Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron

Michael B. Kent, Jr., Campbell University School of Law

Available at: https://works.bepress.com/michael_kent/2/
ARTICLES

CONSTRUING THE CANON: AN EXEGESIS OF REGULATORY TAKINGS JURISPRUDENCE AFTER LINGLE V. CHEVRON

BY MICHAEL B. KENT, JR.*

INTRODUCTION

It is by now axiomatic that regulatory takings jurisprudence over the last three decades has been "muddled,"1 "confused,"2 and "a constitutional quagmire."3 Since the Supreme Court's 1978 decision in *Penn Central Transportation Company v. City of New York*4 (which attempted to provide some guidelines by which to determine when a regulatory action would trigger the Takings Clause), this area has been a murky sea of competing theories, alternative analytical tests, and seemingly results-oriented decision-making. Almost from the beginning of its tangled affair with regulatory takings, the Supreme Court conflated the distinction between two constitutional inquiries: when a land use regulation offended notions of due process and when the same

---
* Assistant Professor of Law, John Marshall Law School, Atlanta, Georgia.

1 See, e.g., Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); see also Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205 (2004) ("Conventional wisdom teaches that the Supreme Court's takings doctrine is a muddle.").


regulation resulted in property takings.\textsuperscript{5} Similarly, as Eric R. Claeys recently noted, the Court has utilized rival conceptions of "private property" and the proper role of regulations affecting it.\textsuperscript{6} Finally, the Court has formulated no less than five different tests for analyzing regulatory takings challenges,\textsuperscript{7} all but one of which was established in a split decision,\textsuperscript{8} and it has offered seemingly opposing explanations of how various issues arising within those tests should be resolved. The result has been a general absence of predictability, coherence, or confidence in the Court's consideration of regulatory takings claims. As Justice Stevens has lamented, "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of [the] Court's takings jurisprudence."\textsuperscript{9}

In 2005, however, the Court made substantial strides in bringing some clarity to the law of regulatory takings. In \textit{Lingle v. Chevron U.S.A., Inc.}, the Court selectively admitted its past doctrinal errors and rejected one of its leading formulations for determining when a regulatory taking has occurred—the "substantially advances" test.\textsuperscript{10} This test, which found its seminal expression in \textit{Agins v. City of Tiburon},\textsuperscript{11} suggested that a regulation works a taking under the Fifth Amendment if it "does


\textsuperscript{6} See Eric R. Claeys, The Penn Central Test and Tensions in Liberal Property Theory, 30 HARV. ENVTL. L. REV. 339, 349–66 (2006) (discussing the "classical approach", the "modern approach", and the decisions in which they were applied).

\textsuperscript{7} See infra Part I.


\textsuperscript{9} Nollan, 483 U.S. at 866 (Stevens, J., dissenting).


\textsuperscript{11} Agins, 447 U.S. 255.
not substantially advance legitimate state interests." In *Lingle*, the Court unanimously held that "this formula prescribes an inquiry in the nature of due process . . . that has no proper place in our takings jurisprudence." Through *Lingle*, the Court reduced the number of takings tests by explicitly overruling a prior decision that contributed substantially to the takings muddle. This is no small feat from a Court that has shown a penchant for finding consistency between conflicting precedents. As Benjamin Barros has commented, "[o]ne admirable trait of the Court's opinion in *Lingle* is its recognition that its precedents in this area are not holy writ." But *Lingle* does more than demonstrate the Court's willingness to overrule tarnished decisions. In addition to overruling *Agins*, the Court unanimously reaffirmed five other decisions that, when read in conjunction with *Lingle* and with one another, begin to provide a comprehensible framework for how the Court thinks about regulatory takings. Thus, while *Lingle* admits that not all of the Court's prior takings cases are holy writ, it nonetheless establishes certain decisions as canonical. And while this "canon" does not explicitly answer every question about regulatory takings, it provides considerable insight into the Court's thoughts about how those questions should be answered.

This Article seeks to shed light on those thoughts and, concomitantly, to assist theorists, judges, practitioners, and law students in finding their way out of the regulatory takings quagmire. To that end, this Article endeavors primarily to elucidate the post-*Lingle* state of regulatory takings law and does not intend to provide a comprehensive evaluation of whether the Court necessarily "gets it right." It is my aim to show that by analyzing the *Lingle* "canon" exegetically—that is, by its own language and contexts, seeking to interpret each decision in light of the others—one can begin to discern a clearer and more orderly picture of the law of regulatory takings.

Part I provides a brief overview of some the Court's more significant pre-*Lingle* takings decisions. This overview is intended to provide a basic understanding of the state of regulatory takings doctrine at the time *Lingle* was decided, and the discussion of these

---

12 See id. at 260.
13 *Lingle*, 544 U.S. at 540.
14 Barros, supra note 2, at 356 n.60.

Imaged with Permission from N.Y.U. Environmental Law Journal
cases, therefore, is by no means exhaustive. With the contextual picture having been painted, Part II focuses on *Lingle* itself. After discussing the background of the litigation and the Court’s unanimous opinion, Part II concludes that, by establishing an authoritative “canon” of regulatory takings decisions, the *Lingle* Court made great strides toward clarifying its jurisprudence in this area of constitutional analysis. Part III attempts an exegesis of this “canon,” seeking to divine the intent of the Court through an analysis of the language and context of the Supreme Court’s takings decisions as if they were components of a single, unified text. In this regard, Part III seeks to derive from the cases the overarching themes and fundamental characteristics of regulatory takings. Additionally, Part III attempts to elucidate the application of the various tests established by the Court, concluding that the “canon” forms two basic frameworks that paint a more or less consistent picture of takings analysis. The Conclusion raises some questions still left unanswered by the *Lingle* “canon.”

I. THE PRE-NINGLE MUDDLE

A. The Penn Central and Agins Tests

Although the notion that regulatory action can amount to a taking of private property has been extant for well over a century, the starting point for much of the modern confusion about regulatory takings is the Court’s decision in *Penn Central Transportation Company v. City of New York.* In *Penn Central,* the Court deliberately avoided establishing any “set formula” for determining when a regulatory taking occurs. Instead, the Court described the proper analysis as an “essentially ad hoc, factual inquiry” that is rooted in due process notions of “justice and fairness” and “depends largely upon the particular circumstances

---

15 See James W. Ely, Jr., “Poor Relation” Once More: The Supreme Court and the Vanishing Rights of Property Owners, 2004–2005 CATO SUP. CT. REV. 39, 42–43 (2005) (“By the late nineteenth century courts and commentators were considering whether a regulation might so diminish the value or usefulness of property as to be tantamount to a taking without physical interference or acquisition of title.”); accord Lawson, et al., supra note 5, at 25 (“From the nineteenth century onward, courts have consistently assumed that some governmental actions other than formal transfers of title can amount to takings of property . . . .”).


17 See id. at 124.
[in each] case." The Court identified "several factors that have particular significance" to this ad hoc investigation, including "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action." Despite identifying these factors as being significant, it is not clear that the Court intended them to be anything more than broad analytical guidelines. The Court provided no further explanation of these factors, and (as any first-year law student attempting to analyze the decision can attest) it paid little attention to them throughout the remainder of the opinion, other than explaining that the factors were to be considered in relation to "the parcel as a whole" rather than the individual segments (such as surface, superjacent, and subjacent rights) that make up the parcel.

The next year, in Kaiser Aetna v. United States, the Court had occasion to repeat the Penn Central factors, but it still offered no real insight into their meaning or proper application. Nonetheless, Kaiser Aetna did produce one thing of lasting significance: it marked the first time that the Court described the factors in the distinct, tripartite fashion that has become so familiar to practitioners and scholars today: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." Eventually, the Court transformed this Kaiser Aetna three-part formula into "an outcome-determinative test," a transformation

---

18 Id. (internal quotations omitted).
19 Id.
20 See Lawson, et al., supra note 5, at 5 (concluding that Penn Central "had the more modest, but nonetheless important, ambition of providing a framework or structure for discussion of the issues arising in takings... law"); accord Claeys, supra note 6, at 343 (assuming that Penn Central's three part test was "originally meant... to serve a modest, argument-framing function," in which "the factors act more or less as placeholders, which help lawyers and judges focus their arguments on a few considerations that everyone can understand").
21 As has been noted by Gary Lawson, Katherine Ferguson, and Guillermo A. Montero, neither the Court's actual discussion nor the structure of its argument followed the analysis suggested by the factors outlined by the Court. Lawson, et al., supra note 5, at 32.
24 Id. at 175.
25 See Lawson, et al., supra note 5, at 33–34 ("What we know today as the
that accounts for much of the confusion surrounding regulatory takings doctrine, as practitioners, judges, and academics have struggled ever since to determine what the test means and how it should be applied.\textsuperscript{26}

The vagueness of the \textit{Penn Central}/\textit{Kaiser Aetna} framework, however, is not the only contributing factor to the uncertainty surrounding this area of the law. Perhaps because the \textit{Penn Central} framework was not originally intended to be an outcome-determinative test, or perhaps because a significant number of Justices have found it unsatisfactory as such a test, the Court spent the next two decades establishing alternative formulations by which to determine whether a regulatory taking had occurred. One of the more significant of these alternatives came just two years after \textit{Penn Central}, in the Court’s unanimous opinion in \textit{Agins v. City of Tiburon}.\textsuperscript{27} In \textit{Agins}, the Court suggested that a regulation works a taking under the Fifth Amendment if it “does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”\textsuperscript{28} Applying this disjunctive test, the Court held that the regulation at issue \textit{did} substantially advance legitimate governmental purposes and \textit{did not} deprive the landowners of their land’s economic viability.\textsuperscript{29} Thus, the Court found that the regulation did not effect a taking of private property,\textsuperscript{30} a holding almost certainly consistent with the outcome that would have been reached under \textit{Penn Central}. Despite this consistency, however, the first half of the \textit{Agins} formula—known as the “substantially advances” test—was often repeated by the Court and eventually came to be regarded as an alternative to the \textit{Penn Central} factors.\textsuperscript{31} Thus, a takings challenge to government

\textit{Penn Central} three-part framework is really the \textit{Kaiser Aetna} three-part framework.”).\textsuperscript{26}

\textit{Penn Central} framework is legion. See \textit{id.} at 34 (describing academic criticism of \textit{Penn Central} as being not “a cottage industry” but rather “an industrial revolution”). For a sampling of recent academic attempts to explain the \textit{Penn Central} test see generally Cordes, supra note 3, at 35–40; Echeverria, supra note 2, at 178–210; and Lawson, et al., supra note 5, at 30–50.

\textsuperscript{27} \textit{See generally} \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980).
\textsuperscript{28} \textit{Id.} at 260 (citations omitted).
\textsuperscript{29} \textit{Id.} at 261–62.
\textsuperscript{30} \textit{Id.} at 263.
\textsuperscript{31} \textit{See, e.g.}, \textit{City of Monterey v. Del Monte Dunes at Monterey, Ltd.}, 526 U.S. 687, 704 (1999) (citing to precedents that refer to the \textit{Agins} “substantially advances” test).
action could be analyzed under either of these two distinct tests, both based on rather amorphous concepts more in keeping with a due process analysis and capable of yielding very different results depending on the circumstances of any particular case (including the agendas or ideologies of the decisionmakers).  

B. The Context-Specific Tests

Apparently not content with these two alternatives, the Court throughout the 1980s and 1990s developed three more tests with which to analyze takings challenges in specific regulatory contexts. The first of these tests was established in *Loretto v. Teleprompter Manhattan CATV Corporation*, where the Court held that a regulatory action that results in a permanent physical occupation of property is a taking *per se*, regardless of "the size of the area permanently occupied." In establishing this bright-line test, the Court made clear that cases concerning permanent physical invasions involved neither a balancing of the *Penn Central* factors nor an evaluation of the considerations at work in *Agins*. Rather, the Court explained "that a permanent physical

---

32 At least one commentator has hinted that this infusion of due process concepts into the law of takings was in large part the product of "property rights advocates" trying to achieve the type of "judicial activism" that is no longer available under the deferential standards applied to substantive due process challenges themselves. *See* Echeverria, *supra* note 2, at 199. While it may be true that "property right advocates" have utilized the "substantially advances" test and its conflation of due process and takings analyses, they are by no means alone in this regard. Indeed, Justice Brennan, whom few would describe as a "property rights advocate," linked the takings inquiry to due process notions of "justice and fairness" and agreed that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123–24, 127 (1978). Likewise, Justice Stevens expressly invoked the "substantially advances" test in *Keystone Bituminous Coal Ass'n v. DeBenedicts*, 480 U.S. 470, 485 (1987), to support the idea that regulations protecting the public health, safety, or welfare should largely be excepted from the just compensation requirement regardless of their effects on private property. *See also* Barros, *supra* note 2, at 355 (concluding that rejection of the "substantially advances" test "represents a setback to taking opponents who, like Justice Stevens, tend to argue that a government act should not be found to be a taking when it furthers a really important public purpose"). Finally, as noted earlier, the Court has confused the similar yet separate due process and takings inquiries from very early on. *See supra* note 5 and authorities cited therein; *see also* Ely, *supra* note 15, at 44.

33 458 U.S. 419 (1982).

34 *Id.* at 436, 441.

35 *See id.* at 432.
occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." Thus, the simple fact that the intrusion occurred meant that the regulation was a taking requiring just compensation, regardless of the economic impact on the property owner or the extent to which the regulation advanced legitimate state interests.

Ten years after Loretto, the Court announced its second bright-line test in Lucas v. South Carolina Coastal Council.37 There the Court held that a regulation results in a taking when it "denies all economically beneficial or productive use of land."38 Equating such denials with the physical appropriations found to be per se takings in Loretto,39 the Court concluded that a Lucas type of regulatory action was similarly subject to "categorical treatment" as a per se taking. This categorical treatment allowed the Court to bypass the "case-specific inquiry into the public interest advanced in support of the restraint"40 and in doing so, the Court specifically rejected the idea, drawn from its earlier cases, that regulations designed to prevent or mitigate public harm enjoy some sort of exemption from the Fifth Amendment’s just compensation requirement.

The Court’s early cases relied on this type of “harm-prevention” analysis simply to make the same point that was made in the first half of the Agins test—that “land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ . . . .”41 But the Court acknowledged that inquiries into the purposes underlying a regulation, especially where the inquiry seeks to divine whether the regulation is designed to prevent a harm or confer a benefit, are not entirely helpful for determining whether the regulation has taken an interest in private property. Thus, on one hand, Lucas appeared to suggest that the government’s reasons for regulating should be of little consequence to the takings inquiry, a suggestion that seemed to undermine much of the rationale behind Agins and a good portion

36 Id. (emphasis added); see also id. at 434.
38 Id. at 1015.
39 See id. at 1017.
40 Id. at 1015.
of the rationale behind *Penn Central*.

Despite its seeming discomfort with this aspect of its prior decisions, however, the Court made no assertions that it was overruling those decisions or that the reasoning used therein should now be considered verboten. In fact, later in its opinion, the *Lucas* Court seemingly resurrected the relevance of the regulation’s underlying purpose, at least in the narrow context of a total economic deprivation. When such a deprivation occurs, the Court noted, the regulation is considered a taking unless the government can show that the uses prohibited by the regulation would also be proscribed by “background principles of the State’s law of property and nuisance.” Thus, if the regulation was designed to “duplicate the result that could have been achieved” under common law nuisance—an inquiry that ordinarily considers harms and benefits—no compensation is required despite the total economic deprivation. *Lucas*, then, not only established another analytical test; by presenting seemingly converse views about the relevance of a regulation’s underlying purposes, it added further confusion to the law.

However, the *Lucas* majority did not stop there. In discussing what might qualify as a deprivation of all economically beneficial use (and, therefore, trigger the new “total deprivation” test), the Court confessed that the answer could not be gleaned from its prior opinions. The majority explained:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a

---

42 Id. at 1029.
43 Id.
44 See id. at 1030–31.
45 See, e.g., R. Wilson Freyermuth et al., Property and Lawyering 964–65 n.2 (2d ed. 2006) (questioning whether *Lucas*’s “background principles” exception is conceptually any different than the harm/benefit distinction it purported to reject, and hinting that real difference is which branch of government—legislative or judicial—does the balancing); Dreher, supra note 5, at 387 (noting that *Lucas* “[i]ronically . . . affirmed the core principle of the ‘nuisance exception’” after “having broadly disclaimed the relevance of the legislature’s purposes to takings doctrine”).
46 See *Lucas*, 505 U.S at 1016 n.7.
mere diminution in value of the tract as a whole.\textsuperscript{47} This remark, which obviously called into question \textit{Penn Central}'s "parcel as a whole" rule, did little to promote predictability in regulatory takings analysis, a result that was compounded by the majority's refusal to answer the very question it had raised.\textsuperscript{48}

The Court's final context-specific test for determining when a regulation results in a taking was established in two cases—\textit{Nollan v. California Coastal Commission}\textsuperscript{49} and \textit{Dolan v. City of Tigard}\textsuperscript{50}—involving attempts by the government to condition regulatory approval of land use proposals on the landowners' dedication of public easements across their properties.\textsuperscript{51} In each case, the Court began by noting that, had the respective governments simply promulgated regulations requiring dedication of the easements, the regulations without question would have qualified as takings under the Fifth Amendment.\textsuperscript{52} Such a conclusion flowed logically from the Court's prior holding in \textit{Loretto} that regulations requiring permanent physical occupations constituted takings \textit{per se}.\textsuperscript{53} But the Court explained that the conditional (rather than mandatory) nature of the easements could make a constitutional difference—provided, that is, that the conditional easements served some legitimate governmental purpose. In this regard, the Court explicitly relied on the \textit{Agins} "substantially advances" test: "We have long recognized that a land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ."\textsuperscript{54} And if those interests are sufficient to allow the government flatly to deny a proposed land use, then the government should also be able to offer the landowner the less drastic alternative of approval subject to a condition that serves the same interests as would an outright denial.\textsuperscript{55} Thus, the Court explained, the conditional easements

\textsuperscript{47} Id.
\textsuperscript{48} See \textit{Lucas}, 505 U.S. at 1016 n.7 (raising the denominator issue but stating that "we avoid this difficulty in the present case").
\textsuperscript{50} \textit{Dolan v. City of Tigard}, 512 U.S. 374 (1994).
\textsuperscript{51} See id. at 380; see also \textit{Nollan}, 483 U.S. at 828.
\textsuperscript{52} \textit{Dolan}, 512 U.S. at 384; \textit{Nollan}, 483 U.S. at 831.
\textsuperscript{53} See \textit{Nollan}, 483 U.S. at 831–32 (citing \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 432–35 (1982)).
\textsuperscript{54} Id. at 834 (quoting \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980)).
\textsuperscript{55} See id. at 836–37.
would not constitute takings if (but only if) they bore an "essential nexus" to the same governmental purposes that would justify an outright denial of the land use application.  

Although Nollan ended its inquiry at this stage, finding that no "essential nexus" existed between the easement and the government's stated purposes in that case, the Dolan Court added a second step to the analysis. In Dolan, after concluding that the "essential nexus" sufficiently had been established, the Court explained that the government also had to demonstrate that there was a "rough proportionality" between the conditional easement and the likely impact of the land use plan under consideration. 

Put differently, to avoid paying just compensation, the government had to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." The Court also made clear that it would show no deference to legislative determinations in this regard. Conclusory statements are not sufficient to satisfy the "rough proportionality" burden; rather, the government must quantify that the condition imposed will, or is likely to, offset the public burdens expected to result from the proposed land use.

The test established in Nollan/Dolan contributed to the confusion about regulatory takings in a number of ways. First, by requiring inquiry into the government's purposes, as well as the causal connection between those purposes and the regulatory condition imposed on the land owner, the test seemed to be at variance with the Court's intervening (albeit schizophrenic) criticism of such inquiries in Lucas. Indeed, at least on the surface, the Nollan/Dolan framework had a very Agins-like quality, intensifying the doctrinal entanglement of due process with takings analysis. Second, in the "rough proportionality" stage, Nollan/Dolan clearly envisions close judicial scrutiny of the conclusions and methods utilized by the government in support of

---

56 See id. at 837; Dolan, 512 U.S. at 386–87.
57 See Dolan, 512 U.S. at 391–96.
58 Id. at 391.
59 Id. at 395–96.
60 See e.g., Daniel Pollak, Regulatory Takings: The Supreme Court Tries to Prune Agins Without Stepping on Nollan and Dolan, 33 ECOLOGY L.Q. 925, 929 (2006) ("At first blush, it appears that the Nollan and Dolan rules subject government regulation to just the sort of means-ends inquiry [established by Agins].")
the regulatory condition, a result noticeably at odds with the deferential posture toward legislative determinations taken in both Penn Central 61 and Agins. 62 The soundness of this heightened scrutiny, and what it means in practice, has been the subject of much debate and disagreement. 63 Finally, there has been a lack of clarity concerning the exact nature of the regulatory conditions to which Nollan/Dolan is intended to apply. For example, courts and commentators have disagreed about the applicability of Nollan/Dolan to monetary exactions (as opposed to physical dedications of land) 64 and to legislatively-determined development conditions of general application (as opposed to ad hoc conditions resulting from adjudicative determinations). 65

C. Penn Central and Agins Redux?

As the twentieth century came to a close, and after more than a decade developing these context-specific tests, the Court returned its focus to its earlier formulations from Penn Central and Agins, creating even more disorder in the process. In City of

64 See, e.g., FREYERMUTH ET AL., supra note 45, at 988 (discussing differing approaches taken by state courts to monetary impact fees); see also Ronald H. Rosenberg, The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees, 59 SMU L. REV. 177, 256–59 (2006) (discussing differing approaches taken by state courts to monetary impact fees).
65 See Steven A. Haskins, Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide, 38 URB. LAW. 487, 496–500 (2006) (reviewing differing court views on the applicability of Nollan/Dolan to legislative or adjudicative regulations); Michael B. Kent, Jr., Forming a Tie That Binds: Development Agreements in Georgia and the Need for Legislative Clarity, 30 ENVIRONS ENVTL. L. & POL’Y J. 1, 14 n.66 (2006) (citing to cases that rejected the application of Nollan/Dolan to regulations that were legislative); Christopher T. Goodin, Comment, Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference," 28 U. HAW. L. REV. 139, 148–57 (2005) (reviewing cases).
Monterey v. Del Monte Dunes at Monterey, Ltd., for example, the Court expressly declined to revisit the "substantially advances" test from Agins. Additionally, despite its earlier statements from Lucas questioning the significance of a regulation's underlying purposes to takings law, the Court in Del Monte Dunes specifically held that inquiries into such purposes were permissible and could, under certain circumstances, be performed by juries. Nonetheless, five members of the Court specifically indicated that they were not endorsing the "substantially advances" test, raising questions as to its continued viability.

Two years later, in Palazzolo v. Rhode Island, the Court considered a landowner's claim that a wetlands regulation qualified as a taking under both Lucas and Penn Central. In doing so, the Palazzolo Court generated more doubt about the proper application of both tests. First, the Court rejected the idea that the plaintiff was precluded from advancing his takings claims simply because he had acquired the property after the enactment of the regulation at issue. For purposes of the Lucas claim, the relevant question was whether the regulation, in existence at the time title passed to the plaintiff, qualified as a "background principle" sufficient to defeat the presumption of a taking caused by a total economic deprivation. The Court answered that question negatively, stating that "[a] regulation or common-law rule cannot be a background principle for some owners but not for others," and a background principle, therefore, could not depend upon something as subjective as the passage of title. For purposes of the Penn Central claim, the relevant question was whether the existence of the regulation sufficiently informed the plaintiff's reasonable, investment-backed expectations such that he could not reasonably anticipate using the land free of the

67 Id. at 704.
68 Id. at 704-07, 721.
69 See id. at 732 n.2 (Scalia, J., concurring); see also id. at 753 n.12 (Souter, J., dissenting).
71 Id. at 615-16.
72 See id. at 626. The Court ultimately rejected the plaintiff's Lucas claim on the basis that the regulation did not, in fact, deprive him of all economically viable use of the land. See id. at 631-32.
73 Id. at 630.
regulation.\textsuperscript{74} The Court answered this question negatively as well, concluding that the takings claim was “not barred by the mere fact that title was acquired after the effective date of the state-imposed restrictions.”\textsuperscript{75}

\textit{Palazzolo}, therefore, established that pre-existing regulations will not necessarily preclude a takings claim, but it left unanswered whether and to what extent such regulations properly should inform the takings analysis (especially under the \textit{Penn Central} framework). Indeed, two concurring Justices reached diametrically opposing conclusions on the issue. Justice O’Connor, for example, concluded that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [his or her investment-backed] expectations.”\textsuperscript{76} Justice Scalia, by contrast, concluded that the pre-existing nature of a regulation normally “should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.”\textsuperscript{77} According to Justice Scalia, this was true in both the \textit{Lucas} and the \textit{Penn Central} contexts:

The ‘investment-backed expectations’ that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a \textit{Penn Central} taking, no less than a total taking [under \textit{Lucas}], is not absolved by the transfer of title.\textsuperscript{78}

Some courts and commentators indicated that Justice O’Connor’s opinion represented the reigning view on the Court,\textsuperscript{79} but the Court itself gave no clear indication as to who had the better argument.

Not only did the \textit{Palazzolo} Court avoid squarely addressing the significance of pre-existing restrictions, but following in the footsteps of \textit{Lucas}, it created further uncertainty by admitting its

\textsuperscript{74} See id. at 626.
\textsuperscript{75} Id. at 630.
\textsuperscript{76} Id. at 633 (O’Connor, J., concurring).
\textsuperscript{77} Id. at 637 (Scalia, J., concurring).
\textsuperscript{78} Id. (citation omitted).
\textsuperscript{79} Lawson, et al., supra note 5, at 43–44 (opining that “Justice O’Connor’s view best represents controlling doctrine” and that Justice Scalia “seems to be a minority of one”). See also Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (citing Justice O’Connor’s opinion and stating that “the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations”).

Imaged with Permission from N.Y.U. Environmental Law Journal
past “discomfort with the logic of” Penn Central’s “parcel as a whole” doctrine.\textsuperscript{80} This uncertainty was enhanced the very next year by the Court’s opinion in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency.\textsuperscript{81} Its prior discomfort notwithstanding, the Court in Tahoe-Sierra swore renewed allegiance to the “parcel as a whole” rule by rejecting a Lucas claim brought against a thirty-two-month development moratorium.\textsuperscript{82} Although the plaintiff’s land had been totally deprived of economically productive use for the moratorium period, the Court held that the plaintiff’s parcel could not be segmented temporally any more than it could be segmented physically, and the impact of the moratorium had to be weighed against the entire duration of possession associated with the plaintiff’s parcel as a whole.\textsuperscript{83} Since the duration of a fee simple estate potentially lasts forever, the Court held that there was no total deprivation such as would trigger Lucas.\textsuperscript{84}

By 2002, then, twenty-four years after its decision in Penn Central, the Court had established a variety of tests with which to adjudge regulatory takings claims and had offered confusing, if not conflicting, statements regarding exactly when and how certain aspects of those tests were to apply. More damaging, the Court (despite some minor protestations from the Lucas majority) seemed wedded to viewing takings law through the prism of due process principles, frequently alluding to the purposes underlying the specific governmental action at issue. All of this resulted in a lack of predictability as to how any particular case might turn out, making it difficult for practitioners to advise their clients and increasing the frustration of scholars attempting to find any doctrinal or theoretical coherence in takings law. In short, the Court had done much to deserve the labels used to characterize its regulatory takings jurisprudence. This area of the law truly was a “muddle.” The stage was set for the Court to offer some clarification, if it was only willing to do so. The Court demonstrated such willingness three years later, in Lingle v. Chevron, U.S.A., Inc.\textsuperscript{85}

\textsuperscript{80} See Palazzolo, 533 U.S. at 631.
\textsuperscript{81} 535 U.S. 302 (2002).
\textsuperscript{82} See id. at 327.
\textsuperscript{83} See id. at 331–32.
\textsuperscript{84} See id. at 332.
II. ENTER LINGLE

A. History of the Litigation

At issue in Lingle was whether a Hawaii rent control statute, aimed at curbing high gasoline prices, worked a taking under the Fifth Amendment. The statute was enacted in response to the highly concentrated nature of Hawaii's gasoline market. When the lawsuit in Lingle initially was filed, only six gasoline wholesalers were conducting business in the state, and roughly fifty percent of the state's retail stations were leased from these wholesalers by independent lessee-dealers. In response to concerns that this market concentration was resulting in high retail prices for gasoline, the Hawaii Legislature enacted Act 257. Among other things, Act 257 capped the amount of rent that the oil companies could charge the lessee-dealers.

Shortly after the enactment of the statute, Chevron U.S.A. brought a federal lawsuit alleging that Act 257 worked a taking of Chevron's property, and seeking declaratory and injunctive relief. Chevron subsequently moved for summary judgment on this claim, arguing that the rent cap imposed by Act 257 did not substantially advance any legitimate governmental interest and, therefore, ran afoul of the first half of the Agins test. The district court agreed, concluding that the rent cap would not substantially advance the state's interest in reducing retail gasoline prices. This was so, according to the district court, because the oil companies would simply recoup the lost revenue occasioned by Act 257 by raising their wholesale prices, meaning that in actuality there would be no savings for the lessee-dealers to pass along to consumers. Because the rent cap would not result in lower retail prices, it failed the Agins test, and the district court granted summary judgment to Chevron.

86 Id. at 533.
87 Id. at 532.
88 Id. at 533.
89 Id.
90 Id.
91 Id. at 534.
92 Id.
94 Id.
On appeal, a divided panel of the Ninth Circuit vacated the grant of summary judgment and remanded the case to the district court for further consideration. Although the panel majority agreed that the "substantially advances" test constituted the appropriate legal standard, it nonetheless found that a genuine issue of material fact remained as to whether the rent cap would benefit consumers. Accordingly, disposition at the summary judgment stage was improper.

On remand, the district court conducted a one-day bench trial in which it heard competing expert opinions as to the "substantially advances" issue. The district court again ruled in favor of Chevron, finding that any rent reductions required by Act 257 would simply be offset by higher wholesale prices, the end result of which would actually be an increase in retail prices. Based on this and other findings, the district court again held that "Act 257 effect[ed] an unconstitutional regulatory taking given its failure to substantially advance any legitimate state interest."

The Ninth Circuit affirmed the holding of the United States District Court for the District of Hawaii and rejected the argument that the district court erred in applying the "substantially advances" test rather than a more deferential, due process standard. On petition by the State of Hawaii, the Supreme Court granted certiorari "to decide whether the 'substantially advances' formula announced in Agins is an appropriate test for determining whether a regulation effects a Fifth Amendment taking."

B. The Court's Opinion

The Court began its unanimous opinion with portentous language: "On occasion, a would-be doctrinal rule or test finds its

---

95 Chevron U.S.A., Inc. v. Cayetano, 224 F.3d 1030, 1042 (9th Cir. 2000).
96 Id. at 1042.
97 Id. at 1041.
99 Id. at 1187–89, 1193.
100 Id. at 1193.
101 Chevron U.S.A., Inc. v. Bronster, 363 F.3d 846, 848–55; see also id. at 849–61 (9th Cir. 2004) (Fletcher, J., dissenting).
way into our case law through simple repetition of a phrase—however fortuitously coined."\(^{104}\) The remainder of the opinion set forth why the "substantially advances" test from *Agins*, which (according to the Court) had become "ensconced in our Fifth Amendment takings jurisprudence"\(^{105}\) through such repetition, was no longer an appropriate takings analysis.

After reciting the procedural history of the litigation, the opinion provided a crash course tutorial on the law of regulatory takings. Beginning with the text of the Fifth Amendment itself,\(^{106}\) the Court explained that 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."\(^{107}\) The Court described the primary justification for this compensation requirement to be the fair distribution of public burdens. In other words, the Takings Clause is designed to prevent the government "from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole."\(^{108}\)

The epitome of such an unfair burden distribution, the Court explained, "is a direct government appropriation or physical invasion of private property."\(^{109}\) Indeed, the Court indicated that its two *per se* tests from *Loretto* and *Lucas* flowed straightforwardly from this notion that physical appropriation is unduly burdensome on the landowner. Like a physical regulation, the Court explained, the categorical tests established in *Loretto* and *Lucas* are designed to address regulations imposing singular

\(^{104}\) *Id.* at 531.

\(^{105}\) *Id.* at 532.

\(^{106}\) U.S. CONST. amend. V ("No person shall be... deprived of life, liberty or property... ; nor shall private property be taken for public use, without just compensation.").

\(^{107}\) *Lingle*, 544 U.S. at 537 (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987)) (emphases in original).

\(^{108}\) *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

\(^{109}\) *Id.* James W. Ely, Jr. has pointed out that Justice O'Connor's opinion "repeated the historically dubious proposition" that, before the Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "it was thought that the Takings Clause did not reach regulations at all." *See* Ely, *supra* note 15, at 50. As noted previously in this Article, the idea that regulatory action could affect a taking of private property had been in existence since at least the nineteenth century. *Id.* at 42–43.
burdens upon the rights of property owners.110

Similarly, the concept of burden distribution is equally present in the Penn Central framework, which (the Court explicitly stated) governs takings challenges to regulations that fall outside the specific contexts of Loretto, Lucas, and Nollan/Dolan.111 Notably, in discussing the Penn Central factors, the Court did not repeat the three-part formulation from Kaiser Aetna, but rather returned to the actual language of Penn Central itself:

Primary among those factors are ‘[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.’ In addition, the “character of the governmental action”—for instance whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’—may be relevant in discerning whether a taking has occurred.112

The Court explained that these factors, like the tests articulated in Loretto and Lucas, primarily are concerned with the burden borne by the property owner because they turn “in large part . . . upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”113

The unifying characteristic of all three tests, then, is that each “focuses directly upon the severity of the burden that government imposes upon private property rights.”114 And the end goal of this focus in each test, the Court concluded, is “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.”115 In other words, all three tests (Penn Central, Loretto, and Lucas) are designed to compare how closely the challenged regulation comes to the paradigmatic situation of a physical taking.

In “stark contrast” to these tests, said the Court, is the

110 See Lingle, 544 U.S. at 539–40.
111 Id. at 538.
113 See id. at 540.
114 Id. at 539.
115 See id.
“substantially advances” test from Agins. Unlike the foregoing tests, “the ‘substantially advances’ inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners.” Thus, the Court concluded, the test does not inform the central question of a regulatory takings claim—i.e., whether the regulation at issue is “functionally comparable to government appropriation or invasion of private property” such that it imposes an unfair burden on the rights of the property owner bringing the challenge. Rather, the “substantially advances” formula concerns the underlying purposes and validity of the regulation, an inquiry that “is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.” In those situations where the regulation “fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process,” the Court suggested that the property owner indeed would be entitled to relief. But the Court indicated that challenges to such a regulation properly fall within the parameters of the Due Process Clause, not the Takings Clause, because “[n]o amount of compensation can authorize such action.” For these reasons, the Court concluded that the “substantially advances” formula “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.”

Having jettisoned the “substantially advances” test as inconsistent with a proper takings analysis, the Court had one remaining piece of business—to deal with the Nollan/Dolan framework and its similar inquiries into the underlying purposes of the challenged regulation. As previously explained, the Nollan/Dolan test requires that the condition imposed on the landowner advance the same legitimate state interests that would be served by an outright denial of the land use plan for which

116 See id. at 542.
117 Id. (emphases in original).
118 See id.
119 Id. at 543.
120 See id.
121 See id.
122 Id. at 540.
approval is sought. The question, then, was whether the Nollan/Dolan test could survive the rejection of the “substantially advances” formulation.

The Court answered that question in the affirmative. The Court explained that, although Nollan and Dolan “drew upon the language of Agins,” those cases in fact did not apply Agins’s “substantially advances” formula. Rather, those cases addressed the separate context of land-use exactions concerning demands by the government that the owners dedicate public easements in exchange for obtaining necessary development approval. Because both cases “involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings,” the analytical formula developed in those cases, unlike the “substantially advances” test, was specifically concerned “with the degree or type of burden [the] regulation places upon property.” To determine whether that burden could be permissible within the context of a conditional land-use approval, Nollan/Dolan asks not “whether the exaction would substantially advance some legitimate state interest,” but whether it “substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether.” Thus, explained the Court, Nollan/Dolan is grounded not in notions of due process but in the separate doctrine of unconstitutional conditions, which examines whether the government has conditioned a benefit on the surrender of a constitutional right.

The opinion closed by stating that, a quarter century after Agins, the Court would now “correct course” and abandon the “substantially advances” formula as a suitable takings test. In rejecting Agins, however, the Court made clear that certain other decisions would continue to have particular significance to the

---

124 Dolan, 512 U.S. at 385; Nollan, 483 U.S. at 834.
125 See Lingle, 544 U.S. at 546.
126 Id.
127 Id. at 547.
128 Id.
129 See id.
130 Id. at 548.
takings inquiry:

[W]e 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 [under Loretto], a Lucas-type "total regulatory taking," a Penn Central taking, or a land-use exaction violating the standards set forth in Nollan and Dolan.131

Thus, after years of confusion and conflict, the Court in Lingle placed its unanimous stamp of approval on these five decisions, setting them apart as a sort of authoritative "canon" to govern regulatory takings analysis. In doing so, as the next Part seeks to demonstrate, the Court made great strides toward clarifying its regulatory takings jurisprudence.

III. EXEGESIS OF THE CANON

A. Defining "Exegesis"

As stated, this Article proposes that Lingle, along with the cases it unanimously reaffirms, offers much insight and clarity into the Court's thinking about regulatory takings. It is the aim of this Part to prove that proposition through an exegesis of the decisions making up the Lingle "canon." Before doing so, however, it is necessary to identify what is meant by the use of the word "exegesis."

In ordinary terms, the word "exegesis" refers to an exposition, explanation, or interpretation of a word, sentence, or other written material.132 One of the more frequent uses of the word, however, occurs in connection with an interpretation of sacred writings, especially the Christian Bible.133 Thus, theologians use the word to describe the method and process of explaining a religious text.134 Having analogized the decisions reaffirmed in Lingle as a sort of authoritative "canon" for purposes of understanding regulatory takings, it seems fitting to refer to the explanatory interpretation of those decisions as an "exegesis."

131 Id.
132 See 5 OXFORD ENGLISH DICTIONARY 524 (Clarendon Press 2d ed. 1991) (defining "exegesis").
133 Id.
But the use of this term is intended to convey more than a simple exposition of the relevant judicial opinions. By choosing the term "exegesis," this Article has in mind a specific interpretative method that carefully looks at the language of the text, as well as the background and circumstances of its writing, to discover the author's intended meaning. Known to theologians as the grammatical/historical method, this notion of "exegesis" is specifically contrasted to the practice of "eisegesis," which involves the interpretation of a text by reading into it one's own ideas or presuppositions. Moreover, one of the hallmarks of the grammatical/historical method, at least as historically employed by theologians in the Reformed Protestant tradition, is to view a compiled group of associated writings (such as the individual books of the Christian Bible) not as disjointed endeavors, but as a single, congruent effort developed through progressive revelation. Thus, while taking into account the language and context of the individual constituents, each portion of the work is to be interpreted harmoniously in light of the others, with the clearer passages illuminating those that appear more difficult to understand.

It is the aim of this Article to apply these techniques to the interpretation of the cases comprising the Lingle "canon," viewing them as component parts of a unified whole and interpreting each not only through its own language and context but also through the language and contexts of the others. The following analysis, therefore, attempts to explain the Court's own understanding of the

---

136 REYMOND, supra note 135, at 49.
137 See 5 OXFORD ENGLISH DICTIONARY 102 (Clarendon Press 2d ed. 1991) (defining "eisegesis")
138 See REYMOND, supra note 135, at 49–52; see also WESTMINSTER CONFESSION OF FAITH ch. I, ¶ 9, reprinted in G.I. WILLIAMSON, THE WESTMINSTER CONFESSION OF FAITH FOR STUDY CLASSES 24 (2d ed. 2004). The primary basis for this interpretive rule, at least in the Reformed tradition, is the theological doctrine of divine inspiration—that is, each of the books in the Old and New Testaments were written by human authors pursuant to the inspiration of God Himself and, therefore, are "ultimately the product of a single divine mind." See REYMOND, supra note 135, at 49–50. Although it should go without saying, prudence demands an express disavowal that any decision of the United States Supreme Court enjoys similar status.
law of regulatory takings by, in effect, allowing the “canon” (as much as possible) to speak for itself. By reading the cases in this manner, it is possible to discern the dominant themes and characteristics of regulatory takings law as emphasized by the Court. Additionally, in light of those themes and characteristics, it is possible to perceive a greater coherence in the various tests contained within the “canon.”

B. Themes and Characteristics

Just as Lingle began its analysis by looking at the text of the Takings Clause, so should an exegesis of the Lingle “canon” begin with a discussion of the remedial system created by that Clause. The Fifth Amendment to the United States Constitution provides, among other things, that “private property [shall not] be taken for public use, without just compensation.”139 As understood by the Lingle “canon,” this language presents a crucial balance between the individual rights of private property owners and the necessity of the government to function in the best interests of the public at large. Indeed, without the Takings Clause, the existence of both private property and good government are at danger of extinction.

On the property rights side of the equation, the Lingle “canon” repeatedly links the Takings Clause to the concept of burden distribution: “One of the principal purposes of the Takings Clause is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”140 This restraint, in large part, is rooted in the traditional understandings “regarding the content of, and the State’s power over, the ‘bundle of rights’ that [owners] acquire when they obtain title to property.”141 Chief among these understandings is an expectation that an owner “will be relatively undisturbed at least in the possession of his property.”142 That expectation becomes unreasonable, however, without some check

---

139 U.S. CONST. amend V.
on the government's ability inequitably to burden certain interests in favor of others. As such, the "canon" makes clear that the government is not allowed, free of charge, physically to appropriate to itself the property of its citizens.\textsuperscript{143} Equally clear is that some limit must also exist on the government's regulatory power over private property. As explained by \textit{Lucas}:

\begin{quote}
[I]f the protection against physical appropriations of private property [is] to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property [is] necessarily constrained by constitutional limits. If, instead, the uses of private property [are] subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]'\textsuperscript{144}
\end{quote}

Accordingly, the protections afforded by the Takings Clause must extend in some degree to regulatory action as well as to physical appropriation.

Understanding why it is necessary to protect private property from inequitable burden distribution, the next question is how meaningfully to do so. In this regard, \textit{Lingle} explains that the Takings Clause is not intended to create an outright prohibition against governmental interference with private property rights.\textsuperscript{145} Rather, it is designed to guarantee that the owner of those rights will receive compensation as a result of governmental interference.\textsuperscript{146} To use the well-known framework articulated by Professors Calabresi and Melamed, the Takings Clause creates a "liability rule" rather than a "property rule."\textsuperscript{147} In other words, the

\textsuperscript{143} \textit{See Lingle}, 544 U.S. at 537 (describing "direct government appropriation" as "[t]he paradigmatic taking requiring just compensation"); \textit{Lucas}, 505 U.S. at 1014 (suggesting that earliest understandings of Takings Clause clearly prohibited "a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession'") (citations omitted, alteration in original); \textit{Loretto}, 458 U.S. at 426 ("[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."); \textit{Penn Central}, 438 U.S. at 124 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . .")\textsuperscript{144} \textit{Lucas}, 505 U.S. at 1014 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922)).

\textsuperscript{145} \textit{Lingle}, 544 U.S. at 536.

\textsuperscript{146} \textit{See id. at 536–37}.

\textsuperscript{147} \textit{See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Imaged with Permission from N.Y.U. Environmental Law Journal
compensatory system created by the Takings Clause permits the
government to acquire or destroy a private property interest upon
payment of an objective price determined by the state (i.e., a
"liability rule") instead of enforcing the subjective worth placed on
that interest by the property owner himself in a voluntary
transaction (i.e., a "property rule"). Therefore, the remedy
envisioned by the Takings Clause is a forced sale at fair market
value.

This distinction between liability-rule enforcement and
property-rule enforcement also has great significance to the other
side of the takings equation: the continued existence and effective
functioning of government. Just as the "canon" emphasizes the
need to protect private property from the unequal distribution of
public burdens, so too does it emphasize the need to ensure that the
government's ability to act for the common welfare is not held
hostage by the whims of a few property owners. The liability rule
created by the Takings Clause achieves a better balance between
these competing goals than would a property rule that allows
judicial invalidation of the government's interference with
property rights, a remedy that obviously would pose risks to the
government's purpose and operations. Thus, the Takings Clause
relies on compensatory rather than injunctive relief. Even this
system, however, might endanger the government if every
regulation that affected private property in any way required
expenditure from the public fisc. Consequently, the Lingle
"canon" repeatedly urges that care be taken when determining
which regulatory actions trigger the compensation remedy. As
Lingle itself explains:

[W]e must remain cognizant that 'government regulation—by
definition—involves the adjustment of rights for the public
good,' and that 'Government 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'.

See Lingle, 544 U.S. at 543; see also id. at 544 (noting that "Chevron
plainly does not seek compensation for a taking of its property for a legitimate
public use, but rather an injunction against the enforcement of a regulation that it
alleges to be fundamentally arbitrary and irrational" and, for that reason, its
claim "does not sound under the Takings Clause").
The question, then, becomes how to distinguish those regulatory actions that will trigger compensation from those that will not. The *Lingle* "canon" answers this question with the buzz words, "functional equivalence." In other words, a regulation effects a compensable taking under the Fifth Amendment when it is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

Regulations that require an owner to suffer a permanent physical occupation of her property satisfy this standard because the burdens they impose on property rights are identical in character, if not degree, to those occasioned by a direct appropriation via transfer of title. Like a direct appropriation, such regulatory action affects the entire "bundle of rights" acquired by the property owner. Among the most important rights in the "bundle" are the rights of exclusion, possession, use, and disposition. The government's direct appropriation of a parcel by transfer of title clearly extinguishes the prior owner's ability to exercise each of these rights, since they are simultaneously transferred with the title itself. In like manner, even though it is not a direct transfer, a regulation that forces permanent physical occupation of the parcel similarly "destroys each of these rights":

First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or

---


See *Loretto*, 458 U.S. at 435; cf. *Lucas*, 505 U.S. at 1027 (discussing importance of "bundle of rights" theory to regulatory takings jurisprudence).

See *Loretto*, 458 U.S. at 435.

Id. (emphasis in original).
sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.155

Because of its effect on these core property rights, regulatory conduct that results in a physical invasion or occupation of property ordinarily will be considered the functional equivalent of a direct appropriation.156

Likewise, a regulation that deprives a parcel of all productive economic value also will be considered the functional equivalent of a direct appropriation.157 Here again, although not as explicitly as with a physical occupation, the Lingle “canon” focuses on the similarity between the burdens imposed by a direct appropriation of title and a regulation that renders the parcel valueless. As demonstrated, a direct appropriation adversely affects each of the owner’s core property rights. A careful reading of the “canon,” using the plainer passages to interpret those that are more difficult, reveals that these same interests also are endangered by a regulatory deprivation of the parcel’s economic viability.

First, this type of regulatory conduct obviously imposes a substantial burden on the owner’s right to use the parcel, since the regulation by definition prohibits any “economically beneficial or productive use”158 from which the owner can achieve a reasonable profit.159 In this manner, at least from the owner’s vantage point, the regulation is “the equivalent of a physical appropriation.”160 Because the parcel no longer has real economic value to the owner, any residual right to use the parcel is so de minimis as to be no right at all.161 In other words, like a direct transfer of title, the


156 See Lingle, 544 U.S. at 539–40; see also Lucas, 505 U.S. at 1015.

157 See Lucas, 505 U.S. at 1015.

158 Cf. Loretto, 458 U.S. at 436 (“Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant.”) (citations omitted); Penn Central, 438 U.S. at 136 (finding no taking where regulation “does not interfere in any way with the present uses” of the parcel and permits owner “not only to profit ... but also to obtain a ‘reasonable return’ on its investment”).

159 See Lingle, 544 U.S. at 539–40; Lucas, 505 U.S. at 1017.

160 See Lingle, 544 U.S. at 539–40; Lucas, 505 U.S. at 1017.

161 See Lucas, 505 U.S. at 1017 (“[F]or what is the land but the profits thereof?!” (citing 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. Ed. 1812) (alterations

Imaged with Permission from N.Y.U. Environmental Law Journal
regulation effectively "denies the owner any power to control the use of the property," a burden that is far removed from the traditional expectations that accompany property ownership. In similar manner, by eviscerating the owner's right to control what takes place on the parcel, a regulation of this sort significantly curtails the owner's right of possession. In effect, this type of regulation turns on its head the traditional expectation that the owner (rather than the state or some other third party) will have primary dominion over, and enjoyment from, the thing to which he holds title. Additionally, a regulation that eliminates all productive use harms the owner's right to dispose of the parcel in the same way as does a regulation requiring a physical occupation. To paraphrase Loretto: "[E]ven though the owner may retain the bare legal right to dispose of the [parcel] by transfer or sale, the [economic deprivation] of that [parcel] by [the state] will ordinarily empty the right of any value, since the purchaser will also be unable to make any [productive] use of the property." Thus, of the four principal property rights making up the owner's "bundle," only the right to exclude arguably can be said to remain intact. And even though it is "perhaps the most fundamental of

---

162 Loretto, 458 U.S. at 436.
163 See Lucas, 505 U.S. at 1027-28 (explaining that "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 power" but regulatory action by which government "subsequently eliminate[s] all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture").
164 See, e.g., Loretto, 458 U.S. at 436 ("[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property."). A comparison of the majority opinion and Justice Blackmun's dissent in Lucas is illustrative of the Court's understanding of the traditional meanings of dominion and enjoyment in the context of land. Justice Blackmun maintained that the owner in Lucas retained dominion and enjoyment because, even though he could not build on the land, he could "picnic, swim, camp in a tent, or live on the property in a movable trailer." Lucas, 505 U.S. at 1044 (Blackmun, J., dissenting). The majority, by contrast, seemingly considered the primary attribute of possession to be the ability to develop "habitable or productive improvements." See id. at 1031 (majority opinion); cf. Nollan v. California Coastal Comm'n, 483 U.S. 825, 833-34 n.2 (1987) (discussing importance of "right to build on one's own property"). The majority's view, of course, is the one unanimously reaffirmed in Lingle. See Lingle, 544 U.S. at 548 (unanimously reaffirming Lucas).
165 See Loretto, 458 U.S. at 436.
166 Although I cannot find textual support for it in the Lingle "canon," my
all property interests,"¹⁶⁷ this right, standing alone, obviously is not sufficient to overcome the damage inflicted on the other three.¹⁶⁸

Therefore, the Lingle "canon" clearly stakes out two categories of regulatory conduct that are deemed to be the functional equivalent of a direct appropriation—i.e., those that require permanent physical occupation and those that eliminate a parcel's economic viability. These categories are characterized by the severe burdens that they impose on the owner's fundamental rights of use, possession, exclusion, and disposition, and they form a clear boundary at which the government no longer possesses the ability to regulate without providing compensation. The extent to which other regulations also will require the payment of compensation depends on how closely they resemble the categories already demarcated. The closer to the categorical boundary a regulation comes—that is, the more it looks like a permanent physical occupation or an economic deprivation—the more likely it is to be considered functionally equivalent to a direct taking.

What does not matter, at least in the primary analysis, is the purpose for which the government promulgates the regulation or the goals to be served thereby. This is the message not only of Lingle itself; reading the cases together, the same message can be found throughout the "canon." Lucas, for example, makes clear


¹⁶⁸ Cf. Lingle, 544 U.S. at 538 (categorizing complete regulatory deprivation of value as per se taking under Fifth Amendment); see also Lucas, 505 U.S. at 1015 (same).
that regulations that result in a permanent physical occupation or deprive a parcel of all productive value—that is, those regulations categorically considered to be the functional equivalent of a direct appropriation by the government—require that compensation be paid to the land owner "no matter how weighty the asserted 'public interests' involved."169 In similar fashion, Loretto, Nollan and Dolan all indicate that a broad focus on the legitimacy, and character of the government’s purpose is unrelated to the compensation issue.170 All of these statements are consistent with Lingle’s explanation that inquiries into the regulation’s underlying validity are distinct from and antecedent to the question of whether the government has taken a property interest for which just compensation must be paid.171 Given this consistency, any statements in the “canon” to the contrary must be viewed either as apocryphal (in the same manner as is the now-defunct “substantially advances” test) or as applicable only in specialized circumstances (such as the limited inquiries permitted by Lucas and Nollan/Dolan). Indeed, Lingle makes the case for both views. Concerning the former, Lingle explicitly labels as “dicta”172 Penn Central’s unorthodox declaration “that a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose.”173 Concerning the latter, Lingle expressly distinguishes the specialized focus of Nollan/Dolan as “worlds apart” from a generalized inquiry into the legitimacy of the government’s reason for regulating.174 Thus, as a general rule, the “canon” makes the public purpose underlying a specific regulatory action largely irrelevant to the question of

170 See Dolan, 512 U.S. at 396 ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)); Nollan, 483 U.S. at 841–42 (noting that government’s justification that “public interest will be served” by exaction “does not establish that the [owners] alone can be compelled to contribute to its realization”); Loretto, 458 U.S. at 425–26 (indicating that Court would not question determination that regulation “serves [a] legitimate public purpose . . . and is within the State’s police power,” but “[i]t is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid”).
171 See Lingle, 544 U.S. at 543.
172 Id. at 541.
whether a regulation so burdens the owner’s fundamental property rights as to be deemed the functional equivalent of a direct appropriation or ouster.

C. Analytical Frameworks

Having identified the dominant themes and characteristics established by the Lingle "canon," attention may now be turned to the practical application of those themes and characteristics. In light of the foregoing discussion, it is possible to perceive a greater unity and coherence in the various analytical tests established by the cases composing the "canon." Indeed, reading the decisions as a unified whole, a strong case can be made that the "canon" really establishes only two analytical frameworks—one applying to the majority of regulatory takings claims (i.e., the "standard analysis") and the other applying to the specific context of land-use exactions (i.e., the "exaction analysis"). As demonstrated below, both frameworks find root in the concept of "functional equivalence."

1. Standard Analysis

The majority of regulatory takings claims may be analyzed under a standard analysis flowing directly from the themes and characteristics articulated above. This analysis presents three basic questions: (1) Can the owner prove that the regulation required a permanent physical invasion or occupation?; (2) If not, can the owner prove that the regulation worked a total economic deprivation of his property?; (3) If not, how closely does the regulation at issue resemble each of the two types of regulatory action just mentioned? Each of these questions is discussed more fully below.

a. Question #1—Loretto

The standard analysis first asks whether the owner has proved that the regulation requires a permanent physical invasion of his property.175 If so, then a taking has occurred regardless of the extent of the invasion, and the government is required to provide just compensation.176 Because regulatory action of this kind

---

175 See id. at 538.
effectively destroys each of the owner’s core property rights,\(^{177}\) neither the amount of land occupied nor the corresponding economic impact has any bearing on the takings inquiry.\(^{178}\) Likewise, that inquiry is wholly unconcerned with the public interests served by the regulation.\(^{179}\)

b. Question #2—Lucas

If the regulation does not effect a permanent physical occupation, then the second question asked is whether the owner has proved that it deprives him of all beneficial or productive economic value.\(^{180}\) Such proof creates a presumption that the regulation works a compensable taking and shifts the burden to the government to demonstrate that “‘background principles of nuisance and property law’ independently restrict the owner’s intended use of the property.”\(^{181}\) The government meets this burden by showing that the regulation accomplishes nothing more than what could have been achieved in court via an action for private nuisance, public nuisance, or actual necessity to prevent "grave threats to the lives and property of others."\(^{182}\)

It is here that the analysis gets a bit tricky, since this sort of evaluation easily raises questions about the government’s reasons for promulgating the regulation. Indeed, \textit{Lucas} itself concedes that the law of nuisance generally engages in a balancing of the harms and benefits presented by the allegedly offending conduct,\(^{183}\) and it identifies the similar harm-benefit language of the Court’s early cases with the “substantially advances” test rejected by \textit{Lingle}.\(^{184}\) Nonetheless, interpreting \textit{Lucas} in light of the other parts of the

\(^{177}\) See \textit{Loretto}, 458 U.S. at 435–36.

\(^{178}\) See id. at 434–35 (stating that permanent physical occupation constitutes a taking even if it “has only minimal economic impact on the owner”); id. at 436–37 (“[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.”); see also id. at 437–38 (intimating that economic impact of regulation may be relevant to amount of compensation due, but not to whether taking has occurred).

\(^{179}\) See \textit{Lucas}, 505 U.S. at 1015; \textit{Loretto}, 458 U.S. at 426.

\(^{180}\) See \textit{Lingle}, 544 U.S. at 538; see also \textit{Lucas}, 505 U.S. at 1015, 1016 n.6 (indicating that owner must “do more than simply file a lawsuit to establish his constitutional entitlement,” but rather must “show that the [regulation] denied him economically beneficial use of his land”).

\(^{181}\) See \textit{Lingle}, 544 U.S. at 538 (quoting \textit{Lucas}, 505 U.S. at 1026–32).

\(^{182}\) \textit{Lucas}, 505 U.S. at 1029 n.16; see id. at 1029.

\(^{183}\) See id. at 1030–31.

\(^{184}\) See id. at 1023–24.
"canon," it seems that the inquiry intended at this stage of the analysis is different in nature from a due process inquiry into the reasons underlying the regulation. Here, the analysis is concerned not so much with the legitimacy or importance of the government’s interests as with the practical consequences resulting from those interests. By demonstrating that the uses prohibited by the regulation would be prohibited to the same degree by common law nuisance, the government also demonstrates that the owner never possessed a right to those uses in the first place. In other words, the regulation in fact does not burden the owner’s right to use, since the “proscribed use interests were not part of his title to begin with." So, instead of proving that compensation is not required because of the weighty interests served by its regulation, the government really is proving that there has been no regulation of a cognizable property interest at all. Should the government meet this burden, then the Takings Clause simply does not apply because, whatever else the regulation might do, it does not deprive the owner of property. Conversely, should the government fail to meet this burden, then the presumption of a taking stands, and the owner is entitled to compensation.

c. Question #3—Penn Central

Finally, if the owner can prove neither a permanent physical invasion nor an economic deprivation, then the standard analysis asks a third question: How closely does the regulation resemble each of those two categories? Here, the analysis is dominated by Penn Central, which (as understood by the Lingle “canon”) presents two (rather than three) factors. The first factor looks at the “economic impact of the regulation on the claimant” measuring the extent of the harm in view of the owner’s “distinct investment-backed expectations.” This factor corresponds directly with the considerations embodied in the second analytical question, evaluating the similarity of the regulation’s impact to the categorical situation of a total economic divestment. The “canon” thus envisions substantial economic harm and not just mere

---

185 Id. at 1027.
186 See Lingle, 544 U.S. at 538–39.
diminution in value.\footnote{See accord Penn Central, 438 U.S. at 131 (rejecting idea “that diminution in property value, standing alone, can establish a ‘taking.’”). Admittedly, the portion of Penn Central in which this language is located is problematic after Lingle, since it relies heavily on language and precedent more consistent with substantive due process than with takings. Not only does this part of the opinion talk about regulations “reasonably related to the promotion of the general welfare,” but it specifically cites as authority Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) and Hadacheck v. Sebastian, 239 U.S. 394 (1915). See id. Other portions of the “canon,” however, indicate that Euclid and Hadacheck are properly understood as due process cases that have little continuing relevance to the Takings Clause. See, e.g., Lingle, 544 U.S. at 541 (characterizing Euclid as substantive due process case); Lucas, 505 U.S. at 1022–24 (listing Hadacheck as “progenitor” of the “substantially advances” test). Nonetheless, Penn Central’s refusal to find a taking based simply on a diminution in value finds support elsewhere in the “canon” and, accordingly, should still be considered authoritative.} It does well to reiterate Lingle’s mantra of “functional equivalence”; to qualify as a taking, a regulation must “be so onerous that its effect is tantamount to a direct appropriation or ouster.”\footnote{See Lingle, 544 U.S. at 537 (emphasis added).} It does well, also, to remember that “functional equivalence” focuses on the burdens imposed on the owner’s principal rights of exclusion, possession, use, and disposition. In light of these characteristics, this factor appears to contemplate economic harm that approaches a near-absolute reduction in value.\footnote{Most commentators after Lingle seem to understand this factor in similar terms. See, e.g., Barros, supra note 2, at 350 n.44; Cordes, supra note 3, at 35; Dreher, supra note 5, at 401; Echeverria, supra note 2, at 178; Lawson, et al., supra note 5, at 38–39.} Moreover, the only authoritative statement in the “canon” (from Penn Central) instructs that this harm should be assessed with regard to the entire parcel, rather than just those segments directly affected by the regulation.\footnote{See Penn Central, 438 U.S. at 130–31. Although Lucas expressed its doubt about this rule, it did not abrogate it or even explicitly contradict it. See Lucas, 505 U.S. at 1016 n.7. As such, the “parcel as a whole” rule must be viewed as controlling.} That harm must also be viewed, however, through the prism of the owner’s investment-backed expectations. Rather than forming a separate analytical element, as is often stated, these expectations instead are a crucial part of assessing the regulation’s economic impact.\footnote{See Loretto, 458 U.S. at 426 (“The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance.” (emphasis added)).}

\footnote{188 See accord Penn Central, 438 U.S. at 131 (rejecting idea “that diminution in property value, standing alone, can establish a ‘taking.’”). Admittedly, the portion of Penn Central in which this language is located is problematic after Lingle, since it relies heavily on language and precedent more consistent with substantive due process than with takings. Not only does this part of the opinion talk about regulations “reasonably related to the promotion of the general welfare,” but it specifically cites as authority Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) and Hadacheck v. Sebastian, 239 U.S. 394 (1915). See id. Other portions of the “canon,” however, indicate that Euclid and Hadacheck are properly understood as due process cases that have little continuing relevance to the Takings Clause. See, e.g., Lingle, 544 U.S. at 541 (characterizing Euclid as substantive due process case); Lucas, 505 U.S. at 1022–24 (listing Hadacheck as “progenitor” of the “substantially advances” test). Nonetheless, Penn Central’s refusal to find a taking based simply on a diminution in value finds support elsewhere in the “canon” and, accordingly, should still be considered authoritative.}
it does provide some important clues. To begin with, the "canon" strongly suggests that this portion of the analysis contains both a subjective and an objective component. By talking in terms of "distinct investment-backed expectations," the "canon" indicates that some consideration must be given to the unique position of the owner.\textsuperscript{193} Put differently, the severity of the harm resulting from the regulation, including an assessment of whether that harm can be considered close to absolute, will depend to some degree on the extent and characteristics of the owner's particular investment. Indeed, this very concept underlies the common law doctrine of vested rights, which prohibits the government from imposing new regulations if the owner has made substantial investment in reliance on the old ones.\textsuperscript{194} Thus, the "canon" supports a consideration of the owner's subjective expectations with regard to the property being regulated.

At the same time, the "canon" also indicates that those expectations must be objectively reasonable. In \textit{Lingle}, for example, the Court noted that, even though Hawaii's rent control measure would reduce Chevron's aggregate annual rental income, "Chevron nevertheless expects to receive a return on its investment... that satisfies any constitutional standard."\textsuperscript{195} Similarly, in \textit{Penn Central}, it was important that the regulation at issue permitted the owner "not only to profit from the [parcel] but also to obtain a 'reasonable return' on its investment."\textsuperscript{196} Finally, as \textit{Lucas} points out, "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 the legitimate exercise of its police powers,"\textsuperscript{197} suggesting that it is unreasonable for the owner not to anticipate at least some regulatory changes concerning the permissible uses of his land. Accordingly, there seems to be a dual focus that evaluates the subjective circumstances of the owner, viewed in light of the objective

\textsuperscript{193} \textit{See Lingle}, 544 U.S. at 539.
\textsuperscript{194} \textit{See Kent, supra note 65, at 9; see also Cordes, supra note 3, at 38 (arguing that "the investment-backed expectations factor of Penn Central is most reasonably understood as engaging at this same point," i.e., common law vested rights doctrine).}
\textsuperscript{195} \textit{See Lingle}, 544 U.S. at 544.
\textsuperscript{196} \textit{Penn Central}, 438 U.S. at 136.
\textsuperscript{197} \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1027 (1992); \textit{accord Cordes, supra note 3, at 37 (discussing the Lucas concept of "regulatory risk" as part of reasonable investment-backed expectations).}
reasonableness of the remaining value of the parcel after permissible regulatory action.

Another clue about the meaning of investment-backed expectations concerns the relevance of the regulatory environment existing at the time the owner acquires the property. Recall that this issue was raised in the separate concurrences of Justice O'Connor and Justice Scalia in Palazzolo. Although the "canon" does not pronounce a clear victor in this debate, it intimates (contrary to conventional wisdom) that Justice Scalia may have the upper hand. Although Justice O'Connor believed that pre-existing regulations should inform whether the claimant's expectations were reasonable, the "canon" appears to support the opposite conclusion. Both Lucas and Loretto maintain that the government, "by ipse dixit, may not transform private property into public property without compensation." This statement counsels against giving much importance to a regulation that, but for its pre-existence of the owner's title, otherwise would have qualified as a taking. Even more to the point is the following passage from Nollan, based on the concept of derivative title:

Nor are the [owners'] rights altered because they acquired the land well after the [government] had begun to implement its policy. So long as the [government] could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Given these assertions, it is difficult to endorse Justice O'Connor's view as canonical, at least in its full measure.

After considering the economic impact (measured by the owner's investment-backed expectations), the analysis proceeds to the second Penn Central factor, "the character of the governmental action." Just as the first factor seeks to evaluate how closely the regulation comes to a total economic deprivation, this factor seeks to determine the regulation's similarity to a permanent physical

---

199 See id. at 633 (O'Connor, J., concurring).
occupation. As explained by Penn Central: "A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."\(^{203}\) Plainly put, compensation is more apt to be due when a regulation requires the owner to suffer an invasion or occupation, even a temporary one, because of the greater potential adversely to affect the owner’s rights to exclude, possess, use, and dispose.\(^{204}\)

The language concerning adjustments for the general welfare is problematic, however, because it conjures the specter of the "substantially advances" test and its improper inquiry into the government’s reasons for regulating. Principally, this language seems to refer to Lingle’s distinction between a regulation that singles out a small number of property owners, on the one hand, with a regulation burdening a larger group of property owners, on the other.\(^{205}\) I agree with Benjamin Barros that the preservation of this distinction is regrettable, since it tends to undermine the separation of due process and takings that the "canon" (particularly Lingle itself) seeks to achieve.\(^{206}\) Indeed, with this distinction in mind, some commentators already have seen the character factor of Penn Central as a new vehicle for continued inquiries into the regulation’s underlying purposes.\(^{207}\) Although such a reading is not without some support, it is troublesome for at least two reasons. First, the "canon" does not uniformly endorse this viewpoint, at least with regard to government actions that directly affect property. In contrast to the foregoing distinction made in Lingle is the following statement from Lucas: “But a regulation specifically directed to land use no more acquires immunity by

\(^{203}\) Penn Central, 438 U.S. at 124; accord Lingle, 544 U.S. at 539; Loretto, 458 U.S. at 426.

\(^{204}\) Language in Loretto can be read to suggest that temporary invasions may qualify as takings only when committed or directed by the government. See Loretto, 458 U.S. at 432 n.9. In light of the "canon’s" general emphasis on the magnitude and distribution of burdens, however, it is difficult to understand why a third-party invasion expressly authorized by the government necessarily is less onerous than a temporary invasion by the government itself.

\(^{205}\) See Lingle, 544 U.S. at 543.

\(^{206}\) See Barros, supra note 2, at 354 n.56.


Imaged with Permission from N.Y.U. Environmental Law Journal
plundering landowners generally than does a law specifically
directed at religious practice acquire immunity by prohibiting all
religions.”

Second, a reading that merely repackages questions
about the government’s reasons for regulating cannot easily be
reconciled with the dominant themes and characteristics of the
“canon,” which ostensibly attempts to divorce due process and
takings analyses.

For these reasons, a better interpretation of the character
factor is one that emphasizes the concept of “functional
equivalence.” Put differently, the character factor asks “whether
the government is doing something that looks very much like an
exercise of eminent domain under some other guise or is instead
simply doing things that governments have long done without
much question.”

Again, the focus appears to be on the consequences of the
government’s action, particularly its effects on the owner’s principal property rights, rather than the reasons
for that action. It must be admitted, however, that this remains one
of the more difficult issues of takings analysis, even after Lingle.

---

(emphasis in original).

209 Steven J. Eagle argues that, even after Lingle, the Court “still does not,
draw a bright line between its older due process analysis and the substance of its
newer takings analysis.” See Steven J. Eagle, Lingle v. Chevron and Its Effect
on Regulatory Takings, SL012 ALI-ABA 167, 170 (2005). In support of this
argument, Eagle notes that the Court continues to define takings “in terms of
deprivation suffered by property owners and not in terms of clearly defined
‘property’ taken by government.” See id. I have some sympathy with this view,
as demonstrated in the Conclusion. I believe, however, that by emphasizing the
burdens placed on the owner’s core property rights, and minimizing
considerations about the government’s reasons for doing what it did, the “canon”
goes further toward a purely property-based test than the Court has heretofore
been willing to acknowledge.

210 See Lawson et al., supra note 5, at 50. In this regard, the character factor
duplicates some of the same considerations made in assessing the regulation’s
economic impact, leading one commentator to opine that Penn Central actually
has only one factor: “whether the impact on the property owner is so severe that
it is functionally equivalent to a classic exercise of eminent domain.” See Barros,
supra note 2, at 354 n.55.

211 R.S. Radford concludes that “[w]hat considerations might reasonably be
included in the ‘character’ calculus remains as great a mystery today as the day
Penn Central was drafted.” Radford, supra note 207, at 448. While I tend to
believe that the Lingle “canon” does provide some clarity, viewing the character
factor primarily as a substitute for the concerns identified in Loretto regarding
physical invasions, I understand Radford’s perplexity about this issue.
2. Exaction Analysis

In addition to the standard analysis discussed above, the Lingle "canon" establishes a second analytical framework for the unique context of land use exactions. Here, too, the analysis presents three central questions: (1) Does the government have an interest sufficient to prohibit the proposed activity altogether? (2) If so, does the exaction imposed on the owner serve that same interest? (3) If so, is the exaction roughly proportional to the putative impact of the proposed activity? Clearly, this analysis addresses the government's interests in regulating to an extent that the standard analysis does not, leading some commentators to argue that Nollan/Dolan is on shaky footing after Lingle. While this argument is understandable, a careful reading of the Lingle "canon" suggests that the exaction analysis, like the standard analysis, is rooted primarily in the concept of "functional equivalence" and, as such, forms a coherent part of takings jurisprudence. Put differently, in the eyes of the Court, Nollan/Dolan asks the same basic question as do the tests in Loretto, Lucas, and Penn Central: Is the burden being imposed on the property owner analogous to the physical appropriation of his property?

a. Question #1—Nollan (Part A)

In answering that question, the "canon" first asks whether the government possesses a sufficient interest to deny the proposed land use altogether. At first blush, this question seems to be at odds with the general disfavor the "canon" exhibits toward evaluations of regulatory purposes. A deeper look, however, reveals that, in practice, this question acts as a sort of analytical placeholder that seeks to establish a logical connection between the failure to provide compensation, on one hand, and the imposition of an otherwise categorical taking, on the other. In this regard, it is important to take notice of two things. First, the "canon" never actually engages in a normative evaluation of the

212 See Pollak, supra note 60, at 930; Sarah B. Nelson, Comment, Lingle v. Chevron USA, Inc., 30 HARV. ENVTL. L. REV. 281, 290 (2006). Nelson goes so far as to suggest that, after Lingle, lower courts should "perhaps disregard Nollan and Dolan all together [sic]." Id. at 292. Given Lingle's unanimous reaffirmance of those decisions, this suggestion seems misplaced.
government's purposes. Rather, in both Nollan and Dolan, the Court assumed that the interests advanced by the government were legitimate and, accordingly, would justify an outright denial of the land uses for which approval was sought.\(^{214}\) As explained by Lingle: "In neither case did the Court question whether the exaction would substantially advance some legitimate state interest."\(^{215}\) Thus, at this stage of the analysis, it seems that any reason identified by the government will be deemed sufficient, an analysis that indeed is "worlds apart" from the more probing inquiry formerly allowed under the "substantially advances" test.\(^{216}\)

Second, it must be remembered that both Nollan and Dolan involved permanent physical invasions of the owners' land—i.e., regulatory action that normally would qualify as a per se taking.\(^{217}\) This characteristic is very important to Lingle's explanation of the two decisions, which it describes as "challenges to adjudicative land use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit."\(^{218}\) Lingle also notes that the Court has never applied Nollan/Dolan "beyond the special context of [such] exactions."\(^{219}\) These statements strongly indicate that the exaction analysis applies only to physical dedications and not to monetary exactions like impact fees, which presumably should be analyzed under the standard analysis articulated above.\(^{220}\) These statements also can be read as preserving the unfortunate distinction between adjudicative and legislative exactions employed by many courts prior to Lingle.\(^{221}\) Thus, it appears that the exaction analysis has a very limited

\(^{214}\) See Dolan v. City of Tigard, 512 U.S. 374, 387 (1994); Nollan, 483 U.S. at 835-36.

\(^{215}\) Lingle, 544 U.S. at 547.

\(^{216}\) See id. at 547-48.

\(^{217}\) Dolan, 512 U.S. at 384; Nollan, 483 U.S. at 831; see also Lingle, 544 U.S. at 547 (explaining that both cases "involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings").

\(^{218}\) Lingle, 544 U.S. at 546.

\(^{219}\) See id. at 547 (alteration in original).

\(^{220}\) See id. (describing Nollan/Dolan as applying to "an adjudicative exaction requiring dedication of private property") (emphasis added). At least one lower court appears to have endorsed this understanding post-Lingle. See Consumers Union of U.S., Inc. v. New York, 840 N.E.2d 68, 83 n.22 & n.23 (N.Y. 2005).

\(^{221}\) See Haskins, supra note 65, Kent, supra note 65; Goodwin, supra note 65.
application.

More important for present purposes, however, is what these statements reveal about the focus of this analytical framework. Because the exactions at issue would qualify as categorical takings under the standard analysis, this framework gives the government a narrow opportunity to escape the normal consequence (i.e., the payment of just compensation) resulting from such onerous impositions. As with the standard analysis, the focus remains on the burden forced upon the landowner (in this case, a permanent physical invasion) and whether it is functionally equivalent to a direct appropriation. The primary difference here is that the government may alter the outcome by linking the permanent physical invasion to some public interest—whatever its nature or validity—pursuant to which it is assumed that the government may prohibit the owner's proposed use altogether. Thus, to the extent that it permits inquiries into the government's purposes, the exaction analysis does so as a way for the government to mitigate its otherwise compensable conduct.

b. Question #2—Nollan (Part B)

Mitigation works, however, only if there is an "essential nexus" between the exaction and the government interest that justifies outright denial of the proposed use.\(^\text{222}\) This is the subject of the second step in the analysis at which point the doctrine of unconstitutional conditions takes center stage.\(^\text{223}\) In the context of exactions, that doctrine provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the


\(^{223}\) See Lingle, 544 U.S. at 547; see also Dolan, 512 U.S. at 385. Although Dolan is often seen as the genesis for applying this doctrine to the area of regulatory takings, see, e.g., id. at 407–08 n.12 (Stevens, J., dissenting) (accusing majority of "writing on a clean slate"), the doctrine's central ideas clearly were at work in Loretto. Responding to the argument that the owners in that case could avoid the regulatory invasion simply by ceasing to rent their property (because the regulation applied only to rentals), the Court explained that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." See Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 439 n.17 (1982). Far from establishing a brand new theory of takings, Nollan and Dolan simply made the same point that Loretto made years earlier.
government when the benefit has little or no relationship to the property. Stated differently, the government may not condition the receipt of a land use permit on the owner’s waiver of her right to receive compensation for a physical invasion, unless that condition bears a direct relationship to the granting of the permit in the first place. Thus, assuming that some public interest warrants an outright denial of the permit, a condition that presents an alternative to outright denial is directly related to the granting of the permit so long as it serves the same public interest. When this occurs, the government can be viewed (theoretically, at least) as giving the owner a voluntary choice between the status quo of denying the proposed land use and the alternative of approving that use subject to the granting of an easement, etc. In these terms, the physical invasion is a permissible price paid by the landowner for obtaining approval that he otherwise has no opportunity of getting and to which he has no entitlement given the government's stated interest.

When the condition fails to serve that interest, however, the choice takes on a markedly different character. By its willingness to allow the proposed land use under these circumstances, the government must be viewed as abandoning its stated interest or, at least, trading it for something the government considers more valuable. Thus, the public purpose used to justify denial of the permit no longer has any real significance, and the status quo can no longer be considered complete prohibition of the owner’s development plan. Accordingly, the owner is no longer purchasing approval that otherwise cannot be obtained, but rather is presented with a Hobson’s choice between obtaining that approval and surrendering his right to just compensation for the

---

224 See Lingle, 544 U.S. at 547 (quoting Dolan, 512 U.S. at 385).
225 See Nollan, 483 U.S. at 836–37.
226 Of course, if the prohibition would result in the elimination of the parcel’s economically productive value, then it would constitute a categorical taking under Lucas, unless it duplicated the result that could be achieved in a common-law nuisance action. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029–32 (1992). Under such circumstances, the owner may wish to decline the offer of conditional approval and proceed under the standard analysis.
227 This is evident from Nollan’s analogy to a law that forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. Nollan, 483 U.S. at 837. Although the prohibition would be justified based on the government’s interest in protecting public safety, the unrelated condition demonstrates that the government is no longer truly concerned about that interest. See id.
public easement demanded by the government.\textsuperscript{228} The extortionate nature\textsuperscript{229} of this choice removes any mitigation for the physical occupation of the parcel, and returns the analysis to the usual understanding that this type of regulatory action is functionally equivalent to direct appropriation of the owner's property.

c. \textit{Question \#3—Dolan}

By contrast, if an essential nexus does exist, then the analysis proceeds to the final question, which asks whether the exaction is "'rough[ly] proportiona[1]... both in nature and extent to the impact of the proposed development."\textsuperscript{230} Once again, in light of the entire "canon," this question must be viewed as relating primarily to the burdens imposed on the owner's principal property rights and the comparability of those burdens to a direct appropriation or ouster. As stated, the physical dedication required by the government would undoubtedly qualify as a compensable taking outside this special regulatory context. Therefore, to avoid paying compensation, the government must demonstrate that the dedication likely will offset whatever adverse effects the new development is expected to have on the public interest being protected (i.e., the same public interest that would justify outright denial).\textsuperscript{231} The government does this by making "some sort of individualized determination,"\textsuperscript{232} through quantifiable findings,\textsuperscript{233} that the exaction will help alleviate the anticipated harm. Without this limitation, the burden suffered by the owner—a burden that the "canon" ordinarily views as effectively destroying each of the owner's core property rights\textsuperscript{234}—cannot in any sense be viewed as voluntarily undertaken and, thus, remains the functional equivalent of a direct appropriation or ouster.

\textsuperscript{228} \textit{Dolan}, 512 U.S. at 385–86.

\textsuperscript{229} \textit{See Nollan}, 483 U.S. at 837.


\textsuperscript{231} \textit{Dolan}, 512 U.S. at 395–96. For example, in \textit{Dolan}, the government was required to show that a public pathway for pedestrian and bicycle use, which ostensibly was designed to protect the public's interest in reducing traffic congestion, actually had some likelihood to alleviate the traffic demand caused by the new development. \textit{Id.}

\textsuperscript{232} \textit{Id.} at 391.

\textsuperscript{233} \textit{See id.} at 395–96.

\textsuperscript{234} \textit{See Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 435 (1982).
CONCLUSION

In conclusion, the "canon" established by Lingle begins the long overdue process of bringing clarity to the confused realm of regulatory takings. By reading these six decisions together, interpreting each one in light of the language and contexts of the others, it is possible to discern some much-needed consistency in the Court's thinking about this area of the law. The "canon" instructs that regulatory takings should be distinguished from due process, and it accordingly places primary emphasis on the burdens imposed on the owner's core rights of exclusion, possession, use, and disposition rather than on the government's purposes and goals for enacting the challenged regulation. This emphasis, in the form of "functional equivalence," is at the heart of the various tests created by the "canon," which form two basic frameworks both aimed at determining whether the effects of the regulation are tantamount to the government directly appropriating to itself the property interests of the owner. Understanding this emphasis and its central role in analyzing takings challenges helps to provide a path out of the theoretical and doctrinal quagmire that was regulatory takings jurisprudence before Lingle.

Of course, the Lingle "canon" does not answer all of the questions about regulatory takings. For example, while the "canon" provides some information about the Penn Central factors, the precise manner in which they relate to one another remains uncertain. Similarly, as noted above, the exact nature and role of the owner's investment-backed expectations, as well as the character of the governmental action, remain open for debate. The very existence of the "canon" raises questions concerning its composition; for example, is the "canon" closed, or is there room for further clarification? Is it possible to conceive of another type of regulatory action that categorically will be considered the functional equivalent of a direct appropriation? Finally, given the emphasis of the "canon" on regulations affecting land, it remains to be seen just how the concept of "functional equivalence" translates to regulations that affect personalty, money

235 For example, it has been suggested that a regulation completely removing the owner's ability to dispose of his property might qualify for such categorical treatment. See Lawson, supra note 5, at 49; cf. Echeverria, supra note 2, at 203 (suggesting that interference with disposition rights, at least the right to devise to one's heirs, should be included in character factor of Penn Central analysis).

Imaged with Permission from N.Y.U. Environmental Law Journal
and other commercial paper, or intellectual property.

It also must be acknowledged that the Lingle "canon" does not draw a perfect line between the takings and due process inquiries. Although the "canon" makes significant progress in tying the takings analysis to the "bundle of rights" affected by the regulation, the focus remains in large part on the property owner and the fairness of the burden being imposed upon her. This continued focus, especially with regard to the distinction between regulations affecting large numbers of property owners versus those affecting fewer owners, hinders the Court's apparent attempts to separate these two areas of constitutional analysis. This separation could better be accomplished by a takings test grounded exclusively on property rights, without evaluations about the treatment of the owner.

Related to the foregoing ideas is the unresolved role that due process will play as the logical antecedent to a takings challenge. The "canon" envisions that substantive challenges to the legitimacy of regulatory action—like those raised in Lingle itself—are properly brought under the Due Process Clause. The Takings Clause, on the other hand, presumes the government has acted legitimately and, therefore, is relevant logically only after that legitimacy has been established or assumed. But whether a property owner could obtain meaningful review of a substantive due process challenge is highly debatable given the Court's expressed avowal, reaffirmed in Lingle, of deferring "to legislative judgments about the need for, and likely effectiveness of, regulatory actions . . . ." In light of this deference, it is not at all clear that the hypothetical due process challenges mentioned by the Court have any real chance of success. In a brief concurring opinion, however, Justice Kennedy observed that Lingle "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process," and that "[t]he failure of a

---

236 See Eagle, supra note 209, at 173 (describing post-Lingle takings law as "based on substantive concepts such as fairness and proportionality in burdens placed upon property owners").
237 Cf. id. at 175.
239 See Ely, supra note 15, at 52 (calling suggestion that property owners engage in due process challenges "futile" and "fanciful" because "[f]ederal courts no longer provide even cursory property rights review under due process").
regulation to accomplish a stated or obvious objective would be relevant to that inquiry.”\textsuperscript{240} Whether Justice Kennedy’s view gains any other supporters will be an important question for the future.

Despite the issues left unresolved, \textit{Lingle} and the “canon” it unanimously endorses provide a good starting point for comprehending the Court’s view of regulatory takings and answering some thorny questions. The lasting contribution of the \textit{Lingle} “canon” is to offer a discernable path out of the maze of what has undoubtedly been a very confused and troubled area of the law. For this reason, the Court’s decision in \textit{Lingle} may well deserve its description as “the most significant regulatory takings case, and perhaps one of the most important court decisions of the modern era.”\textsuperscript{241}

\textsuperscript{240} \textit{Lingle}, 544 U.S. at 548–49 (Kennedy, J., concurring).