evil" attributed to the use of the landowners' property in *Richardson* and *Cashman* was an inadequate supply of affordable housing.[173] Whether those who supply housing services like the plaintiffs in

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[170] *Richardson,* 124 F.3d at 1156.

[171] *Cashman*, 374 F.3d 887.

[172] *Chevron v. Lingle*, 363 F.3d 846 (2004).

[173] *See Richardson*,124 F.3d at 1154; *Cashman*, 374 F.3d 890. To be sure, the City of Cotati sought to obfuscate this point by citing seven specific "purposes" of its rent (continued…)

these cases meaningfully can be said to be the cause of this problem seems at least as dubious as that the landlords in *Pennell* were the cause of their tenants' poverty,[174] but the Ninth Circuit followed the Supreme Court's lead in not second-guessing the legislative assumption of causation. What was obvious on the face of both the *Richardson* and *Cashman* ordinances, however, was that the regulatory schemes that were imposed in these cases would not – indeed, *could* not – enhance the affordability of housing in those communities. As Professor Hirsch and his colleagues have demonstrated, the economic benefits of regulations of this type will simply be capitalized and captured by the initial tenants, leaving all subsequent tenants, and society as a whole in exactly the same position with respect to the cost of housing, as if rent control did not exist.[175] It therefore required no great intrusion into the legislative process to recognize that these measures would not mitigate any "social evils" created by the plaintiffs, and both cases were easily resolved on summary judgment.[176]

The situation in *Chevron* was quite different. The problem the Hawaii legislature sought to address was high gasoline prices. Whether the refiners of gasoline can

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control measure, but the underlying rationale for the measure, like all residential rent control laws, was to lower the price of housing. *Id.* at 891; see also *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976).

[174] *Pennell*, 485 U.S. 1, 21-23 (Scalia, J., dissenting).

[175] *See* Hirsch & Hirsch, *supra* note 55, at 447-48.

[176] Richardson,124 F.3d 1150 (9th Cir. 1997);*Cashman*, 374 F.3d 887 (9th Cir. 2004).

reasonably be held to blame for high retail prices is certainly debatable,[177] but the causal relationship is no doubt closer than that between mobile home parks and a shortage of affordable housing. Once again deferring to the legislative determination of causation, however, it is a much closer question whether regulations governing commercial lease agreements between producers and dealers could plausibly be expected to relieve pressure on consumer prices. The district court in *Chevron v. Cayetano* was convinced they could not, and granted summary judgment by analogy to *Richardson*.[178] The Ninth Circuit set aside this determination, remanding for a factual inquiry into whether dealers would be able to capitalize the value of commercial rent control into the price of their franchises.[179] The district court apparently interpreted this as a mandate to hear expert testimony on the likely effect of the law on retail prices – in other words, conducting a highly intrusive means-ends evaluation of whether the regulations would be likely to achieve their stated objective.[180] It is this aspect of *Lingle* that has drawn the most heated criticism as a return to "Lochnerism;"[181] yet ironically, this application of the substantial advancement

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[177] According to the United States Department of Energy, the retail price of gasoline attributable to refining is no more than 15% in recent years. See http://www.eia.doe.gov/neic/brochure/oil_gas/primer/primer.htm (last visited March 31, 2005). This statistic is consistent with California Energy Commission investigations into gasoline price increases in 2003. See http://www.energy.ca.gov/2003_price_spikes/ (last visited March 31, 2005).

[178] *See Chevron v. Cayetano*, 57 F. Supp. at 1010.

[179] *See Chevron*, 223 F.3d at 1042.

[180] *See Chevron*, 198 F. Supp. at 1182.

[181] *See*, e.g., *Lingle*, Petition for a Writ of Certiorari, 2004 WL 174582 (filed July 30, 2004) (stating that the substantial advancement doctrine is "a pretext for [the Ninth (continued…)

standard seems to depart dramatically from the Ninth Circuit's use of the same test in *Richardson* and *Cashman*, and from the Supreme Court's apparent intention in formulating the standard.

Separating the means-ends application of substantial advancement in *Lingle* from the untroubled cause-effect application in *Richardson* and *Cashman*, one nevertheless confronts the fact that both frustrate the will of legislatures.

III. Tension Between the Constitution and the Regulatory State

The Supreme Court's development of the substantial advancement doctrine has followed a pattern aimed at raising the level of judicial protection for property rights, while attempting to avoid the appearance that it imposes mere policy choices; that it acts as a "super legislature" overriding the will of the legislature when it goes "too far." In truth, however, the substantial advancement doctrine cannot completely divorce the Court from the evaluation of regulatory ends most often associated with means/ends review. In part, this is because the concept of judicial restraint endorsed by the Court since *Nebbia* embraces a false dichotomy: Constitutional adjudication is not a struggle between judicial and legislative will, but the subordination of legislative will to Constitutional principle.[182]

Circuit's] improper judicial invalidation of state legislation based on an intrusive standard of review of economic legislation not seen since the days of *Lochner* . . . ."); Lingle, Brief of the States of New York, et al., as Amici Curiae in Support of Petitioners, 2004 WL 2803196 (filed Dec. 03, 2004) (stating that the Ninth Circuit's decision "threatens a wide array of public protections, by means of the type of intrusive judicial review epitomized by *Lochner* and long ago discredited.").

[182] *See, e.g.*, James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 Mich. St. L. Rev. 845, 856 (the notion that "property is held at the sufferance of the legislature [is] . . . at odds with the place of private (continued…)

A broader argument concerning the nature and scope of judicial review is beyond this paper, but to the extent that the Court holds "value-free" adjudication as an ideal it fails to discharge its obligation to protect the values embodied by the Constitution's text. Further, it confuses the idea of judicial review with judicial subjectivism, mistaking the rule of law for the idea of "judicial will," which undermines the moral and legal legitimacy of the former. The argument of this section is more narrow: to explain why the substantial advancement doctrine, albeit changing the form of takings analysis, cannot eliminate the necessity of evaluating the Constitutional propriety of regulatory ends.

In every application of a cause/effect standard, a court must necessarily determine that the unregulated use of property caused or would cause what Justice Scalia termed the "social evil" justifying the regulation. But as has previously been suggested, what counts as a *cause* of any particular social phenomenon is rife with opportunity for judicial (as well as legislative) discretion.[183] More importantly, however, one cannot begin to answer the question of whether a regulation substantially advances legitimate governmental interests unless one has some gauge for determining what governmental interests are legitimate. The substantial advancement doctrine proceeds on the premise that courts can identify such interests without judicial proscription of the limits of the police power. It does so by focusing on the *form* of regulation rather than its *objective*:

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ownership in the American constitutional system") (citing Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 531 (1868)).

[183] *See supra*, text at notes 172, 175.

specifically, whether the regulation bears a reasonable nexus to the unregulated activities' contribution to an alleged social evil.

But such an inquiry does not achieve the objective of "value-free" adjudication, because it merely masks implicit limits on the police power with hidden assumptions. Unless the Court makes an independent judgment about which "social evils" are worthy of remedying, the Takings Clause fails to provide meaningful protection for a wide variety of property rights. The identification of specific "social evils" and "causes" are means by which the Court's implied limits of the police power are enforced.

To begin an inquiry into the substantial advancement of legitimate governmental interests, a court must first identify the phenomenon perceived as problematic by the legislature. In *Keystone*, for instance, it was the likelihood of subsidence;[184] in *Dolan*, it was traffic congestion or the potential for flooding due to more intensive land use;[185] in *Nollan*, it was the alleged loss of visual access to beaches;[186] in *Lucas*, it was the alleged

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[184] *See Keystone*, 480 U.S. at 474 (describing damage caused by mining "to foundations, walls, other structural members, and the integrity of houses and buildings. Subsidence frequently causes sinkholes or troughs in land which make the land difficult or impossible to develop. Its effect on farming has been well documented--many subsided areas cannot be plowed or properly prepared. Subsidence can also cause the loss of groundwater and surface ponds. In short, it presents the type of environmental concern that has been the focus of so much federal, state, and local regulation in recent decades.").

[185] *See Dolan*, 512 U.S. at 377 (noting Oregon's conditioning "the approval of [Dolan's] building permit on the dedication of a portion of her property for flood control and traffic improvements.").

[186] *See Nollan*, 483 U.S. at 828-29 (noting the California Coastal Commission's finding that "the new house would increase blockage of the view of the ocean, thus contributing to the development of a wall of residential structures that would prevent the public psychologically ... from realizing a stretch of coastline exists nearby that they have every right to visit.").

degradation of the "coastal zone"due to the development of coastal lands that serve, *inter alia*, as barriers against the tide;[187] in *Richardson* it was the high concentration of ownership of condominiums, or else increases in lease prices in excess of inflation;[188] in *Lingle*, it is the fact that gas prices on Hawaii exceed prices found on the mainland.[189] As the first step in applying the substantial advancement inquiry, it is necessary to distinguish which of these effects may rightfully be mitigated by imposing regulatory restrictions on the use of property, and which may not. The Court has offered no particular standard on this point, stating variously that it requires a "careful examination and weighing of all the relevant circumstances";[190] that "[o]ur cases have not elaborated on the standards for what constitutes a 'legitimate state interest,' but they have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements";[191] that "we have eschewed any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated";[192]

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[187] *Lucas*, 505 U.S. at 1010 (citing the "'uncontested ... findings' of the South Carolina Legislature that new construction in the coastal zone--such as petitioner intended--threatened this public resource.").

[188] *See Richardson*, 124 F.3d at 1154 (describing the object of the regulation to "break up this pattern of land ownership and control the escalating prices of housing.").

[189] *See Lingle*, Brief for Petitioners, WL 103793 (filed January 14, 2005) (stating that the "purpose of the act is to combat the effects of alleged concentration in the Hawaii market for gasoline, which the Legislature said was resulting in higher gasoline prices and hurting consumers and the public.").

[190] *Palazzolo*, 553 U.S. at 636 (O'Connor, J., concurring).

[191] *Nollan*, 483 U.S. at 834-35.

[192] *Penn Central* at 124.

and warning against any standard that "would transform government regulation into a luxury few governments could afford."[193]

There must, however, be some operative theory of individual rights against which the Court measures the use of property and its impact on third parties. The Court must have a clear concept of what constitutes a "social evil." Without such a distinction, the substantial advancement inquiry relies entirely on the Court's finding that a particular use of property is responsible for its *sub silentio* definition of harm. Were the Court to apply *Nebbia*-style deference to all legislative declarations of harm, any social phenomenon perceived as problematic could simply be declared a nuisance, and regulatory measures ostensibly aimed at its abatement could thereby avoiding takings liability altogether. As Justice Scalia pointed out in *Lucas*:

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"--which require

[193] *Tahoe-Sierra Preservation Council v. Regional Planning Agency*, 535 U.S. 302, 323 (2002).

> compensation–from regulatory deprivations that do not require compensation . . . . [T]he legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed.[194]

At least with respect to regulations that deprive property of all economically viable use, therefore, *Lucas* demands that any nuisance-like limitation on property rights cited as justification "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."[195] Such a standard is "value-free" according to the Court because it draws on the "the historical compact recorded in the Takings Clause that has become part of our constitutional culture"[196] regarding land use. This standard, however, does not apply to other forms of property or regulations that do not destroy all economically viable use since "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."[197]

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[194] *Lucas*, 505 U.S. at 1026.

[195] Id. at 1027.

[196] Id. at 1028.

[197] Id. at 1027-28.

But this last condition comes full circle by begging the question of what are *legitimate exercises* of the state's police powers. It leaves to the discretion of the Court the standard for determining which "social ills" may be mitigated by uncompensated regulation in cases involving less than a total deprivation of all economiclly viable use of property. As a result, one can easily identify disagreements as to what constitutes the legitimate mitigation of such a "social evil" among the Members of the Court. For example, classifying the abatement of subsidence as an objective sufficeintly "legitimate" to justify uncompensated resrictions on property rights, so obvious to Justice Stevens in *Keystone*, apparently came as a surprise to Chief Justice Rehnquist:

> The ease with which the Court moves from the recognition of public interests to the assertion that the activity here regulated is "akin to a public nuisance" suggests an exception far wider than recognized in our previous cases. . . . A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is

> intended to secure for the public an extra measure of "health, safety, and welfare."[198]

Likewise, Justice Stevens found it "unfortunate" that the 1972 ordinance aimed at maintaining the clarity of the water at Lake Tahoe "allowed numerous exceptions and did not significantly limit the construction of new residential housing."[199] Despite the Court's commitment to "value-free" adjudication, Justice Stevens here stakes out a personal preference for regulating the algae content in Lake Tahoe through comprehensive restrictions on housing development. The Court enforces that preference without reference to a standard of harm. It merely assumes that maintaining the clarity of the lake's water is a sufficiently legitimate police power function to justify the effective extinguishment, without compensation, of the right to build a home on one's land. Similar fundamental value judgments are expressed by way of conclusory assertion in *Nollan*, *Dolan*, and *Richardson* as well.[200]

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[198] *Keystone*, 480U.S. at 512-13 (Rehnquist, J., dissenting).

[199] *Tahoe-Sierra*, 535 U.S. at 309.

[200] *See Nollan*, 483 U.S. at 835 ("assum[ing], without deciding," that among the legitimate governmental interests is "protect[ion] of the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." In which case, "the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes . . ."); *Dolan v. City of Tigard*, 512 U.S. 374 (stating "[u]ndoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld"); *Richardson v. City and County of Honolulu*, 124 F.3d at 1163 (finding legitimate "the City's interest in maintaining affordable owner-occupied residential housing).

The point of these examples is to illustrate that the cause and effect test embodied by *Agins* cannot save the Court from the need to make independent judgments about the nature and scope of "legitimate" governmental objectives; it only moves the evaluation of legislative ends to a deeper, and usually implicit, level. To the extent that the Court accepts a particular interest as falling within the sphere of "legitimacy," and views the unregulated use of property as in some sense the "cause" of the problem being addressed, compensation may be avoided in the advancement of that interest.[201] No change in the form of the takings analysis can substitute for the Court's obligation to promulgate a standard for determining when the rights of third parties have been violated by the use of property and, therefore, when the state may properly restrict such uses without paying compensation. Where the substantial advancement doctrine has heightened the constitutional protection of property rights, it is only to the extent that it has imported elements of such a standard from the common law.

The substantial advancement doctrine has been one means by which the Court has faced this fact: it removes limited aspects and applications of the right to property from the framework of rational basis scrutiny by close examination of the form of confiscatory regulation. As has been demonstrated, however, the formal analysis is effective largely because it relies on ambiguity to apply underlying norms about the nature and scope of property rights.

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[201] Always assuming, of course, that *Agins*' second prong is satisfied.

Addressing the tension between the Constitution and the regulatory state, however, is not a "return to *Lochner*" but a logical necessity of the judicial power. No takings standard will eliminate the need of the Court to evaluate the constitutional propriety of regulatory ends. Constitutional adjudication can never be wholly "value free" because the Constitution's function is the maintenance and protection of definite values, foremost among which is the right to property.

CONCLUSION

From the foregoing, three major conclusions can be drawn. First, the substantial advancement doctrine has often been misconstrued as a simple means/ends inquiry. That conception of *Agins* is inconsistent with the entire thrust of modern judicial review and, as such, is frequently criticized as an imprudent "return to Lochner." It is therefore regrettable that *Lingle v. Chevron*, the vehicle the Supreme Court has chosen to review the substantial advancement standard, is an apparent example of means/ends scrutiny of economic legislation, which may be open to that charge.

A careful review of cases invoking the substantial advancement test, however, shows that, properly understood, it does not merely scrutinize legislation to determine whether an appropriate means/ends relationship is present. Rather, *Agins* primarily advances a cause and effect test. When the Court asks whether a regulation substantially advances legitimate government interests, certain assumptions are built into those terms. Only those interests concerning the mitigation of "social ills" *caused* by the unregulated use of property are deemed legitimate for these purposes. The test has been described as

applying an "eye for an eye mentality"[202] because its function is to ensure that the state exacts from property owners only that which can reasonably be construed as the equivalent of social costs imposed (or exploited) by their use of property. Such a test meets twin goals: 1) it protects certain classes of property from the trap of extreme judicial deference created by the Court's longstanding due process standards of review and 2) it gives cover to the Court against charges that, by such exemptions, it is merely overriding legislatively determined social policy.

Finally, an analysis of the test illustrates that there is an inherent contradiction among these goals, which is not fully resolved by a change in the form of the takings inquiry. While it is proper for judges to be objective and to set their personal values aside when evaluating legislation, there is no way to avoid the fact that there are constitutional values at odds with several generations of regulatory restrictions on property.

The criticisms of *Agins*, one may conclude, are not entirely specious. Although the *Agins* test is by no means a return to *Lochner*, it does confront many of the questions concerning the limits of the police power that have been abdicated by the judiciary since *Nebbia*. Until this issue is brought to center stage by the Court, takings doctrine will remain a swamp of unstated assumptions relying on doctrinal ambiguities to protect constitutional rights.

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[202] *See Nollan*, 483 U.S. at 865 (Blackmun, J., dissenting).