A quarter century ago, the Supreme Court suggested that a regulation may be considered a taking if it fails to "substantially advance" a legitimate state interest. The phrase developed into a vehicle for attacking environmental regulations, and particularly local land use ordinances. Last May, a unanimous Court recognized its mistake in surprisingly candid language. Taking up a highly political controversy, Justice O'Conner made clear that the "substantially advances" test, while applicable to due process, "has no proper place in our takings jurisprudence." Moreover, she signaled the Court's intention to avoid interfering with the democratic process. Even though a concurrence by Justice Kennedy welcomed increased due process litigation, the tone of Lingle rebukes the substantive due process review characterized by Lochner v. New York. Nevertheless, Justice O'Connor tried distinguishing Nollan v. Cal. Coastal Comm'n and Dolan v. Tigard as "adjudicative land-use extractions." If this becomes the next fortuitously coined phrase in takings jurisprudence, Lingle could create as much doctrinal inconsistency as it resolves. Fortunately, that is unlikely. Given the political climate surrounding Lingle, courts may choose to avoid Nollan and Dolan's inherent contradictions with Lingle by limiting their application. Thus, Lingle can do a great deal to protect all kinds of environmental regulations from judicial overreaching.

BACKGROUND

On June 21, 1997, the Hawaii legislature responded to increasing public concern about gasoline prices by enacting Act 257. Act 257 im-

* 125 S. Ct. 2074 (2005).
** J.D. Candidate, Harvard Law School, Class of 2006.
4 Id. at 2083.
5 See id. at 2085 (observing that the courts are not well-suited to "scrutinize the efficacy of . . . state and federal regulations.").
6 Id. at 2087 (Kennedy, J., concurring).
7 198 U.S. 45 (1905) (overturning a legislative limit on working hours on grounds that, in the Court's judgment, the policy would not be effective in furthering its stated goal).
8 Id. at 2086; see also Dolan v. Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825 (1987).
9 Cf. Lingle, 125 S. Ct. at 2074.
10 Chevron USA, Inc. v. Cayetano, 57 F. Supp. 2d 1003, 1004–05 (D. Haw. 1998) [hereinafter Chevron I]; 1997 Haw. Sess. Laws, Act 257, § 3 (codified as amended at HAW. REV. STAT. § 486H-10.4 (2004)). Notably, this is only one chapter in the political fight over gasoline prices in Hawaii. For instance, between 1999 and 2001, the state sued oil companies over alleged anti-trust violations that inflated gasoline prices. See Anzai v. Chevron
posed rent controls on the lease of service stations, similar to those traditionally imposed on residential properties. In theory, the rent controls would lower operating costs for service stations, and in turn, the service stations would charge Hawaii consumers lower prices. Chevron USA, Inc. ("Chevron") promptly refuted the efficacy of Act 257, pointing out, inter alia, that service stations could simply pocket their savings. The owner of sixty-four Hawaii service stations, Chevron sued Hawaii's governor and attorney general, alleging Act 257 was an unconstitutional taking under the Fifth and Fourteenth Amendments.

Chief Judge Kay found for Chevron on summary judgment. He acknowledged the propriety of efforts to "protect consumers from the harmful effects of the highly concentrated petroleum market in Hawaii," but found that "Act 257 as crafted fails to substantially further this legitimate state interest, and therefore effects an unconstitutional taking." Chief Judge Kay did not elaborate on takings doctrine, but instead broadly cited earlier Supreme Court decisions.

On appeal, the Ninth Circuit affirmed Chief Judge Kay's ruling with respect to Chevron's takings claim, but only after considerably more discussion. Writing for himself and Judge Dorothy Nelson, Judge Beezer quickly dismissed the suggestion that he should evaluate the law as potentially unconstitutional under the Fifth Amendment's Due Process Clause, thus rejecting the application of rational basis review. Instead, he looked
to the more demanding "substantially advances" test\(^{21}\) to identify Act 257 as a regulatory taking under the Fifth Amendment's Takings Clause.\(^{22}\)

Judge Fletcher concurred with the majority's decision to remand the case to district court for factual findings, but disagreed with its reasoning on the takings issue.\(^{23}\) Noting that there was no functional difference between rent control laws like Act 257 and price controls, which would be challenged under due process, he wrote that "[t]he constitutional test for ordinary rent control and price control laws is the same [and] essentially requires that the law be 'reasonable' and 'not confiscatory.'"\(^{24}\) Judge Fletcher traced the "substantially advances" test to its conception in \textit{Agins v. Tiburon}, and argued for limiting it to cases "of severe zoning limitations on the use of land... and required dedications by landowners as a condition of receiving building permits."\(^{25}\) He would direct the district court in \textit{Chevron} to apply the less stringent rational basis review.\(^{26}\)

On remand, Judge Mollway found for \textit{Chevron} on the facts.\(^{27}\) On the case's second appeal to the Ninth Circuit, Hawaii argued for the first time that Act 257 should be analyzed under the Due Process Clause and its rational basis review, rather than as a takings case with more probing "substantially advances" review.\(^{28}\) Unimpressed, Judge Beezer reminded the litigants that the case's posture precluded this new argument, and further, that while considering whether \textit{Chevron} made this argument in the first appeal, the majority stated a preference for the "substantially advances" test, making it the law of the case.\(^{29}\)

\(^{21}\) \textit{See Nollan v. Cal. Coastal Comm'n}, 483 U.S. 825, 834 (1987) (defining this test as whether "the regulation 'substantially advance[s]' the 'legitimate state interest' sought to be achieved, not that the State could rationally have decided that the measure adopted might achieve the State's objectives"); cf. Glenn E. Summers, \textit{Private Property without Lochner: Towards a Takings Jurisprudence Uncorrupted by Substantive Due Process}, 142 U. Pa. L. Rev. 837, 841 (1993) (concluding that this test "does nothing more than create an exception to the minimum rationality standard of due process").

\(^{22}\) \textit{Chevron II}, 224 F.3d at 1035 (citing \textit{Richardson v. Honolulu}, 124 F.3d 1150 (9th Cir. 1997)).

\(^{23}\) \textit{Id.}

\(^{24}\) \textit{Chevron II}, 224 F.3d at 1043 (Fletcher, J., concurring in judgment).

\(^{25}\) \textit{Id.}


\(^{27}\) \textit{Chevron II}, 224 F.3d at 1044–49 (Fletcher, J., concurring in judgment). Judge Fletcher never directly stated how he would apply rational basis review, but implies that Act 257 would pass this lower level of scrutiny. \textit{Id.}; \textit{see also supra} note 13 and infra note 49.

\(^{28}\) \textit{Chevron USA, Inc. v. Cayetano}, 198 F. Supp. 2d 1182, 1183 (D. Haw. 2002) [hereinafter \textit{Chevron III}] (evaluating a series of complex factual scenarios to find that "Act 257 will not advance the goal of lowering gasoline prices").

\(^{29}\) \textit{Chevron USA, Inc. v. Bronster}, 363 F.3d 846, 850 (9th Cir. 2004) [hereinafter \textit{Chevron IV}].

\(^{30}\) \textit{Id.} at 850–55; \textit{see also Chevron II}, 224 F.3d at 1033–36. Curiously, Judge Beezer looked into \textit{Hawaii Housing Authority v. Midkiff}, 467 U.S. 229 (1984), and distinguished it by noting "the Court applied the more deferential test [i.e. rational basis review instead of the 'substantially advances' test] only because it involved claims of an actual physical taking." \textit{Chevron IV}, 363 F.3d at 850. This system paradoxically reviews government more strin-
Hawaii filed a second petition for certiorari with the Supreme Court. This time, the Court granted certiorari and unanimously reversed.

Justice O’Connor began the opinion by observing that “on occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined.” Her candor continued, as she wrote that the “substantially advances” test 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.”

She explained that the “substantially advances” test inappropriately focuses on the efficacy of the regulation, and “reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights or how the regulatory burden is distributed among property owners.” These factors—magnitude, character, and distribution of the burden—are the ones to which the courts should look to determine regulatory takings; they help the court to determine whether the government action is “functionally equivalent to a classic taking in which government directly appropriates private property.”

Justice O’Connor elucidated takings inquiries by separating two questions: first, whether the case presents a taking; and second, whether the action is an arbitrary use of government power that would violate the Due Process Clause. In previous cases, these two distinct inquiries have been gently on regulatory takings than it does for physical takings. The justification commonly given for this result is that physical takings require just compensation, and therefore need less review. See Chevron I, 57 F. Supp. 2d at 1008 (citing Midkiff, 467 U.S. at 242). However, this justification falls apart when you consider that once a court finds a regulatory taking, the government owes full and just compensation identical to what it would owe for a physical taking. See, e.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). While Lingle clears up this confusion between defining takings and reviewing due process, this example shows how rational basis review, not the “substantially advances” test, works in ordinary physical takings cases.

Hawaii had also appealed the Ninth Circuit’s first decision, but the Supreme Court denied certiorari. Cayetano v. Chevron USA, Inc., 532 U.S. 942 (2001).


Lingle, 125 S. Ct. at 2084.

Id.

Id. at 2082.

Id. at 2080–84.
conflated by “regrettably imprecise” language. The conflation caused the “substantially advances” test to seep into takings jurisprudence where “it has no proper place.” Rather, the test “prescribes an inquiry in the nature of due process.” Because earlier findings relied on inappropriately applying a due process test to determine a taking, they could not support a judgment against Act 257.

Teasing out this distinction with logical application, Justice O’Connor pointed out the “ineffective” and “foolish” result of allowing non-invasive regulations to qualify as takings merely because a legislature or executive agency acted ineffectively, when a landowner with identical burdens would not have suffered a taking (and hence would receive no compensation) merely because his legislature or executive agency acted in a way that would effectively serve a legitimate state interest further down the line.

Justice O’Connor’s opinion also addressed “serious practical difficulties” that would result if courts had to “scrutinize the efficacy of a vast array of state and federal regulations.” She wrote that applying the “substantially advances” test as a standard for finding regulatory takings “would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.” Noting the highly political nature of gas prices in Hawaii, she observed that “the reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.”

In the final part of her opinion, Justice O’Connor wrote that her candid language in Lingle should not be employed to disturb the Court’s prior holdings. She explained away most of the Court’s earlier references to the “substantially advances” test as mere dicta. Nollan and Dolan were not as easily dismissed; nevertheless, Justice O’Connor distinguished them on the grounds that they were cases of “adjudicative land use extraction,”

37 Id. at 2083.
38 Id. at 2087.
39 Id. at 2083. However, Justice O’Connor’s carefully chosen language cannot obscure the fact that other physical takings receive rational basis review. See supra note 29.
40 Id. at 2084.
41 Id. at 2085; see also Reply Brief for Petitioners at 15–20, Lingle v. Chevron USA, Inc., 125 S. Ct. 2074 (2005) (No. 04-163) [hereinafter Hawaii Brief]; Brief for the United States as Amicus Curiae in support of the Petitioners, Lingle v. Chevron USA, Inc., 125 S. Ct. 2074 (2005) (No. 04-163) [hereinafter Government Brief].
42 Lingle, 125 S. Ct. at 2085.
43 Id.; see also supra note 10. In fact, Justice O’Connor considered deference to the legislature to be so well established that she does not provide any supporting citation. See Lingle, 125 S. Ct. at 2085.
44 Id. at 2085–86; but see Transcript of Oral Argument, supra note 31 (Scalia, J.) (“So we have to eat crow no matter what we do. Right?”)
45 Lingle, 125 S. Ct. at 2086.
functionally equivalent to a physical taking. A regulatory action like Lingle could not fall into this line of precedent.

Justice Kennedy joined in Justice O'Connor's opinion, but wrote separately to observe that Lingle did nothing to weaken due process jurisprudence. He explained, "this separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process." 

**ANALYSIS**

**A. Lingle in Political Context**

Lingle stands out among the Supreme Court's recent takings decisions both for its unanimity and for its unusual commitment to producing doctrinally coherent takings standards. Early commentators have taken Lingle as a sign that the Court wishes to move toward moderation. Yet, a complicated political quandary underlies this lucid decision.

Many conservatives, including those on the Court, support the Private Property Rights Movement, which resists any government interference into private property. In pure doctrinal form, private property rights

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46 Id.; see also Chevron II, 224 F.3d at 1043–44 (Fletcher, J., concurring in judgment).
47 Lingle, 125 S. Ct. at 2086.
48 Id. at 2087 (Kennedy, J., concurring).
49 Id. Neither Hawaii nor Chevron advanced a timely claim for due process review. See Chevron II, 224 F.3d at 1030; Chevron III, 363 F.3d at 850. This leaves an open question as to whether Act 257 would pass this less stringent review. See supra notes 13 and 26; but cf. Brief for the Cato Institute as Amicus Curiae in Support of Respondent, Lingle v. Chevron USA, Inc., 125 S. Ct. 20074 (2005) (No. 04-163) [hereinafter Cato Institute Brief].
51 See Dowling, supra note 50; Linda Greenhouse, The Court in Transition the 2004-2005 Session; Court's Term a Turn Back to Center, N.Y. TIMES, July 4, 2005, at A1.
53 This view has long been recognized as an impediment to environmental protection. See Stanley Scott, An Introductory Interpretation, Regulation v. Compensation in Land Use Context, xi, xiii (1977). In fact, many scholars believe the development of the Private Property Rights Movement is a direct reaction to environmental laws. See, e.g., Alfred M. Olivetti, Jr., & Jeff Worsham, This Land is Your Land, This Land is My Land: The Property Rights Movement and Regulatory Takings 21–48 (2003); Feinman, supra note 52, at 128–71. For a view of the Private Property Rights Movement applied to environmental law generally, see Nancie G. Marzulla & Roger J. Mar-
advocates have proposed compensation for any regulation that interfered with a property interest. While such extreme views have never been widely credited, the Private Property Rights Movement has received varying degrees of endorsement in Court opinions.

In fact, most of the success enjoyed by the private property rights movement has been in the courts, which is not surprising considering the restrictive limits private property rights advocates place on legislatures and executive agencies. This creates an acute tension between the so-called political branches and the judiciary. It charges the courts with scrutinizing delicate political decisions even in cases where legislatures or administrative agencies applied all of the proper democratic protections and procedures. Lingle vividly illustrates this tension: years of heated debate in the state legislature, politicians running from car to car with pamphlets at gas stations, countless citizen editorials in the local press—all to be resolved by a single federal judge in a detached courtroom. This does not sit well with conservatives who pride themselves on judicial restraint, sepa-


See Lingle v. Chevron USA, Inc., 125 S. Ct. 2074, 2085 (2005) ("[W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.").


See Hawaii Brief, supra note 41, at 18.

6 See ReyEs, supra note 10.

ration of powers and fidelity to an originalist notion of democracy—
ev

Justice Scalia is more closely associated with the property rights
movement than any of his colleagues, and he has often articulated his
staunch commitment to private property rights, even in the face of his
stated preference for originalist constitutional interpretation. Still, Justice
Scalia rejects *Lochner*-like substantive due process. When asked to choose,
Justice Scalia—alongside Chief Justice Rehnquist and Justice Thomas—
quietly added his vote to overrule aggressive judicial review of political
action. This decision on the part of Court conservatives strongly indicates
that future regulations will not be disturbed with probing substantive due
process inquiries.

Looking at the direction of takings jurisprudence, Court watchers also
keep a careful eye on the moderates, particularly Justice Kennedy. In
*Lingle*, his role was the most intriguing. His concurrence invited a more
probing due process inquiry that, while unpopular, has never expressly
been overruled. Aware of this danger, early commentators have pointed
out that a reversion to *Lochner* would cause exactly the problem that the
*Lingle* Court wished to avoid: intrusive judicial review that prevents de-
mocratic rule.

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61 See Feinman, supra note 52, at 164–68 (criticizing "conservative mythmaking about
the long standing, fundamental nature of property rights"); Tushnet, supra note 56, at
283–85 ( remarking on how takings deviate from original constitutional interpretation);
Lucas v. S.C. Coastal Comm’n, 505 U.S. 1003, 1028 n.15 (1992) (stating that the founding
fathers did not envision regulatory takings as part of the Fifth Amendment); but see Dowling,
supra note 50 (noting that *Lingle* properly characterizes the original understanding).

62 See Lazarus, supra note 50, at 1118–19 ("None could contend that Justice Scalia has
not adhered to a firm position in the regulatory takings cases. Property owners have no
greater ally on the Court.").

63 See id.; see also Feinman, supra note 52, at 159 (noticing that Justice Scalia is con-
siderably to the right of center when interpreting private property rights).

64 See Dowling, supra note 50. See also *Lochner* v. New York, 198 U.S. 45 (1905); but
see Lazarus, supra note 50, at 1118–19 (noticing that Scalia has sometimes overlook-
cenconcerns about overriding democratically elected branches in his takings decisions).

65 See Lazarus, supra note 50, at 1101, 1108.

66 Lingle v. Chevron USA, Inc., 125 S. Ct. 2074, 2086 (2005) (Kennedy, J., concurring);
cf. *Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting). "Moderate" sheepskin aside, Just-
tice Kennedy may be a subtle extremist on this point. See Lazarus, supra note 50, at 1108–
09 (noticing that Justice Kennedy tends to favor *Lochner*-like review in defense of property
rights); Posting of Paul Utrecht, paulzulpc.com, to SCOTUSBlog, http://www.scotusblog.
com/movabletype/mt-tb.cgi/366 (May 28, 2005, 23:00 EST) (on file with the Harvard En-
vironmental Law Review) ("I hope there are more than half a dozen people interested in
Lingle, because it may be a critical turning point in constitutional law."); but see also Mi-
ichael M. Berger, *Though No Blockbuster, Lingle Disentangles Takings, Process*, DAILY J:
1803714780&tkn=GUEecSNVx&evid=720658&evid=1&scid=37378 (on file with the Har-
vard Environmental Law Review) (supporting *Lochner*-like review, trivializing concerns about
interference with democratic rule by focusing on injury to politicians’ ego, and side-stepping
serious separation of powers questions).

67 See Utrecht, supra note 66 ("Ultimately, the governments may regret their victory in
Lingle. If the Due Process Clause is given teeth, it will truly affect each and every piece of
However, considering the political climate that gave birth to *Lingle*, this turn is extremely unlikely. Hardcore property rights advocates may want the most intrusive review possible for environmental regulations and land use restrictions, but most liberals and conservatives do not want the courts to unreasonably interfere with the good-faith predictions of the political branches. Justice Kennedy's invitation to due process claimants may evolve into a clearer due process test, but *Lochner* will remain a textbook story on the importance of not interfering with democracy.

What will develop from *Lingle* is a more coherent takings jurisprudence. The "substantially advances" test acted as a crutch through which litigants and courts could avoid the mystifying *Penn Central* test for determining whether a taking has occurred. With the crutch gone, the Supreme Court will have to end academic debates about the feasibility of a *Penn Central* analysis and show us how it is done.
B. The Future for Nollan and Dolan

Despite Lingle's clarity, it leaves "land-use extraction" twins Nollan and Dolan71 in a remarkably precarious position.72 Justice O'Connor, and Judge Fletcher before her, kept them explicitly distinct from the case at hand.73 Yet, "substantially advances" is a due process inquiry,74 and a thoughtful analysis shows no relevant substantive due process distinction between "adjudicative land-use extraction" and legislative regulations like Act 257.

To force the distinction between Lingle and "adjudicative land-use extraction" cases, Justice O'Connor made much of the fact that Nollan and Dolan, unlike Lingle, require property owners to physically alter the use of their land.75 The emphasis on the physical nature of the taking appeals to Lockeans or romantics,76 but it is a technicality in a modern world where value is fungible and economic considerations dominate our thinking.77 To see how ineffective the distinction is, imagine that Hawaii had mandated that Chevron dedicate five square feet of each service station to the preservation of native plants. Would putting service station soil to work for

71 It is well established that these cases counteract important environmental initiatives. See Srinath Jay Govindan, Note, "Taking" Steps to Protect Private Property and Endangered Species: Constitutional Implications of Habitat Conservation Planning after Dolan v. Tigard, 47 EMORY L.J. 311 (1998) (discussing the dangers Dolan posed to the Endangered Species Act pre-Lingle); Editorial, Judicial Takings and Givings, WASH. POST, May 28, 2005, at A24 ("Lingle is important, because in it the court repudiated a dangerous doctrine in had articulated [in Agins], a doctrine with horrid implications for environmental and other regulatory enforcement.").

72 Both Nollan and Dolan found regulatory takings in cases in which local planners attached restrictions and requirements while issuing building permits. Using the Agins "substantially advances" language the Court found that the land use requirements were takings, because the planners failed to show an "essential nexus" between the regulations and their stated legitimate purposes. See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834–37 (1987) (providing background and reasoning through the facts); Dolan v. Tigard, 512 U.S. 374, 385–91 (1994) (same); see also Edward J. Sullivan, Return of the Platonic Guardians: Nollan and Dolan and the First Prong of Agins, 34 URB. LAW. 39, 40 (2002) (noting that Nollan and Dolan "turn solely" on the first prong of Agins); see also Siegel, supra note 68.

73 See Lingle v. Chevron USA, 125 S. Ct. 2086 (2005); Chevron II, 224 F.3d at 1044 (Fletcher, J., concurring in judgment).

74 Lingle, 125 S. Ct. at 2086.

75 Id.; but see Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (emphasizing that a finding of a taking turns on the degree of the interference with the right, and not the character of the property at issue); see also Chevron IV, 363 F.3d at 850 (pointing out that other physical takings receive rational basis review).


77 See Fred Bosselman, Land as a Privileged Form of Property, in TAKINGS: LAND DEVELOPMENT AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 29, 42 (David L. Callies ed., 1996) ("[T]he Supreme Court's decision to re-establish the privileged status of land over other investment is puzzling."); J. David Breemer, The Evolution of the "Essential Nexus": How State and Federal Courts have Applied Nollan and Dolan and Where They Should Go from Here, 59 WASH. & LEE L. REV. 373, 397–98 (2002) (arguing that "[a] monetary exaction can be used to force a landowner to shoulder a disproportionate share of a public burden just as easily as a demand for the dedication of real property").
the public good really be more of a burden on Chevron than economic regulations that control its commercial transactions? 78

Perhaps the magic word is "adjudicative." 79 One of the most striking aspects of Nollan and Dolan is the personally tailored nature of the "land-use exactions," 80 and the word "adjudicative" calls to mind the long-established doctrine of Londoner and Bi-Metallic, which distinguishes between cases in which decisions have general application and those in which the decisions affect only a few individuals. 81 Prior to Lingle, some scholars had already reviewed administrative practice with respect to takings law, and explored relevant differences between legislative action like that in Lingle, and the action by administrative agencies like that in Nollan and Dolan. 82

However, Lingle makes clear that the "substantially advances" test is substantive—not procedural—due process. 83 The administrative practice cases did not involve evaluating the wisdom behind any particular regulations. 84 Instead, they asked a more fundamental question—whether this was a legitimate mechanism for making law. If one seriously believed that administrative agencies were inappropriately distributing public burdens through the nature of their design, desultory substantive review of particular land-use extraction cases would be wholly inadequate to satisfy the Fifth Amendment. Indeed, the very existence of agency adjudication would be called into question.

78 One might rightly point out that this analysis questions whether Nollan and Dolan should be considered "takings." See Sullivan, supra note 72, at 52 ("Nowhere in Nollan or Dolan is there any examination of whether the property has been 'taken' in any sense people would ordinarily attribute to that word."). But even assuming Nollan and Dolan are categorical takings, the argument reveals that there is nothing special about "land-use" cases that requires heightened due process scrutiny.

79 Lingle, 125 S. Ct. at 2086.
81 Londoner v. Denver, 210 U.S. 373 (1908) (finding a tax too specific to be quasi-legislative and therefore not general administrative rule-making); Bi-Metallic Investment Co. v. State Bd. of Equalization of Colo., 239 U.S. 441 (1915) (finding a tax general enough to be considered quasi-legislative administrative rule-making); see also Administrative Procedure Act, 5 U.S.C. § 551(5), (7) (2004) (defining "rule making" and "adjudication").
82 See Sullivan, supra note 72, at 71 (applying these administrative law principles to the takings problem and arguing that "arbiters of this balance must not be Supreme Court Justices, but rather the legislators and their agencies, in decisions made within the administrative process, and subject to administrative review"); Breemer, supra note 77, at 405-07 (arguing that the legislative-adjudicative distinction is hard to apply to takings in a meaningful way); Fred Bosselman, Dolan Works, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 345, 348 (Thomas E. Roberts ed., 2002) (taking a functionalist approach to defend the exaction practices in Dolan, and showing that "the legislative-adjudicative distinction is irrelevant" in this context); but see Kmiec, supra note 68, at 377 (asserting that "some nominally legislative land-use actions are really administrative or adjudicatory in character and merit closer review or specialized procedural protections to avoid the disproportionate singling out of particular landowners" but offering no additional explanation).
83 See Lingle, 125 S. Ct. at 2082-83; supra note 21.
84 See supra note 81.
This is not the direction taken by Justice O'Connor in Lingle; instead, she explained that takings inquiries focus on the burden felt by the property owner, which does not change if a different branch of government acts, just as it does not change when the government has a different purpose or achieves higher efficacy. Assuming you have identical regulations, a skillfully crafted “essential nexus” does nothing to lessen a property owner’s burden; nor does replacing an administrative official’s signature with a legislative vote. Naturally, disproportionate burdens are a concern, but rational basis review provides adequate protection. It unfairly discredits administrative agencies to suggest that their actions should incur unusually high judicial scrutiny, when the same action by a legislature would receive mere rational basis review.

Asking courts to “substitute their predictive judgments for those of elected legislatures and expert agencies” and to “scrutinize the efficacy of a vast array of state and federal regulations” deserves a sound and explicit justification absent from Nollan and Dolan. Justice O'Connor should have extended her Lingle reasoning to make this point rather than cautiously protecting wrongly decided precedent. But even without an explicit overruling, Lingle fatally undercuts Nollan and Dolan. It also signals the Court’s realization that the political branches are better left alone.

Before this opinion, courts readily applied the “substantially advances” test. Now, lower courts concerned with precedent should hesitate to rely on it, and perhaps disregard Nollan and Dolan all together. Lingle reinforces a political atmosphere in which both liberals and conservatives disfa-

85 Cf. Lingle, 125 S. Ct. at 2084.
87 The suggestion also shows that determining a taking and reviewing due process are highly conflated in Nollan and Dolan. Cf. Lingle, 125 S. Ct. at 2082–83.
88 Id. at 2086.
89 For an idea of what such a sound and explicit justification would look like, see generally Judith A. Baer, Equality Under the Constitution: Reclaiming the 14th Amendment (1983) (discussing suspect classes that deserve heightened scrutiny).
90 See Sullivan, supra note 72, at 49 (remarking that in Dolan, as in Nollan, “the Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof . . . [and] the Court was reverting to territory it had long since rightly abandoned”).
91 Cf. Skinner v. Oklahoma, 316 U.S. 535, 538 (1942) (cautiously endorsing Buck v. Bell, 274 U.S. 200 (1927) while destroying its logical foundation); William Shakespeare, Hamlet act 1, sc. 5 (“That one may smile and smile and be a villain.”).
92 See Breemer, supra note 77, at 381–82 (observing that “unlike the Court’s other regulatory takings tests . . . the essential nexus standard is routinely enforced beyond the halls of the High Court”); but see Sullivan, supra note 72, at 40 (noting that outside Nollan and Dolan the Supreme Court has never “seen fit to impugn a land-use ordinance as a taking on the basis that it failed to substantially advance legitimate state interests”); Murray Feldman & Michael J. Brennan, Judicial Application of the Endangered Species Act and the Implication for Takings of Protected Species and Private Property, in Private Property and the Endangered Species Act, 25, 38 (Jason F. Shogren ed., 1998) (“Despite the political discourse that has linked the constitutional takings/ private property debates, there has been little litigation addressing the subject under the Endangered Species Act.”).
vor probing judicial review. Declining to apply the “substantially advances” test in future cases can avoid the inherent contradictions that arise when one tries to reconcile *Nollan* and *Dolan* with *Lingle*. Thus, *Lingle* may develop additional significance as legal victory for environmentalists, who depend on regulations and land-use restrictions in their efforts to protect human health, preserve endangered species and safeguard natural resources.