UNITED STATES SUPREME COURT DITCHES FIRST PRONG OF AGINS

In Lingle v. Chevron U.S.A., Inc., 544 U. S. ___ (May 23, 2005), a unanimous United States Supreme Court reversed itself in clearing up one of the major outstanding issues in takings jurisprudence, i.e., whether the takings clause of the Fifth Amendment to the Federal Constitution requires a showing that a regulation "substantially advance" a legitimate state interest. This test was one of two formulated by the United States Supreme Court in Agins v. City of Tiberon, 447 U.S. 255 (1980) and had been repeated in a number of that court's later opinions. In this case, the test had been used to strike down a Hawai'i statute that limited the rents an oil company may charge its lessee-operators.

Hawai'i's legislature perceived that both dealers and consumers would benefit by the limitation and the wisdom of the legislature's economic decision was controversial. Chevron had often bought or leased property from a third party, built a gas station, then leased the facility to an operator, charging a monthly rent based on a margin on the sale of fuel and other products, in addition to requiring the operator to buy all its products from the company at a price the company sets unilaterally. The legislation set a rent limitation at no greater than 15% of gross profits from fuel sales and 15% of profits from other sales. In 1997, Chevron sued under the takings and due process clauses and moved for summary judgment. The trial court found Chevron would lose rent on some operations, but gain on others.

In 1998, the Federal District Court granted summary judgment, finding the statute would not substantially advance the state's interests in preventing concentration of the market or lowering retail gas prices, but would allow incumbent lessees to gain a premium on the transfer of their lease interests to others, also resulting in no consumer savings. The court also found that oil companies would simply raise fuel prices to offset reductions in rental income. In the first

appeal to the Ninth Circuit decided in 2000, that court found the District Court correctly applied the relevant legal standard, but that there was a question of material fact as to whether the legislation would benefit consumers, and sent the matter back for trial on that issue. On remand, the District Court held a one-day bench trial and again found against the state on the facts, finding Chevron's expert testimony "more persuasive" than that of the state's expert and adopting the same reasoning as it and the Ninth Circuit had used previously. The Ninth Circuit affirmed with one dissent, finding that the State was barred by its previous decision from raising the validity of the "substantially advances" test or arguing for a more deferential standard of review. The United States Supreme Court granted certiorari.

Justice O'Connor, writing for the Court, traced the history of the takings clause, first from physical invasion or appropriation of property (as was the case in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)), to regulations that went "too far" under Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). The opinion went on to discuss two types of "categorical" takings, i.e., in those cases such as Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) involving physical occupation or denial of all viable beneficial use of land, with some exceptions, such as when background principles of property or nuisance law dictated otherwise. The opinion went on to say that, outside these two relatively narrow categories, the three factors of Penn Central Transp. Co. v. New York City, 433 U.S. 104 (1978) applied, including the economic impact of the regulation on the claimant, the extent to which the regulation interfered with "distinct investment-backed expectations," and the character of the governmental action (so that it was easier to uphold a regulation that adjusted values through regulation for economic or social purposes than if it were a physical invasion). The Court added:

> "Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in Loretto, Lucas, and Penn Central) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property. perhaps the most fundamental of all property interests. See Dolan v. City of Tigard, 512 U. S. 374, 384 (1994); Nollan v. California Coastal Comm'n, 483 U. S. 825, 831.832 (1987); Loretto, *supra*, at 433; Kaiser Aetna v. United States, 444 U. S. 164, 176 (1979). In the Lucas context, of course, the Complete elimination of a property's value is the determinative factor. See Lucas, *supra*, at 1017 (positing that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation"). And the Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."

The Court's opinion went on to discuss the role of Agins in takings jurisprudence, in which the "substantially advance" test was stated in the disjunctive ("or") as an alternative to a taking based on complete deprivation of all viable economic use. As such, this test became a freestanding criterion and the Court took this opportunity to consider whether this was a separate criterion for takings, concluding that the test "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." In doing so, the Court noted the derivation of the test from substantive due process cases, such as Nectow v. Town of Cambridge, 277 U.S. 183 (1928) and Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), which were cited as support in Agins. The Court also noted the "commingling" of takings and due process strands from the few previous land use cases decided by it and found its selection of language in Agins "regrettably imprecise," as it suggests a means-ends test which purports to test the efficacy of legislation to achieve its stated purpose.

The "substantially advance" test may be viable in a due process inquiry, but "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth

Amendment" as it does not inquire into the magnitude or character of the burden on private property, nor how that burden is distributed (i.e., whether "in all fairness and justice" the burden should fall on the public at large or on property owners). The test thus does not identify those regulations that are functionally equivalent to government appropriation or invasion of private property. Whether a regulation is "effective" or not is not a concern of the Takings Clause, which is concerned with appropriation of property "for public use." Indeed, the Court made the distinction between takings and interference with property rights as follows:

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> "* * * [I]f a government action is found to be impermissible for instance because it fails to meet the .public use requirement or is so arbitrary as to violate due process that is the end of the inquiry. No amount of compensation can authorize such action."

The court noted that it was unclear just how the Hawai'i statute would affect Chevron's property rights, as the company still made enough money from its rentals to satisfy any constitutional standard, so it is difficult to see how the company was singled out to bear any severe regulatory burden. The gist of Chevron's claim is that the legislation was not particularly effective in achieving its stated ends, something that does not sound under the takings clause and the Court noted that Chevron did not seek money compensation, but an injunction against the regulation, which it contended was arbitrary and irrational (and which sounded in substantive due process.) As a practical matter, use of the test would require the courts to scrutinize the wisdom and predictive ability on the efficacy of any number of regulatory exercises. In this case, the test would require a court to decide which expert was "more persuasive" with regard to economic regulation where the Supreme Court has avoided the use of such tests under a substantive due process examination, where it has deferred to legislative judgments. As Chevron

had advanced only a "substantially advance" basis for its takings claim, it was not entitled to summary judgment on that claim.

The Court said that its decision in this case did not disturb its previous use of the test, noting that in no previous case had the test been used to find a taking, though the test had been used in *dicta*. The Court distinguished Nollan and Dolan as based not on the "substantially advance" language of Agins (although that case was used for that proposition), but rather on Fifth Amendment challenges to "adjudicative land-use exactions – specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition for obtaining a development permit." In those "unconstitutional conditions" cases, the government demand would have been a taking, if there were no relationship to the grant of a permit or if that relationship were not "roughly proportional." Despite the use of the "substantially advance" language, those cases retain their constitutional vitality under the Fifth Amendment, said the Court. The Court concluded:

> "Twenty-five years ago, the Court posited that a regulation of private property effects a taking if [it] does not substantially advance [a] legitimate state interes[t]. *Agins*, *supra*, at 260. The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course. We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. Because Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion."

Justice Kennedy concurred, emphasizing his influential vote and opinion in Eastern Enterprises v. Apfel, 524 U.S. 498, 539 (1998), in which he distinguished due process from

takings claims, noting that Chevron had chosen to dismiss its due process claims in this case. Chevron was thus left with no basis for its claims at all.

This is a significant case, for it significantly changes the rules for takings by eliminating the "substantially advance" test and leaving it to a claim under due process, where it will likely fail if it involves economic or social legislation where the courts will not second guess the legislatures. While the deprivation of all viable economic use, appropriation or physical invasion of property remains classic "takings" cases, they are subject to the uncertain calculus of the three Penn Central factors, which will virtually require a trial in most cases. Two other things are notable about this decision – the perceived equivalency of the relationship between total deprivation of economic use to appropriation of property so as to justify a takings claim, and the emphasis in the "unconstitutional conditions" restatement of the element of physical appropriation through a condition, which may lessen the force of a Fifth Amendment claim to conditions involving property improvements or exaction of fees. These latter conditions might not be tested under the Fifth Amendment. If left to the due process clause, they might not be viable in most cases.

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(Edward J. Sullivan participated in the Amicus Brief of the American Planning Association in this case on behalf of the position of the State of Hawai'i.)

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