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Reconsideration of the State's Takings Formula under
Lingle v. Chevron U.S.A., Inc.

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The State of Regulatory Takings in Washington: Reconsideration of the State's Takings Formula under *Lingle v. Chevron U.S.A., Inc.*

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I. Background

On May 23, 2005, in *Lingle v. Chevron U.S.A., Inc.*,² the United States Supreme Court explained that analysis appropriate to the due process clause of the Fourteenth Amendment has no part in Fifth Amendment regulatory takings analyses. The Court expressly removed the "substantially advances" inquiry from the regulatory takings analyses line-up, deeming it more appropriate as a due process test. Now two years after the decision, the impact of *Lingle* on Washington's regulatory taking framework remains undetermined.

This article explains the *Lingle* opinion's impact on regulatory takings, reviews the current state of Washington's takings analysis under the *Guimont v. Clarke*³ framework, describes how the Washington analysis must change after *Lingle*, and suggests that the end of due process consideration in takings claims will expand government liability for "police power" regulations.

II. *Lingle v. Chevron U.S.A., Inc.*: The Undoing of Commingled Takings and Due Process Analyses

In *Lingle v. Chevron U.S.A., Inc.*, the United States Supreme Court extracted substantive due process analyses from takings analyses and articulated the takings theories under which plaintiffs may proceed. Before exploring the Court's holding, the following discussion outlines the background to the litigation and the proceedings below.

A. Background

The *Lingle v. Chevron U.S.A., Inc.* litigation originated in the United States District Court for the District of Hawaii. In 1997, the Hawaii Legislature enacted Act 257 in apparent reaction to concerns about the effects of Hawaii's market concentration on retail gasoline prices. The statute sought to protect independent retail gasoline dealers by imposing certain restrictions on the ownership and leasing of service stations by oil companies. Significantly, the Act limited the amount of rent that an oil company could charge a lessee-dealer to 15 percent of the dealer's gross profits from gasoline sales plus 15 percent of gross sales of products other than gasoline.⁴

At the time of Act 257's passage, Chevron U.S.A. was the largest refiner and marketer of gasoline in Hawaii. It controlled 60 percent of the market for gasoline

produced or refined in Hawaii. It also controlled 30 percent of the wholesale gasoline market on the most populous island, Oahu. In a typical retail arrangement, Chevron would buy Hawaiian property, build a service station, and then lease the service station to a dealer, charging a monthly rent and requiring the dealer to enter into a supply contract with Chevron.⁵

B. Proceedings Below

Thirty days after Hawaii passed Act 257, Chevron filed suit against the Governor and the State Attorney General in the United States District Court for the District of Hawaii. Chevron claimed, among other things, that the Act's 15 percent rent cap effected a taking of Chevron's property in violation of both the Fifth and Fourteenth Amendments. Chevron moved for summary judgment on its takings claim, and the State filed a cross-motion for summary judgment on all claims.⁶

The district court granted summary judgment to Chevron, applying the "substantially advances" takings test articulated in *Agins v. City of Tiburon*.⁷ The court held that "Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments." The district court found that the purpose of the Act was to maintain the viability of independent gasoline lessee-dealers thereby avoiding consumer price creep. However, the court held that the Act 257 was invalid because it would not substantially advance this purpose because it would not actually reduce lessee-dealers' costs or retail prices.⁸

On appeal, the Ninth Circuit held that the district court had applied the proper legal standard to Chevron's takings claim, but ruled that genuine issues of material fact remained as to whether the effects of Act would substantially advance its purpose.⁹ On remand, the district court again granted summary judgment to Chevron.¹⁰ A second appeal followed. The Ninth Circuit affirmed, with a dissenting opinion contending that the Act should not be reviewed under the "substantially advances" standard.¹¹ The Supreme Court granted certiorari and reversed.¹²

C. Opinion of the Court

Justice O'Connor delivered the opinion of the Court, with seven Justices joining the opinion and Justice Kennedy filing a concurring opinion.

1. Takings overview.

The *Lingle* opinion begins with an introduction to Fifth Amendment takings jurisprudence, as applied to the States through the Fourteenth Amendment. The Court reminds that the Takings Clause does not prohibit the government from taking private property but, rather, places conditions on such takings: the taking must be for public use, and the government must provide just compensation to the property owner. The Court

then observes that the “paradigmatic taking” requiring just compensation is a direct government appropriation or the physical invasion of private property.¹³

In addition to appropriations and invasions, severe land use regulations may also result in a taking of property requiring just compensation. This is because some land use regulations may have the same effect as an appropriation or invasion without actually resulting in a change of title or direct, physical impact on the property. These are termed “regulatory takings” and have been recognized since the Supreme Court’s 1922 *Pennsylvania Coal v. Mahon*¹⁴ opinion.

Reviewing historic takings jurisprudence, the *Lingle* opinion recognizes the two distinct types of regulatory takings claims: (1) categorical or *per se* takings resulting from a loss of all economically viable use of property and (2) all other claims, requiring factual, ad hoc inquiries. Under the former, the Court determines whether the challenged regulation deprives a property owner of economically beneficial use of property. If so, just compensation is required under the Court’s holding in *Lucas v. South Carolina Coast Council*.¹⁵ Under the latter, the Court conducts a factual inquiry to gauge the impact of the regulation, utilizing the three non-exclusive balancing considerations set out in *Penn Central Transportation Co. v. City of New York*¹⁶ to determine if the regulation “goes too far:” (1) the regulation’s economic impact on the claimant, (2) the extent to which it interferes with distinct investment-backed expectations, and (3) the character of the government action (hereinafter, regulatory takings requiring *Penn Central*’s ad hoc factual inquiries are referred to as “*Penn Central* takings”).

The *Lingle* Court then identifies a common touchstone to the three inquiries that are not actual appropriation (physical invasion, deprivation of all economic use, *Penn Central* takings): “Each [inquiry] aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹⁷

2. Agins’ substantially advances test repudiated.

After presenting an overview of takings jurisprudence and recognizing the common touchstone, the Court moves into an analysis of the *Agins v. City of Tiburon* “substantially advances” test. In *Agins*, the Court announced: “[T]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.”¹⁸ Following the *Agins* opinion, courts had used the “substantially advance” clause as a stand-alone regulatory takings test existing independently of *Penn Central*’s three factors. Under the substantially advances test, regulations not effectively achieving a public purpose were subject to invalidation as an unconstitutional taking.

In *Lingle*, the Court traces the origins of the substantially advances test noting that “[t]here is no question that the ‘substantially advances’ formula was derived from due

process, not takings, precedents." *Agins* relied on both *Nectow v. Cambridge*¹⁹ and *Village of Euclid v. Ambler Realty Co.*,²⁰ both cases analyzing challenges to local jurisdictions' zoning regulations under the due process clause of the Fourteenth Amendment. Furthermore, *Agins* followed the landmark *Penn Central* decision by just two years, and *Penn Central* itself intermixed due process and takings analyses.²¹

The Court holds the substantially advances test up to the three regulatory takings analyses overviewed earlier in the opinion (physical invasion, deprivation of all economic use, regulations that "go too far"). The Court determines that in "stark contrast" to the three regulatory takings constructs, the substantially advances test reveals nothing about the "*magnitude or character of the burden*" upon private property rights and provides no information about the "*distribution*" of the burden among property owners.²² As a result, the test does not – like the other three tests do – identify regulations that are "functionally comparable" to government appropriation or invasion of private property. Rather, the substantially advances test suggests a means-end test that inquires into how "effective" the regulation is at achieving legitimate public interests. The Court concludes 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."²³

Emphasizing that the removal of the "substantially advances" test from takings jurisprudence does not necessitate the overruling of prior precedent, the Court assures that it had never found a compensable taking employing the substantially advances formula and that the *Agins*-based *Nollan*²⁴ and *Dolan*²⁵ analysis for land use exactions nevertheless remains valid.²⁶

3. *Lingle's* blueprint for the future

After removing the substantially advances formula from possible takings formulae, the Supreme Court concludes by announcing the remaining field of takings analyses:

We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above – by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.²⁷

In conclusion, *Lingle* makes three significant contributions to takings jurisprudence: (1) it removes the "substantially advances" test from takings analyses; (2) it clarifies that takings and substantive due process analyses should be performed

separately; and (3) it reassures plaintiffs that they may seek relief under one (or more) of the remaining discrete takings analyses.²⁸

III. *Guimont v. Clarke* and Washington's Two-Part Threshold Inquiry

Meanwhile, as discussed more fully below, Washington courts continue to engage in a multi-step takings analysis derived from a now obsolete synthesis of prior takings inquiries.

A. Background: *Presbytery of Seattle v. King County*.

In its 1990 *Presbytery of Seattle v. King County*²⁹ holding, the Washington Supreme Court took on the subject of regulatory takings – the "most perplexing area of American land use law"³⁰ – dealing with the subject by setting a specific multi-part test for analyzing regulatory takings claims. The Court announced a two-part threshold inquiry that, although modified – survives today.

In *Presbytery*, the Presbytery of Seattle had purchased a single-family home on a several-acre parcel in unincorporated King County. The property was encumbered by a significant wetland area which reduced the ultimate developability of the parcel. Before applying for any permits from the County, the Presbytery brought suit against the County claiming that the wetland regulations effected a taking of property without just compensation. The trial court granted summary judgment to King County on the basis that the Presbytery had failed to exhaust its administrative remedies by not having applied for permits. The Court of Appeals affirmed.

On review by the Washington Supreme Court, the Court took the opportunity to clarify the relationship between takings claims and substantive due process claims. The Court stated that the "two constitutional theories are alternatives in cases where overly severe land use regulations are alleged." To determine which theory to apply, the Court created a two-part threshold inquiry:

1. Does the challenged regulation safeguard the public interest in health, safety, the environment or the fiscal integrity of an area, or does it go beyond preventing a public harm and actually enhances a publicly owned right in property?
2. Does the regulation destroy one or more of the fundamental attributes of ownership – the right to possess, to exclude others and to dispose of property?

Applying this two-part threshold inquiry, a takings analysis should be performed if the regulation either goes beyond preventing a public harm or destroys one or more fundamental attributes of ownership. The *Presbytery* takings analysis, then, consists of two steps: (1) the *Agins* "substantially advances" question and (2) the *Penn Central* ad hoc inquiry.

Conversely, a substantive due process analysis should be performed if the regulation passes the two threshold inquiries (thereby eliminating the possibility of a taking) because a regulation not constituting a taking must still pass the due process test of reasonableness.³¹

B. *Guimont v. Clarke*: the United States Supreme Court's *Lucas* opinion triggered a revision to *Presbytery* analysis

Just two years after the Washington Supreme Court's clarification of the relationship between regulatory takings and substantive due process claims in *Presbytery*, a United States Supreme Court decision forced the Court to take another look.

In 1992, the United States Supreme Court decided *Lucas v. South Carolina Coastal Council*,³² another regulatory takings case. In that opinion, the Court declared that a land use regulation depriving a property owner of all economically viable use constitutes a "total taking" for which the government must pay just compensation. By so ruling, the Court created a second category of *per se* takings, total takings joining physical invasions as *per se* takings.

The timing of the *Lucas* decision coincided with a regulatory taking case having just been argued before the Washington Supreme Court, *Guimont v. Clarke*. In *Guimont*, representatives of the Washington Manufactured Home Association challenged a state-wide regulation which required mobile home park owners to pay relocation compensation to tenants when closing mobile home parks. The Association argued that the forced relocation assistance was unconstitutional. The trial court ruled the regulation constituted a taking without just compensation and violated the park owners' substantive due process rights. The Washington Supreme Court accepted direct review. When the *Lucas* decision came down just after the *Guimont* oral argument to the Court, the parties submitted supplemental briefing on the impacts of *Lucas*.

In response to the *Lucas* decision, the Washington Supreme Court's *Guimont* opinion was an express effort to "square" the prior *Presbytery* test with the new *Lucas* total taking category. After engaging in a substantial discussion of both its prior takings/substantive due process analyses and the outcome of the *Lucas* opinion, the Court's adjustment of the *Presbytery* test was quite simple: the Court did nothing more than re-order the two threshold inquiries. Thus, under *Guimont*, Washington's analysis for Fifth Amendment takings claims³³ is as follows:

Step 1: The court engages in a two-part threshold inquiry.

- (1) Does the challenged regulation destroy or derogate a fundamental attribute of property ownership including the right to possess, to exclude others, to dispose of others, or to make some economically viable use of the property.

If the answer is "yes," the court conducts a takings analysis.

If the answer is "no," the court proceeds to the second threshold inquiry.

- (2) Does the challenged regulation safeguard the public interest in health, safety, the environment or the fiscal integrity of an area, or does the challenged regulation seek less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit?

If the answer is "the regulation seeks more to impose on those regulated the requirement providing an affirmative public benefit," the court conducts a takings analysis.

If the answer is "the regulation seeks more to safeguard the public interest," there is no taking, and the analysis ends.

Step 2: If answers to the threshold questions allow continued inquiry, the court conducts a takings analysis.

The takings analysis, in turn, has two parts:

- (1) The court asks whether the regulation "substantially advances" a legitimate state interest.

If the answer is "no," the regulation is a taking, and the analysis ends.

If the answer is "yes," the court proceeds with a balancing test.

- (2) If the inquiry continues, the court engages in the ad hoc takings balancing test established in *Penn Central* in which the court considers:

1. The regulation's economic impact on the property;
2. The extent of the regulation's interference with investment-backed expectations; and,
3. The character of the government action.

If, after balancing these considerations, the court determines that a taking has occurred, just compensation is required.

In conclusion, *Guimont* requires the satisfaction of two threshold inquiries and an affirmation that a challenged regulation substantially advances a legitimate state interest before a court would ever even reach *Penn Central's* factual inquiry.

IV. The Surviving *Guimont* Test Is Inconsistent with *Lingle*

Under *Lingle's* clear pronouncement that due process and takings analyses should no longer commingle, the *Guimont* test is no longer constitutionally valid for three primary reasons and will be modified.

First, as discussed at length above, in *Lingle*, the United States Supreme Court expressly extracted *Agins'* "substantially advances" inquiry from takings analyses and properly described it as a substantive due process analysis. Despite this, the *Guimont* test's two-part takings analysis still commences with a "substantially advances" inquiry. The Washington Supreme Court has yet not overruled this portion of the *Guimont* formulation, and courts in Washington continue to use it.

Second, a broader reading of *Lingle* requires elimination of *Guimont's* second threshold inquiry. To review, this second inquiry asks:

Does the challenged regulation safeguard the public interest in health, safety, the environment or the fiscal integrity of an area, or does the challenged regulation seek less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit?

Under *Lingle*, the Supreme Court did more than merely reject the "substantially advances" formula. The Court made it clear that regulatory takings and substantive due process inquiries are to be treated distinctly. Regulatory takings analyses relate to the impact on the property owner, asking whether the regulation is so severe as to become the functional equivalent of an appropriation of property. Substantive due process analyses, on the other hand, focus on reasonableness and the balancing of public and private interests through a three-prong due process test:

1. Is the regulation aimed at achieving a legitimate public purpose?
2. Does the regulation use means that are reasonably necessary to achieve that purpose?
3. Is the regulation unduly oppressive on the landowner?³⁴

When juxtaposed against the three-prong substantive due process test, Washington's second threshold inquiry reveals itself as more appropriately a due process reasonableness test rather than a regulatory takings test because it provides no help in determining whether the regulation is the "functional equivalent" of a government appropriation or invasion. Yet, Washington continues to embrace the second threshold inquiry. In the most recent published Washington opinion on regulatory takings, *Peste v. Mason County*, Division II of the Court of Appeals observed that before a court employs

a takings analysis it must "analyze whether the challenged regulation goes beyond preventing a public harm to producing a public benefit."³⁵

Third, and simultaneously maybe most important and most basic, the *Guimont* flowchart-like approach with threshold inquiries and ordered steps is no longer necessary under *Lingle*. The *Lingle* Court concluded with the simple instructions that a plaintiff seeking to challenge a government regulation can proceed under one of the four distinct takings theories: (1) physical invasion; (2) "total taking" under *Lucas*; (3) a *Penn Central* "goes too far" taking; or (4) an excessive land use exaction under *Nollan* and *Dolan*. Each of these four theories has its own discrete, stand-alone test. Therefore, under *Lingle*, the proper takings analysis becomes:

Step 1: Identify the nature of the regulation's impact:

- Physical invasion?
- Loss of all economically viable use of the property?
- Encumbrance of property use but some economically viable use remains?
- Exaction of land sought as a development condition?

Step 2: Apply the appropriate analysis based on the nature of the impact:

- For a physical invasion: This is a *per se* taking, requiring just compensation.
- For loss of all economically viable use: This is a *per se* taking, requiring just compensation.
- For encumbrance less than total loss of economic use: Employ *Penn Central*'s three-part factual inquiry to determine if the regulation goes too far.
- For an exaction: Employ *Nollan* and *Dolan*'s essential nexus and rough proportionality guidelines to determine if the exaction rises to a taking requiring compensation.³⁶

The dissent in *City of Des Moines v. Gray Businesses, L.L.C.* recognized this simplification of takings analyses, agreeing with the majority that under the circumstances of the case, a *per se* taking had not occurred. However, Judge Becker observed that a government regulation may still constitute a taking under *Penn Central* if it goes too far.³⁷ He suggests that the *Lingle* test will ultimately replace the *Guimont* structure. As discussed, this has yet to happen.

V. Looking to the Future: *Lingle*'s Impact on the Police Power

The impact of *Lingle* will reach even beyond restructuring Washington's *Guimont* test to align with the Supreme Court's interpretation of Fifth Amendment takings analyses. *Lingle* also signals new limitations on the police power. The article next

overviews the nature of and historical judicial deference to the police power before concluding with a forecast of *Lingle's* impacts on police power limits on Washington.

A. An Overview of the Police Power and the Courts' Historical Deference.

The police power of the state (and of the municipalities within their limited jurisdiction [citation omitted]) not only extends to enactments designed to protect and promote public peace, health, morals and safety, but also to those intended to promote the general public welfare and prosperity.³⁸

In Washington, municipalities derive their police power authority to regulate from Article 11, Section 11 of the Washington Constitution which provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Essentially, the police power allows local governments to enact regulations for the public benefit, even if those regulations result in harm to some individuals.

The scope of local government's police power is broad and may be applied to all of the legitimate objects of government. As stated in *Snohomish County v. State*: "The county's police power is as extensive as that of the Legislature, so long as the subject matter is local and the regulation does not conflict with general laws."³⁹ In addition, regularly enacted laws have traditionally been presumed constitutional. The Washington Supreme Court articulated the significance of this presumption in *Lenci v. Seattle*:

[I]f a state of facts justifying the ordinance can reasonably be conceived to exist, such facts must be presumed to exist and the ordinance passed in conformity therewith. [Citation omitted]. These rules are more than mere rules of judicial convenience. They mark the line of demarcation between legislative and judicial functions.⁴⁰

To overcome this presumption, Washington courts have held that a challenger must show either that the legislation is not reasonably necessary for the public health, safety, morals, or general welfare, or that it is not substantially related to a legitimate, identified governmental goal.⁴¹ Moreover, economic hardship, which often may accompany legislative action, is presumed not to affect a regulation's constitutionality unless the legislation is shown to be "clearly unreasonable and discriminatory."⁴²

Prior to the *Lingle* decision, the United States Supreme Court also treated regulations enacted under states' police powers with a great degree of deference. The *Mugler v. Kansas* opinion⁴³ represents the height of the Court's deference to police power authority. In *Mugler*, the Court addressed the constitutionality of a local police power regulation banning the manufacturing of liquor except for medical, scientific, or mechanical purposes. Although the regulation prohibited the existing use of the defendant's property, the Court rejected the claim that the regulation failed under the

Fourteenth Amendment due process clause or required just compensation under the Fifth Amendment takings clause:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . Nor can legislation of that character come within the fourteenth amendment, in any case, unless it is apparent that the real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.

Mugler, 123 U.S. at 668-69. Under the Court's *Mugler* analysis, therefore, any police power regulation enacted to further public "health, morals, or safety" withstands both due process and takings clause challenges.

Although the Court eventually moved away from its *Mugler* conclusion that any valid police power regulation will survive a due process or takings challenge, the pre-*Lingle* Court continued to give deference to police power enactments when considering takings clause claims. For example, in 1962's *Goldblatt v. Hempstead* opinion,⁴⁴ the Court considered the validity of a town's zoning ordinance which prohibited excavating uses and operated to terminate the petitioner's business. Affirming the zoning ordinance as a valid exercise of the town's police powers, the Court nevertheless acknowledged that a police power regulation *could* rise to the level of a taking:

This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. There is no set formula to determine where regulation ends and taking begins.⁴⁵

Finally, in the Court's *Penn Central* opinion – the bedrock regulatory takings case – the Court strongly signaled that police power regulations could be curtailed by the Fifth Amendment takings clause if the effect of the regulation was too harsh:

A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."⁴⁶

Yet, obviously, the *Penn Central* Court upheld the New York ordinance at issue as a valid regulation. In so doing, it based its decision in part on the regulation's "promotion

of the general welfare,"⁴⁷ thereby once again justifying harm to the private property owner by achieving public benefit.

With *Lingle* seemingly ending the intermixing of due process and takings analyses, the historical deference to police power regulations will not likely continue to the same degree. This is because, under *Lingle*, the judicial respect given to regulations purportedly advancing the public good has been recognized by the Court as an analysis properly made under a due process clause challenge, not a takings clause challenge. The three-prong *Penn Central* factual takings clause analysis, conversely, evaluates a regulation's impact on the private individual. In theory, then, *Lingle*'s endorsement of the *Penn Central* inquiry, once applied in Washington, will operate to reduce local governments' police power authority because regulations can no longer be saved from a takings challenge by their advancement of the public interest. This article concludes with a forecast of how *Lingle* will redirect takings clause litigation in Washington.

B. Under *Lingle*, Police Power Regulations Must Independently Satisfy Fifth Amendment Takings Challenges.

In Washington, municipalities' authority to exercise their police powers has been fortified by the hurdles facing a plaintiff in bringing a takings challenge under the *Guimont* test. Because a Washington plaintiff is rarely able to satisfy the necessary *Guimont* threshold inquiries, many plaintiffs never even reach a takings analysis. Instead, plaintiffs must pursue their claims solely as substantive due process claims.

This is an unsatisfactory and unjust result. As the Washington Supreme Court has acknowledged, takings claims and substantive due process claims attack regulations at different stages. A substantive due process claim challenges the government's authority to enact the regulation at all. Such claims seldom prevail. A takings claim, conversely, *presumes* that the municipality had the authority to regulate but evaluates whether the effect of the regulation is inordinate. With the *Guimont* formula setting the bar so high for reaching a Fifth Amendment takings analysis, Washington courts rarely allow a plaintiff to force a look at whether the government regulation has effected a taking.

When Washington courts apply the Supreme Court's *Lingle* opinion, plaintiffs will have a second feasible option for challenging land use regulations. A plaintiff could still challenge the government's authority to enact the regulation under the three-prong due process test. And now, a plaintiff would also be able to challenge the regulation as a taking requiring just compensation by proceeding directly to the appropriate takings analysis (physical invasion, total taking, *Penn Central* taking, or exaction). The effect of this will be that police power regulations must meet two tests: (1) regulations must be reasonable (*i.e.*, the government cannot enact regulations denying due process) and (2) regulations must not amount to the functional equivalent of an appropriation of property (*i.e.*, the government cannot take property without just compensation).⁴⁸

But, how significant will this change really be? The *Guimont* test has never been applied to a physical invasion or exaction claim. Furthermore, since *Guimont* Washington courts have recognized that the "total taking" scenario in *Lucas* constitutes a categorical or per se taking of private property requiring just compensation. Necessarily then, the only form of taking claim that is entangled in the *Guimont* formula is a claim that a land use regulation has gone too far – a *Penn Central* taking. For this reason, in Washington, the impact of the elimination of the *Guimont* takings analysis will only be felt by *Penn Central* takings claims.

While *Lingle* plainly rejected the relevance of due process inquiry in a takings context and with its validation of regulation by its public purpose, it recognized the continuing relevance of considering the character of the burden and its distribution among property holders. As discussed, *Penn Central*'s three-prong factual inquiry concludes with an analysis of "the character of the government action." This third prong, coupled with *Lingle*'s continued reflection on the character and distribution of regulation, may bring consideration of a regulation's advancement of the public interest right back into the takings equation. *Penn Central*'s own description of this third, "character" prong emphasizes balancing public interest and private harm:

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.⁴⁹

Significantly, the Supreme Court's post-*Penn Central* decision, *Loretto v. Teleprompter Manhattan CATV Corp.*,⁵⁰ created a per se takings category for physical invasions. This eliminated the need for the distinction set up in *Penn Central*'s third prong between physical invasions and regulations for the "common good." Since *Loretto*, the Supreme Court has interpreted the third prong to require that the burdens imposed by regulation be distributed among the public rather than falling on individuals.⁵¹ But the lower courts – and even arguably the Supreme Court itself – have not treated this prong consistently and have occasionally applied the third prong to endorse (or reject) regulations after weighing public interest against private harm.⁵²

With Washington courts increasingly engaged in *Penn Central* takings analyses, the courts will need to resolve the question of what the "character of the government action" prong means to a regulatory taking claim in light of *Lingle*'s separation of takings and substantive due process. One reading of *Lingle* requires entirely divorcing consideration of the public interest from the "character" prong. A narrower reading of *Lingle*'s application to the "character" prong requires limiting consideration of the public interest to the regulation's *distribution of burden*, rather than the regulation's *purpose*. The eventual judicial resolution will clarify to what extent governments can exercise their police powers of regulation without going "too far" and effecting a Fifth Amendment taking requiring just compensation.

VI. Conclusion

In conclusion, the United States Supreme Court's opinion in *Lingle v. Chevron U.S.A., Inc.* likely will alter litigation of regulatory takings claims in Washington. *Lingle* demands the elimination of *Guimont v. Clarke*'s two-part threshold inquiry which has prevented plaintiffs from submitting challenged regulations to a *Penn Central* regulatory takings analysis. Once the threshold inquiry is eliminated, plaintiffs will proceed directly to *Penn Central*'s three-prong factual inquiry. At that time, Washington courts can take up the issue of interpreting *Penn Central*'s "character of the government action" prong in light of the Supreme Court's instructions that due process and takings analyses can no longer be commingled.

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² 544 U.S. 528 (2005).

³ 121 Wn.2d 586, 584 P.2d 1 (1993).

⁴ *Lingle*, 544 U.S. at 533.

⁵ *Id.* at 532-33.

⁶ *Id.* at 533-34.

⁷ 447 U.S. 255 (1980).

⁸ 544 U.S. at 534-35.

⁹ *Id.*

¹⁰ *Id.* at 536.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 536-37.

¹⁴ 260 U.S. 390 (1922).

¹⁵ 505 U.S. 1003 (1992).

¹⁶ 438 U.S. 104 (1978) (hereinafter "*Penn Central*").

¹⁷ 544 U.S. at 540.

¹⁸ 447 U.S. at 260.

¹⁹ 277 U.S. 183 (1928).

²⁰ 272 U.S. 365 (1926).

²¹ In dicta in *Penn Central*, the Court noted that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." 438 U.S. at 127.

²² 544 U.S. at 542.

²³ *Id.* at 540.

²⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 285 (1987).

²⁵ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

²⁶ 544 U.S. at 548.

²⁷ *Id.*

²⁸ *Lingle* is an 8-1 opinion. Justice Kennedy, the only Justice not joining Justice O'Connor's opinion, filed a concurring opinion to clarify that the *Lingle* opinion should not foreclose the possibility that a regulation could be so arbitrary or irrational so as to violate due process rights.

²⁹ 114 Wn.2d 320, 787 P.2d 907 (1990).

³⁰ *Presbytery*, 114 Wn.2d. at 909.

³¹ In Washington, a substantive due process test requires the satisfaction of three elements. The regulation must (1) be aimed at achieving a legitimate state purpose; (2) use means that are reasonably necessary to achieve that purpose; and (3) not be unduly oppressive on the person regulated. *Viking Prop. Inc. v. Holm*, 155 Wn.2d 112, 131, 118 P.3d 322 (2005).

³² 505 U.S. 1003 (1992).

³³ The *Guimont* court clarified that its decision addressed only takings claims brought under the Federal Constitution, as the plaintiffs had not engaged in necessary briefing of the analogous State Constitution provisions.

³⁴ In reviewing the "unduly oppressive" element, courts weigh the following non exclusive factors:

On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present, and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Presbytery, 114 Wn.2d at 331.

³⁵ 133 Wn. App. 456, 472, 136 P.3d 140 (2006).

³⁶ *See Dolan*, 512 U.S. at 386, 392.

³⁷ The dissenting opinion then goes on to quote the second *Guimont* threshold inquiry, rather than the *Penn Central* factors, as the test for whether a regulation goes too far.

³⁸ *Tacoma v. Fox*, 158 Wash. 325, 330-31, 290 P. 1010 (1930).

³⁹ 97 Wn.2d 646, 649, 648 P.2d 430 (1982).

⁴⁰ *Lenci v. Seattle*, 63 Wn.2d 664, 668, 388 P.2d 926 (1964).

⁴¹ *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998); *Homes Unlimited, Inc. v. Seattle*, 90 Wn.2d 154, 158, 579, P.2d 1331 (1978); *Second Amendment Found. v. Renton*, 35 Wn. App. 583, 586, 668 P.2d 596 (1983).

⁴² *Homes Unlimited*, 90 Wn.2d at 158.

⁴³ 123 U.S. 623 (1887).

⁴⁴ 369 U.S. 590 (1962).

⁴⁵ 369 U.S. at 594 (internal citations omitted).

⁴⁶ 483 U.S. at 149-50.

⁴⁷ 483 U.S. at 138. (concluding that the New York City zoning ordinance did not effect a taking because, in part, the "restrictions are substantially related to the promotion of the general welfare").

⁴⁸ The option of pursuing two claims may only be viable in state court. In federal courts, substantive due process claims have been severely curtailed by *Graham v. Connor*, 490 U.S. 386 (1990), and its progeny that federal plaintiffs may not have alternate substantive due process and takings claims. *But see* Justice Kennedy's concurring opinion in *Lingle* that substantive due process claims may still exist. 544 U.S. at 548.

⁴⁹ *Penn Central*, 438 U.S. at 124.

⁵⁰ 458 U.S. 419 (1982).

⁵¹ *Bowen v. Gilliard*, 483 U.S. 587, 608 (1987) (uphold AFDC child support requirements, in part, because the burden was spread among the taxpaying public).

⁵² For example, in *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 861 (9th Cir. 2001), the Ninth Circuit applied the character prong by determining whether the government regulation was unusual within the industry at issue. Meanwhile, in *U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 419 (5th Cir. 2000), the Fifth Circuit analyzed whether the regulation was "rational" and represented a solution to a compelling problem that would be distributed across the public.