Administrative Law and Regulation

Supreme Court Decision: Regulatory Takings

*By Louis K. Fisher and Esther Slater McDonald**

In its recent decision in *Lingle v. Chevron U.S.A.*,[1] the Supreme Court unanimously repudiated its prior statements that government regulation of private property effects a taking—and, thus, is invalid absent just compensation—if it does not substantially advance a legitimate state interest. The Just Compensation Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[2] The Court's decision, which sharply limits constitutional protection for property rights, is one of the most significant of October Term 2004.

Since at least 1922, when Justice Holmes authored the seminal opinion for the Court in *Pennsylvania Coal v. Mahon*,[3] it has been established that a "taking" under the Just Compensation Clause can occur not only through the government's outright acquisition or physical invasion of property, but also through government regulation of property use. For more than fifty years thereafter, however, the contours of regulatory takings analysis remained unclear, as the Court routinely upheld government action that, without compensation, served valid public purposes even while greatly diminishing the economic value of certain private property.[4] Then, in *Penn Central Transportation Co. v. New York City*,[5] the Court expressly stated the rule "implicit" in earlier cases: An interference with property rights "may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[6] Twenty-five years ago, in *Agins v. City of Tiburon*,[7] the Court held that property regulation effects a taking if it does not "substantially advance legitimate state interests."[8]

The Court subsequently reiterated the availability of the substantially advances test in a long line of cases.[9] Nevertheless, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[10] the Court recognized the need for "a thorough explanation of the nature [and] applicability of the requirement that a regulation substantially advance legitimate public interests."[11] Similarly, the distinct requirement that property regulation not deprive an owner of all economically viable use[12] was not thoroughly explained until 1992, when the Court articulated "good reasons" for the rule in *Lucas v. South Carolina Coastal Council*.[13] In *Del Monte Dunes*, the Court did not explore the basis for the substantially advances test because the government itself had proposed the jury instruction incorporating that standard.[14] The *Lingle* case squarely presented the issue.

In *Lingle*, Chevron U.S.A. Inc. challenged a Hawaii law limiting the rents that oil companies may collect under their agreements with lessee dealers, who lease their service stations from the oil companies. The stated purpose of the law is to combat the effects of alleged concentration in the Hawaii market for gasoline, which, according to the legislature, causes retail gasoline prices to rise at the pump. The State argued that the legislature intended to achieve its purpose by "maintain[ing] the benefit" of a "multiplicity of independent lessee-dealerships" to "forestall" the "possibility that oil companies might try" at some unknown future date to "rais[e] rents to the point that existing dealers would be forced out of business."[15] According to the State, such a reduction in lessee-dealerships would lead to higher gasoline prices for consumers.

However, the law was unaccompanied by any legislative findings on the existence of these alleged dangers. Indeed, at trial, the State introduced no evidence that the legislature had conducted any hearings or compiled any evidence on these issues. Instead, the State conceded (1) that the Hawaii retail market for gasoline is highly unconcentrated; (2) that the rents Chevron and other oil companies were charging—which are prohibited by the law—have not caused high retail gasoline prices; and (3) that the forced reductions in rent imposed by the law will not cause lessee dealers to lower their retail gasoline prices to consumers. Accordingly, even the dissenting judge in the court of appeals agreed that the law did not substantially advance its purpose.[16] The dispositive issue before the Supreme Court was whether the substantially advances test is a valid part of Just Compensation Clause jurisprudence.

Chevron argued that the text of the Just Compensation Clause applies to *all* government action that deprives owners of traditional private property rights, such as the right to lease and collect rent on real property. The Clause refers to taking property rather than condemning it, and regulation can destroy property rights no less than direct appropriation. Nonetheless, *Mahon* recognized that the "seemingly absolute protection" afforded by the Clause necessarily is qualified by the government's need to accomplish its legitimate purposes through regulation.[17] As the Court stated, "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[18] Thus, like the First Amendment's clear prohibition of *all* laws "abridging the freedom of speech,"[19] the "seemingly absolute protection" provided by the Just Compensation Clause is subject to an "implied limitation."[20]

The Supreme Court's regulatory takings jurisprudence defines the scope of the implied exception to the rule established by the text of the Just Compensation Clause. The Court recognized in *Mahon* that "the natural tendency of human nature is to extend the qualification [of the Clause's protection] more and more until at last private property disappears."[21] The Court cautioned that "obviously the implied limitation must have its limits, or the contract and due process clauses are gone."[22]

Because the government's need to regulate gives rise to the Just Compensation Clause's implied limitation in the first instance, the scope of that limitation should depend in large part on the strength of the government's interest in regulating the property at issue. In *Penn Central*, the Court held that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel."[23] The Court's other regulatory takings decisions likewise indicated that this critical inquiry into the character of the government's action was required by *Mahon*'s premise that it is the government's interest that qualifies the "seemingly absolute protection" provided by the Just Compensation Clause.[24]

Significantly, property regulation serving *any* legitimate government purpose potentially qualifies for the implied limitation on the Clause's protections. Initially, it might have been thought that the implied limitation could apply only to governmental regulation of "noxious" uses.[25] The Court more recently has recognized, however, that any distinction between preventing public harms and achieving public benefits is tenuous at best.[26] In *Lucas*, therefore, the Court recognized that the substantially advances test—which applies to property regulation with a legitimate government purpose—was the "contemporary statement[]" of the Court's historical recognition that government may burden property rights to prevent a "harmful or noxious use" without necessarily triggering the Fifth Amendment's compensation requirement.[27] But, regardless of the nature of the government's interest, it always has been necessary for the property regulation, at a bare minimum, actually to advance that interest in order to come within the Just Compensation Clause's implied exception.

In *Lingle*, the Supreme Court disagreed with this argument's fundamental premises concerning the text of the Just Compensation Clause and the meaning of *Mahon*. Instead of holding that regulation must be sufficiently justified to warrant an exception to the Clause's "seemingly absolute protection" of private property,[28] the Court held that the Clause protects property only from "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[29] Because the substantially advances test "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property[,] it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."[30]

Chevron also argued that the inquiry into the character of the government's action furthers the fundamental purpose of the Just Compensation Clause "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."[31] As the Court has held, "[t]he determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[32]

The substantially advances test prevented unfair "singling out" in two ways. First, property regulation cannot substantially advance legitimate government purposes if it restricts property uses that do not "substantially impede these purposes."[33] The substantially advances test thus focused on whether the property regulated is the source of the social condition the government seeks to address. Although in regulatory takings cases the Court frequently applies the general *Penn Central* balancing test, no such balancing should be necessary when, at the threshold, the property taken is not the source of the condition sought to be corrected. In that circumstance, compensation should be required because no basis exists for requiring the property owner to shoulder alone the economic burden imposed by the statute.[34] By ensuring that governmental action burdens only those property uses that are "the source of the social problem," the causal nexus required by the substantially advances test prevented a regulated landowner from being "singled out unfairly" by legislation seeking to remedy social problems not attributable to his property.[35]

In addition, even if the regulated property is the source of the social condition that the government purportedly seeks to address, the substantially advances test would not be satisfied if property regulation is not sufficiently related to that condition. No legitimate basis exists for singling out property for a special burden if the burden will not contribute to the problem's solution.[36] In that circumstance as well, the rationale for taking property rights without compensation—the government's need to achieve its legitimate purposes—is absent, and the core purpose of the Just Compensation Clause to prevent unfair burdens on discrete property rights is violated.

The risk of unfair singling out was conspicuously present in *Lingle*. The State made no claim that the rents charged by oil companies to lessee dealers had been the source of high gasoline prices or had impeded the State's efforts to reduce those prices. Nor did the State claim that the rents had caused a reduction in competition by contributing to market concentration. Thus, the State had no basis for singling out oil companies to shoulder the burden of the State's regulation; and, thus, the State had no rationale for taking Chevron's property interests without compensation. The legislature, however, was under political pressure to appear responsive to Hawaiians' concerns about gasoline prices. Unwilling or unable to address the circumstances that actually affect gasoline prices (such as high gasoline taxes and geographic isolation that discourages entry by new refiners), the legislature indulged a powerful lobbying group of local lessee-dealers with a grant of reduced rents, and avoided political accountability by placing the burden of the law on out-of-state companies. In this political climate, the State could not plausibly assert that the Just Compensation Clause leaves protection against such unfairness to the democratic process. On the contrary, the Clause should prevent unfair singling out by requiring just compensation for regulatory burdens unconnected to a legitimate purpose.

The Supreme Court dismissed these arguments as "untenable," on the ground that "[t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation."[37] Accordingly, the Court stated, "[i]t would make little sense to say that the second owner has suffered a taking while the first has not."[38] The Court did not explain, however, why the singling out of a property owner to bear a burden is not *unfair* when his property is not the source of the social condition that the government seeks to address. It is true that the owners of red cedar trees and the owners of white cedar trees would be singled out equally if both were ordered to destroy their trees to prevent harm to nearby apple orchards.[39] Nevertheless, the singling out of the white cedars' owner is *unfair* if only red—and not white—cedars actually endanger apple trees. Because the Supreme Court in *Lingle* did not discuss the unfairness element of the "singling out" rationale, it will be interesting to see how the Court applies that rationale in future cases.

Also noteworthy is the Court's disagreement with Chevron's argument that extreme deference to economic legislation is inappropriate under the Just Compensation Clause, an express limitation on governmental interference with individual rights. The State's primary argument was that adherence to the substantially advances test would herald a return of the unrestrained judicial activism of the *Lochner* era through "departure from the deferential standard of review that is appropriate in constitutional challenges to economic legislation."[40] The United States, which filed an *amicus* brief and participated in oral argument, similarly maintained that all "economic legislation" enjoys broad immunity from meaningful constitutional review. Chevron contended, however, that the extreme deference sought by the State and its *amici* applies primarily where rights are asserted under the elusive concept of "substantive due process." Less deference in that setting would revive the vice of the *Lochner* era, which was the courts' use of the "vague contours of the Due Process Clause" to strike down state laws "[un]restrained by some express prohibition in the Constitution."[41]

In contrast, the Court does not blindly defer to government regulation when it infringes upon specific, concrete rights—even rights that supposedly hold "subordinate position[s],"[42] such as the right to free commercial speech[43] or the right to engage in interstate commerce.[44] Rather, in such cases, the Court routinely examines the effectiveness of economic legislation to ensure that the *explicit* guarantees of the Constitution are not infringed.[45] These cases confirm that "simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights."[46] The Just Compensation Clause is such an explicit source of constitutional protection; and, as the Court emphasized in *Dolan*, the Just Compensation Clause is not "a poor relation in these comparable circumstances" to the other amendments in the Bill of Rights.[47]

In fact, Chevron argued, examination of a law's effectiveness under the Just Compensation Clause is far less intrusive than under other provisions of the Bill of Rights. Determining under the Just Compensation Clause that a law fails to substantially advance a legitimate state interest would not bar the government from acting; it would mean only that the law effects a taking for which compensation must be paid. Rather than focusing on whether the government may regulate at all, the test focused on whether the government must pay just compensation for its regulation because an individual has been singled out to bear a burden that should be borne by the public. By asking whether the regulation advances the government's purpose, the test evaluated whether the property regulated is the source of the problem and whether the regulation addresses that problem. Moreover, allowing courts to answer that question does not necessarily require courts to disregard considered legislative judgments made after extensive factual inquiry. In *Lingle*, the State relied upon *post hoc* rationalizations developed by its lawyers and an expert hired for litigation. The Supreme Court thus was not presented with the question whether, as in the First Amendment context, some deference is owed to reasonable inferences drawn by the legislature on the basis of substantial evidence.[48]

The Court swept aside Chevron's arguments with the broad statement that "[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions . . . are no less applicable" when addressing regulatory takings claims than "when addressing substantive due process challenges to government regulation."[49] Just as this conclusion seems difficult to reconcile with the "poor relation" statement in *Dolan*, the Court's characterizations of the substantially advances test seem difficult to reconcile with prior decisions in which the test played a role. For example, the Court indicated in *Lingle* that the substantially advances standard "prescribes an inquiry in the nature of a due process . . . test" by inherently asking whether the government's action is "fundamentally arbitrary and irrational."[50] The Court had previously stated, however, that the substantially advances test was "quite different" from the rational basis test applied to most due process and equal protection claims.[51] In addition, the Court in *Lingle* suggested that government action failing the substantially advances test inherently must be enjoined.[52] But, in *Del Monte Dunes*, the Supreme Court indicated that an injunction would *not* be appropriate if the government chose to provide just compensation for a taking under the substantially advances test: "Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone."[53]

In addition to leaving these apparent inconsistencies unresolved, the *Lingle* decision raises the important question of how, if at all, the government's interest in regulating property might be relevant to the takings inquiry under *Penn Central*. The Supreme Court made clear in *Lingle* that the "substantially advances" formula is not "a stand-alone regulatory takings test that is wholly independent of *Penn Central*."[54] Accordingly, the *Penn Central* factors govern all

regulatory takings challenges except those where the regulation requires (either directly or through a land-use exaction) an owner to suffer a permanent physical invasion of her property, or deprives an owner of all economically viable use of her property.[55]

Prior to *Lingle*, the Court had stated that the three *Penn Central* factors—"the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action"—*all* "have particular significance."[56] The Court in *Lingle*, however, greatly downplayed the importance of the character of the government's action in the *Penn Central* analysis. Under *Penn Central*, the *Lingle* Court emphasized, the existence of a taking "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests," while the "character of the governmental action" also "may be relevant."[57] At the same time, the Court gave little shape to the "character" inquiry, stating only that it asks "for instance whether [the government action] 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."[58] This statement provides scant guidance because the Court previously had held—and *Lingle* itself reaffirmed—that regulation amounting to a physical invasion will be deemed a taking *per se*.[59]

It therefore remains unclear whether, in applying *Penn Central*, the lower courts are to disregard entirely the Supreme Court's prior indications "that the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required."[60] By jettisoning the substantially advances test, the Supreme Court only sharpened the need for answers to this and other "vexing subsidiary questions" about *Penn Central*.[61]

* The authors are associates at Jones Day in Washington, D.C. Jones Day represents the respondent in *Lingle v. Chevron*, and the authors participated in the drafting of the respondent's brief. This article originally was written as a preview of the Supreme Court's decision but has been adapted in light of the actual disposition. The views expressed herein are solely those of the authors.

Footnotes

[1] No. 04-163 (decided May 23, 2005).

[2] U.S. CONST. amend. V.

[3] 260 U.S. 393 (1922).

[4] *E.g.*, Miller v. Schoene, 276 U.S. 272 (1928) (government required destruction of cedar trees that were causing damage to nearby apple trees); Goldblatt v. Hempstead, 369 U.S. 590 (1962) (government imposed limitations on sand and gravel excavation activities that destabilized surrounding land).

[5] 438 U.S. 104 (1978).

[6] *Id.* at 127.

[7] 447 U.S. 255 (1980).

[8] *Id.* at 260.

[9] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 333-34 (2002) (noting that property owner could have made the argument that land-use restrictions "did not substantially advance a legitimate state interest" to support a taking claim); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999) (noting that jury instruction requiring "that a regulation substantially advance legitimate public interests" was "consistent with our previous general discussions of regulatory takings liability"); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'" (quoting *Agins*)); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) (noting that the Court had recognized the validity of the substantial advancement test "on numerous occasions"); Yee v. City of Escondido, 503 U.S. 519, 530 (1992) (noting that there must be "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance"); Nollan v. Calif. Coastal Comm'n, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'" (quoting *Agins*)); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (describing the substantially advances requirement as an "integral part[] of our takings analysis"); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (noting that the substantial advancement test represents part of "our general approach" in takings cases); *see also* San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting) (describing *Agins* as a "clear precedent[] of this Court" establishing that a land-use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests").

[10] 526 U.S. 687.

[11] *Id.* at 704.

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

[13] 505 U.S. at 1019.

[14] 526 U.S. at 704.

[15] Brief for Petitioners at 2-3.

[16] Chevron U.S.A. Inc. v. Bronster, 363 F.3d 846, 859 (9th Cir. 2004) (Fletcher, J., dissenting).

[17] 260 U.S. at 415.

[18] *Id.* at 413.

[19] U.S. CONST. amend. I.

[20] *Mahon*, 260 U.S. at 415; *id.* at 413; *cf.* Virginia v. Black, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

[21] 260 U.S. at 415.

[22] *Id.* at 413.

[23] 438 U.S. at 130-31.

[24] *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (stating that a regulatory taking may occur when "a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation"); *id.* at 634 (O'Connor, J., concurring) ("The

purposes served, as well as the effects produced, by a particular regulation inform the takings analysis."); *Lucas,* 505 U.S. at 1071 (Stevens, J., dissenting) ("[T]he first and, in some ways, the most important factor in takings analysis [is] the character of the regulatory action."); *Yee*, 503 U.S. at 530 (stating that "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance" bears on the existence of a regulatory taking); Hodel v. Irving, 481 U.S. 704, 716 (1987) (finding a regulatory taking based on the "character of the Government regulation," including that it burdened property rights in ways more broad than necessary and ways actually counterproductive to the government's goals); *Keystone*, 480 U.S. at 488 ("[T]he nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred."); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980) (stating that governmental regulation may restrict the exploitation of property "if such public action is justified as promoting the general welfare").

[25] *See Lucas*, 505 U.S. at 1022-23 ("The 'harmful or noxious uses' principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate . . . .")

[26] *Id.* at 1024 ("[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder.")

[27] *Id.* at 1023-24.

[28] *Mahon*, 260 U.S. at 415.

[29] *Lingle*, slip op. at 9.

[30] *Id.* at 12.

[31] Armstrong v. United States, 364 U.S. 40, 49 (1960).

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

[33] *Nollan*, 483 U.S. at 835-36; *see also Tahoe-Sierra*, 535 U.S. at 333-34 (holding a substantially-advances challenge foreclosed by the district court's finding that the regulation "represented a proportional response to a serious risk of harm to the lake"); *Keystone*, 480 U.S. at 491 (upholding regulation prohibiting "uses of property that are tantamount to public nuisances"); *Agins*, 447 U.S. at 262 (upholding regulation prohibiting development that would frustrate the "careful and orderly development of residential property"); *Penn Central*, 438 U.S. at 109 (upholding regulation that prevented renovations marring historic landmarks).

[34] *See Armstrong*, 364 U.S. at 49; *see also* Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (noting that traditional land-use regulation satisfies the Just Compensation Clause "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy").

[35] *Pennell*, 485 U.S. at 20 (Scalia, J., concurring in part and dissenting in part); *see Nollan*, 483 U.S. at 835 n.4 (discussing application of Just Compensation Clause to property owners who have been "singled out to bear the burden" of remedying a problem to which they have not contributed more than others).

[36] *See Dolan*, 512 U.S. 393-95; *Nollan*, 483 U.S. at 838.

[37] *Lingle*, slip op. at 13.

[38] *Id.*

[39] *Cf. Miller*, 276 U.S. 272.

[40] Brief for Petitioners at 37.

[41] Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting); *see also* Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963) ("It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, *so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law*." (emphasis added) (internal quotation marks omitted)).

[42] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[43] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (holding that regulation of commercial speech must "directly advance[] the governmental interest asserted").

[44] *See, e.g.*, S. Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945) (holding that non-discriminatory regulation of interstate commerce must advance the state's purpose by such a degree as to outweigh national interests).

[45] *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 771 (1993) (requiring the state to "demonstrate that the harms it recites are real and that its restriction [of commercial speech] will in fact alleviate them to a material degree"); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671 (1981) (requiring "persuasive evidence" that regulation of interstate commerce furthers the state's interest).

[46] *Dolan*, 512 U.S. at 392.

[47] *Id.*

[48] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 666 (1994).

[49] *Lingle*, slip op. at 15.

[50] *Id.* at 10, 14.

[51] *Nollan*, 483 U.S. at 834 n.3.

[52] *Lingle*, slip op. at 14.

[53] 526 U.S. at 710.

[54] *Id.* at 10.

[55] *Id.* at 8.

[56] Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

[57] *Lingle*, slip op. at 9, 10.

[58] *Id.* at 9 (internal quotation marks omitted).

[59] *Id.* at 8 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[60] *Keystone*, 480 U.S. at 488 (citing *Mahon*).

[61] *Lingle*, slip op. at 9.