Rent Control and Rent Stabilization as Forms of Regulatory and Physical Takings

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RENT CONTROL AND RENT STABILIZATION AS FORMS OF REGULATORY AND PHYSICAL TAKINGS

Christina McDonough*

Abstract: The Fifth Amendment of the United States Constitution prohibits the government’s taking of private property without adequate compensation. Rent controls and rent stabilization unduly burden property owners by depriving them of market rate rental revenue. Furthermore, these methods of producing artificially low rents are often ineffective, failing to alleviate the financial hardships of the programs’ intended beneficiaries. Due to these dual aspects of rent control and rent stabilization programs—as well as by analogizing the programs to more classically recognized forms of regulatory takings, such as where the government deprives a property owner of all reasonable uses of his land—this Note reasons that rent control and rent stabilization measures also constitute unconstitutional takings.

INTRODUCTION

Lingle v. Chevron U.S.A. Inc. overruled more than twenty years of regulatory takings analysis by declaring that a regulation’s ability to substantially advance its stated purpose was improperly analyzed under a regulatory takings claim.1 Prior to Lingle, courts had often declared regulatory takings unconstitutional when they failed to advance their stated goal.2 Instead of a “substantially advances” analysis, the Court declared a better analysis to examine the burden placed on an individual by a regulation.3 The Court determined that when a burden is unduly high, the regulation is unconstitutional.4 In order to assess the burden imposed by the regulation, the character of the government action is to be scrutinized.5

4 See id.
5 Id.
Rent controls have been particularly affected by the recent developments in regulatory takings jurisprudence. Under a “substantially advances” analysis, rent controls were on the cusp of extinction. Rent controls often fail to provide affordable housing for low income individuals. Instead, they provide a flood of under-priced apartments for middle- to high-income individuals.

Part I of this Note discusses the background of the Fifth Amendment’s Takings Clause. Part II examines the status of rent controls under a physical takings analysis, and also how rent controls have historically been analyzed under regulatory takings. Part III considers how numerous state court decisions on the constitutionality of rent controls as a regulatory taking would differ after Lingle. Finally, Part IV discusses many of the problems with the Lingle decision, particularly the ambiguity of the “character of the government action” prong. This Part argues that the “character of the government action” test can act as a proxy for the “substantially advances” inquiry. In effect, the Lingle standard could assume a similar shape to the older “substantially advances” analysis. Viewed through this angle, rent controls could still be declared unconstitutional in a post-Lingle world.

I. BACKGROUND OF THE FIFTH AMENDMENT’S TAKINGS CLAUSE

A. The Fifth Amendment and Regulatory Takings

The Fifth Amendment to the United States Constitution prohibits the taking of private property, either physically or by regulation, for public use without just compensation. In physical takings, the government is deemed to have physically occupied the land, “whether the government is itself the occupier or enacts a law that allows third-party occupation.” Therefore, land is considered taken when the landowner “has no power to exclude the occupier from possession and use of the space.” The “power to exclude” is a revered and fundamental right

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8 See id. at 3.
9 Id.
10 See U.S. CONST. amend. V. ; Lingle, 544 U.S. at 536.
Within “an owner’s bundle of property rights.”13 The Fifth Amendment explicitly protects this right to exclude.14 Therefore, any government action which violates this right is unconstitutional.15

Unlike physical takings, regulatory takings do not require the government’s actual occupation of property.16 Instead, a regulation effects a taking when it goes “too far.”17 A regulation is often found to have gone too far when the regulation targets an individual property owner, requiring him to bear a burden that would be more appropriately shared by the public.18 In ascertaining if an individual is inappropriately burdened, three factors are examined: (1) the “regulation’s impact on the claimant;” (2) “the extent to which it interferes with distinct investment backed expectations;” and (3) “the character of the government action.”19 The first and second of these factors together determine whether the claimant is left with an economically viable use of his land.20

This test for a regulatory taking is relatively new, established in 2005.21 More than twenty years ago the Supreme Court announced a different test.22 In Agins v. City of Tiburon, the Court determined that a regulatory taking occurred whenever the law fails “to substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.”23 This “substantially advances” test would only be satisfied when the regulation successfully achieved its stated goal.24 However, in Lingle v. Chevron U.S.A. Inc., the Supreme Court ruled that “the ‘substantially advances’ formula is not a valid method of identifying compensable regulatory takings.”25 Instead, the Court found that claims that a regulation failed to substantially advance its stated pur-

13 Id.
14 See id.
15 See id.
21 See Lingle, 544 U.S. at 538–39.
23 Id.
24 Id.
25 Lingle, 544 U.S. at 529.
pose were due process claims, not regulatory takings claims.\textsuperscript{26} Takings analyses must be focused on the burden placed on the property owner through the regulation, and not on whether the regulation accomplished its broader societal goals.\textsuperscript{27}

B. Fifth Amendment Takings and Rent Control

Rent control is a recurring theme in physical and regulatory takings cases.\textsuperscript{28} It is often argued that rent controls are a form of physical or regulatory takings.\textsuperscript{29} Rent control is the means by which the government places a ceiling on the amount that a landlord can charge tenants.\textsuperscript{30} The Supreme Court has explicitly stated that rent control is designed to “protect persons with relatively fixed and limited incomes, consumers, [and] wage earners . . . from undue impairment of their standard of living . . . .”\textsuperscript{31} With only one exception, the Supreme Court has uniformly held that rent controls are constitutional, creating neither a physical nor a regulatory taking.\textsuperscript{32} Rent controls have been upheld because they do not force an individual to become a landlord.\textsuperscript{33} The rent controls merely place a ceiling on the amount of rent a landlord can charge once he has personally decided to accept a tenant.\textsuperscript{34} Courts have found that it is properly within a state’s police power to create and enforce such a regulation.\textsuperscript{35}

II. Supreme Court Precedent

In \textit{Chastleton Corp. v. Sinclair}, the Supreme Court found that rent controls constitute a regulatory taking.\textsuperscript{36} In \textit{Chastleton}, the Court overturned rent controls because the purpose for the control ceased to exist.\textsuperscript{37} The control at issue was enacted during World War I in order to

\begin{footnotesize}
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{See Chastleton Corp. v. Sinclair, 264 U.S. 543, 546 (1924).}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} Bowles v. Willingham, 321 U.S. 503, 513 (1944).
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.; Chastleton, 264 U.S. at 547–48.}
\textsuperscript{33} \textit{Chastleton, 264 U.S. at 547–48.}
\textsuperscript{34} \textit{See id.}
\textsuperscript{35} \textit{Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) ("States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.").}
\textsuperscript{36} 264 U.S. at 549.
\textsuperscript{37} \textit{Id. at 548.}
\end{footnotesize}
make suitable housing more available during wartime.\(^\text{38}\) After the war ended, the controls were no longer justified.\(^\text{39}\) Interestingly, the Court found that when a law is passed in response to wartime conditions, and those conditions cease, not even an increased cost of living justifies the maintenance of rent control.\(^\text{40}\) Moreover, the Court acknowledged the landowner’s right to set rent as an “ordinarily existing private right[]” and that only extenuating circumstances such as a war could allow termination of that right.\(^\text{41}\) Interference with that right for more minor reasons could constitute an infringement of landowners’ Fifth Amendment rights.\(^\text{42}\)

Even though \textit{Chastleton} preceded \textit{Agins v. City of Tiburon}, the \textit{Chastleton} Court applied a “substantially advances” test.\(^\text{43}\) The price control in \textit{Chastleton} would be allowed so long as its effect was to accomplish the control’s purpose of keeping rental values down during wartime.\(^\text{44}\)

A. Rent Controls and Physical Takings

The more recent case of \textit{Yee v. City of Escondido} accurately reflects the Supreme Court’s sentiment that rent controls do not pose constitutional difficulties, at least with regard to physical takings.\(^\text{45}\) \textit{Yee} involved a combination of termination and rent control clauses concerning mobile homes.\(^\text{46}\) Under the California Mobile Home Residency Law, a mobile home park owner may only terminate a tenant’s lease due to either delinquency in rental payments or the park owner’s wish to put the land to another use.\(^\text{47}\) Furthermore, should a tenant sell his mobile home, the park owner may not evict the new mobile home owner during or after the sale.\(^\text{48}\) This state law was coupled with a local Escondido rent control ordinance mandating that the rent in mobile home parks not rise above 1986 rent levels.\(^\text{49}\) The owners of the mobile home parks contended that the combination of these two laws effectuated a physi-

\(^{38}\) Id. at 545, 548.

\(^{39}\) Id. at 548.

\(^{40}\) Id. (noting that “if . . . all that remains of war conditions is the increased cost of living that is not in itself a justification of the [rent controls]”).

\(^{41}\) Id. at 546.

\(^{42}\) See \textit{Chastleton}, 264 U.S. at 548.


\(^{44}\) \textit{Chastleton}, 264 U.S. at 549.

\(^{45}\) See 503 U.S. 519, 519 (1992).

\(^{46}\) Id.

\(^{47}\) \textit{CAL. CIV. CODE} § 796 (West 1982); \textit{Yee}, 503 U.S. at 519.

\(^{48}\) \textit{Yee}, 503 U.S. at 519.

\(^{49}\) Id.
cal taking.\textsuperscript{50} They reasoned that because California law would not allow them to evict new tenants, the law essentially created perpetual tenants.\textsuperscript{51} Such behavior was analogous to an actual physical takeover of the land by the government; the mobile park owners were deprived of all control over their land.\textsuperscript{52} They could no longer choose their incoming tenants, evict current tenants, or set the lease prices.\textsuperscript{53}

The Supreme Court rejected this argument, finding that while such an abrogation of landlord rights may be relevant for a regulatory takings claim, it was not relevant for a physical takings claim—the only claim presented in the case.\textsuperscript{54} The Court found that no physical taking had occurred because it was the owners of the mobile park, not the government, who made the decision to rent the land to tenants.\textsuperscript{55} The original tenants were “invited by the [park owners]” and were not forced upon the park owners by the government.\textsuperscript{56} Furthermore, while the Court acknowledged the idea that the right to exclude was a fundamental right of property owners, the Escondido rent control did not inhibit that right for two reasons: (1) the park owners had voluntarily invited tenants onto their land; and (2) if they wished to exclude tenants, they could do so by merely changing the use of the land.\textsuperscript{57}

The \textit{Yee} Court focused on the fact that the park owners had \textit{first} decided to open their land to tenants, and that this decision was independent of any government regulation or intervention.\textsuperscript{58} Therefore, the Court found that after choosing to open its doors, the park owners did not have the right to select their tenants at will, free from government regulation.\textsuperscript{59}

\begin{itemize}
  \item[a,b,\ldots,\alpha,\beta,\ldots] \end{itemize}

\textbf{B. Recent Supreme Court Interpretations of Rent Controls as Regulatory Takings}

The dissenting opinion in \textit{Pennell v. City of San Jose} is significant because it established instances in which rent control would be considered
unconstitutional regulatory takings. In that case, a rent control ordinance was in place in order to prevent excessively high rents in the city of San Jose. The rent control ordinance contained a provision allowing the landlord to request a rent increase. Upon receiving a rent increase request, a San Jose city official would examine certain objective factors to determine if the rent increase was “reasonable,” or excessive and in violation of the rent control laws. In addition to these objective factors, the officer would also consider one subjective factor: the amount of “hardship to tenant” that would result from the rent increase. This factor would account for a tenant’s ability to pay the rent, without considering whether the rent increase was objectively reasonable.

While the majority found no evidence to suggest that the “hardship to tenant” factor had ever affected a rental amount, thus finding the case premature, two justices disagreed. Not only did the two justices determine that the issue was ripe, they also found that the “hardship to tenant” provision constituted a regulatory taking because it “imposes a public burden on individual landlords.”

The dissent first recognized that rent controls do not normally constitute a regulatory taking because landowners generally contribute to the social problem of excessively high rents. Therefore, rent controls do not unfairly single out such property owners, since these very property owners are the ones creating the problem. However, when the rent is dropped below a “reasonable rent” merely because the tenant cannot afford to pay reasonable rent, then the landlords are being singled out and forced to personally subsidize these individuals. While the landlords may have contributed to the problem of excessively high rents, they did not contribute to the plight of individuals who cannot afford “reasonable rents.”

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60 485 U.S. 1, 16–18 (1988) (Scalia, J., concurring in part and dissenting in part). The majority opinion determined it was premature to consider the appellants claims under the Takings Clause. Id. at 15 (majority opinion).
61 Id. at 4–5 (majority opinion).
62 Id. at 5.
63 Id.
64 Id. at 6.
65 Id.
67 Id. at 14–15 (Scalia, J., concurring in part and dissenting in part).
68 Id. at 15–16.
69 Id. at 20–21.
70 Id.
71 Id. at 22.
72 Pennell, 485 U.S. at 22.
in the relevant sense of preventing rents that are excessive; rather it is using the occasion of rent regulation to establish a welfare program privately funded by those landlords who happen to have ‘hardship’ tenants.”

By forcing these landlords to shoulder the burden of subsidizing the poorer members of society, the San Jose rent ordinance required these landowners to “alone bear a public burden, which in all fairness and justice, should be borne by the public as a whole.” Even though this was a dissenting opinion, it does illustrate that forcing landowners to subsidize the poor or shoulder any problem which they did not create could be unconstitutional. Interestingly, one of the authors of this dissenting opinion was Justice O’Connor, who returned in 2005 to write the majority opinion in *Lingle v. Chevron U.S.A. Inc.* Her dissent in *Pennell* laid the foundation for her *Lingle* argument that a regulatory taking must focus on the burden imposed on the property owner.

### III. State Cases Interpreting the Constitutionality of Rent Controls

Aside from the Supreme Court cases, a large number of rent control jurisprudence springs from New York, due to the state’s extensive use of rent control. New York’s highest court, the Court of Appeals, has provided an illustrative example of a rent control rising to the level of a regulatory taking. In *Manocherian v. Lenox Hill Hospital*, the plaintiff challenged the constitutionality of a New York law that required apartment owners to offer renewal leases on rent-stabilized apartments to not-for-profit hospitals. The apartments were used to house some of the hospital’s employees. This law was found unconstitutional for failing the valid public purpose prong under the old regulatory takings test from *Agins v. City of Tiburon*. The court found that New York’s rent control measures were aimed at protecting renters “who could not compete in an overheated rental market, through no fault of their own.” The rent control laws were broad, with their scope encompass-

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73 Id.
75 *Pennell*, 485 U.S. at 22–23 (Scalia, J., concurring in part and dissenting in part).
76 544 U.S. 528 (2005); *Pennell*, 485 U.S. at 22–23.
77 *Lingle*, 544 U.S. at 529; *Pennell*, 485 U.S. at 22–23.
79 Id. at 480.
80 Id.
81 Id. at 484.
82 Id. at 480.
ing all people during New York’s acute housing shortage.\textsuperscript{83} However, the scope of the not-for-profit hospital provisions was not as broad, only encompassing employees of not-for-profit hospitals.\textsuperscript{84} Such a housing subsidy was more similar to a valuable employment perk than a means of effectuating the valid state purpose of providing housing during a statewide shortage.\textsuperscript{85} Therefore, this law actually required owners who had previously rented to hospitals to subsidize an employment perk.\textsuperscript{86} The court found that this law was unconstitutional not only due to a lack of a valid public purpose, but also because it singled out certain property owners to shoulder a burden that was not related to the general problem of excessively high rents in New York City.\textsuperscript{87}

Moreover, the court distinguished this case from \textit{Yee v. City of Escondido} by first asserting that \textit{Yee} was concerned with a physical, not a regulatory, taking.\textsuperscript{88} In addition, the holding in \textit{Yee} related to a rent control that applied uniformly to all mobile homes, not merely to a disparate subset, as in \textit{Manoucherian}.\textsuperscript{89} Therefore, in \textit{Yee}, all of the mobile park owners were asked to \textit{uniformly} share the problem created when mobile tenants were frequently evicted and asked to move.\textsuperscript{90} Here, only a small subset of New York City landlords was asked to subsidize these hospitals.\textsuperscript{91}

A. Defining the Boundaries of Rent Controls: Seawall Associates v. City of New York

Another New York case that helped to delineate the constitutional boundaries of rent controls was \textit{Seawall Associates v. City of New York}.\textsuperscript{92} This case stands for the proposition that a taking is more likely to have occurred where the state chooses to intervene before a landlord-tenant relationship has developed.\textsuperscript{93} In \textit{Seawall}, the court determined that mandatory “rent-up” provisions violated the Fifth Amendment under both a physical takings and a regulatory takings analysis.\textsuperscript{94}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id., 643 N.E.2d at 483.
\item Id. at 484.
\item Id.
\item Id.
\item Id. at 486.
\item Id.
\item Id., 643 N.E.2d at 486.
\item Id.
\item \textit{Manoucherian}, 643 N.E.2d at 486.
\item Id.
\item \textit{See generally} 542 N.E.2d 1059 (N.Y. 1989).
\item Id. at 1064.
\item Id. at 1061.
\end{enumerate}
\end{footnotesize}
provisions banned owners of single-room occupancy housing from demolishing such housing, and required upgrading all such housing to a habitable condition in which homeless individuals could reside.95 Such “rent-ups” constituted a physical taking because “owners [were] forced to accept the occupation of their properties by persons not already in residence.”96 The Court of Appeals focused on the fact that this was not an instance of the government using its police powers to regulate an existing landlord-tenant relationship, but rather that the government created a landlord-tenant relationship and thereby effectuated a physical taking.97 Actions where “the government authorize[d] the permanent occupation of the landlord’s property by a third party” were found to be unconstitutional.98

Furthermore, the landowners had not “voluntarily put their properties to use for residential housing.”99 The government forced this use on the landlords, effectively denying them the ability to use their land as they found appropriate.100 The court found that the government was violating two of the most basic property rights: the right to possess and the right to exclude.101 Further, the court made clear that a physical taking does not require “actual displacement of the owner’s possession through a fixed encroachment.”102 Rather, allowing strangers to occupy the landowner’s space was sufficient.103

The court found that even if a physical taking had not occurred, a regulatory taking most definitely did occur.104 “Rent-ups” not only denied property owners the economically viable use of their property, but the provisions also failed to substantially advance legitimate state interests, as specified under the old Agins test.105 The “rent-ups” denied the owner an economically viable use of his property because they prohibited the “sole use—entirely permissible before the enactment of the law—for which investment properties are purchased: commercial development.”106 The law failed the public purpose prong of the test for

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95 Id. at 1059.
96 Id. at 1063.
97 Id. at 1064.
99 Seawall, 542 N.E.2d at 1064.
100 Id.
101 Id. at 1063.
102 Id.
103 Id.
104 Id. at 1065.
105 Seawall, 542 N.E.2d at 1065.
106 Id. at 1067.
lack of a nexus between the stated purpose and the means to accomplish that purpose. The purpose of the “rent-up” provisions was to provide and guarantee housing for the homeless. However, the single-room occupancy housing was not specifically earmarked for homeless people. Thus, while this law may have helped alleviate the general problem of expensive housing in New York, it did nothing to specifically ameliorate the housing shortage for homeless citizens.

B. The Effect of Greystone Hotel Co. v. City of New York

A subsequent case, Greystone Hotel Co. v. City of New York, reiterated the point that the government has the authority to impose a rent control once an individual has made the decision to rent rooms. This case also illustrates the emphasis courts place on whether a landlord voluntarily opened his doors to business or was forced to do so.

In Greystone, a hotel challenged a mandatory lease provision specifying that “any occupant of [a] hotel may request a lease, and the hotel must grant a lease, with a term of at least six months for a rent not exceeding the legal regulated rent.” The U.S. District Court for the Southern District of New York distinguished this case from Seawall by explaining that the mandatory lease provision requires that the hotel already have accepted the requestor-tenant as an occupant. Therefore, unlike in Seawall—where a landlord-tenant relationship was being forced by the state actor—here the relationship was already created by the hotel owner. The court further found that the government’s regulation of the amount that the hotel owner could charge was a valid regulation of the landlord-tenant relationship as specified by New York’s police powers. Additionally, once a hotel owner opens his doors, he does not necessarily have the right to select his tenants. Under a state’s police power, a state has the right to tell landlords which tenants to house, after the landlord has made the decision to

107 Id. at 1068.
108 Id.
109 Id.
110 Id.
112 Id.
113 Id. at 526.
114 Id.
115 Id.
116 Id.
117 Greystone Hotel, 13 F. Supp. 2d at 527.
house tenants. Therefore, the court found that none of New York’s actions rose to the level of a physical taking.

The court further examined the regulatory takings issues, finding that no regulatory takings had occurred either. The court found a sufficient nexus between the state purpose of increasing affordable housing and the effect of the mandatory lease provisions. Moreover, the hotel owner was not deprived of an economically viable use. The court found that the hotel was still profitable, and that fact alone revealed that the property still had an economically viable use.

The fact that the Greystone Hotel was not as profitable as it would have been had all of the rooms remained hotel rooms was inconsequential, because “it is clear that the plaintiff has no constitutional right to what it could have received in an unregulated market.” Greystone’s holding appears to be in direct contravention to Seawall, where the court found that a regulatory taking had occurred because the landowner was preempted from using the land for the reason he purchased it, regardless of whether his use of it was still profitable. This juxtaposition of the cases illustrates that courts will be more willing to find rent controls constitutional when they take on their traditional form: imposing a regulation after a landlord-tenant relationship has been established. However, courts are more likely to find controls unconstitutional when they take on any new, expanded form, such as providing housing for hospital employees as in Manocherian or establishing a landlord-tenant relationship as in Seawall.

C. The Anticipated Demise of Rent Controls

As the above history of cases illustrates, courts have found rent controls and variations thereof unconstitutional under the Fifth

118 Id. (finding that “because [hotel owners] voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude”).
119 See id.
120 Id. at 529.
121 Id. at 528.
122 Id. at 528–29.
123 Greystone Hotel, 13 F. Supp. 2d at 527.
124 Id. at 528.
126 Greystone Hotel, 13 F. Supp. 2d at 527.
Amendment for a variety of reasons. Yet, the Supreme Court has overruled much regulatory takings analysis through the rejection of the “substantially advances” test. The “substantially advances” test was hailed by many as the means by which rent controls would be considered unconstitutional, in recognition of the dire effects rent controls can have. Rent controls failed to “substantially advance” their stated goal of providing reasonably priced rental units for people with a low income. For example, many economists believe that a “disproportionate share” of the benefits of rent-controlled apartments go to the upper and middle class, not to the intended beneficiaries. Additionally, rent controls often do not meet the goal of increasing the number of affordable housing units. For example, one study found that cities without rental controls typically increased their rental stock by five percent to twenty percent over a ten-year period. Conversely, cities with rental control measures in place typically decreased their rental stock by eight percent to fourteen percent. In New York City, where housing is a consistent problem, rent controls have caused abandonment of many city properties along with a less plentiful and “more dilapidated” housing stock.

D. Rent Controls in Hawaii: Richardson v. City and County of Honolulu

Due to rent controls often failing to meet their intended purpose, many were anxiously awaiting the demise of rent controls under the “substantially advances” regime. In fact, the State of Hawaii had already abolished rent controls in Richardson v. City and County of Honolulu. In that case, a rent control ordinance put a ceiling on the amount of rent the owner of land could charge the owner of a condominium. As is often the case in Hawaii, the owner of a condominium may differ from the owner of the land on which the condominium

128 See, e.g., Seawall, 542 N.E.2d at 1063.
130 Radford, supra note 7, at 1–4.
131 Id. at 3.
132 Id.
133 Id. at 4.
134 Id.
135 Id.
136 Id.
137 See generally Radford, supra note 7.
138 124 F.3d 1150, 1166 (9th Cir. 1997).
139 Id. at 1163.
sits. The court found the rent control unconstitutional, relying on the Agins “substantially advances” test. The control did nothing to alleviate the housing shortage in Hawaii. Instead, because the rent control failed to “regulate resales,” the owners of the condominiums could essentially charge above market rates when they sold their condominiums, because the buyers were assured that the rental rates for the land would not increase. Therefore, condominium sellers were “capturing the net present value of the reduced land rent in the form of a premium . . . .” Because the cause-and-effect relationship was essentially vitiated, the rent control was found unconstitutional.

E. Problems with Lingle v. Chevron U.S.A. Inc.

Lingle is ripe with its own bevy of problems. For example, one of the factors it cites as necessary to determining whether a taking has occurred is the “character of the government action . . . .” This factor was first established not in Lingle but in Penn Central Transportation Co. v. New York City, where the court specified that “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.” Such a definition was supposed to elucidate the concept of “character of government action.” However, this definition does not seem particularly determinative. Furthermore, four years after the Penn Central decision, the Supreme Court declared that physical takings were per se unconstitutional, no longer requiring the application of the Penn Central balancing test and leading to further confusion over the meaning of “character of government action.”

140 See id. at 1163–64.
141 Id. at 1166.
142 See id. at 1165.
143 Id.
144 Richardson, 124 F.3d at 1166.
145 Id.
146 Id.
147 Id.
149 Id.
150 See id.
1. The “Character of Government Action” Factor Is Equivalent to the “Substantially Advances” Test

The “character of government action” test may be fundamentally concerned with ideas of justness and fairness, echoing Lingle’s warning that a regulatory taking analysis is fundamentally focused on “the severity of the burden that government imposes upon private property rights.”152 Alternatively, the “character of government action” test may be evaluating the “worthiness of the government’s regulatory purpose.”153 Reciprocity, however, may be the key to a character of government action analysis because one of the Court’s concerns is that one entity should not have to disproportionately shoulder a burden.154 The reasoning is that as long as an individual is either receiving a benefit or is being regulated for a problem that he helped to create, then a taking has not occurred.155 However, rent controls are often riddled with a lack of reciprocity: they “primarily . . . capture and transfer financial windfalls between private individuals.”156 Therefore, the character of the government action is void of all reciprocity, since the landlord gains nothing.157

2. “Character of Government Action” Is Different from the “Substantially Advances” Test

However, opponents of the idea that the “character of government action” should adopt the “substantially advances” test reason that making policy decisions, such as the effectiveness of rent control, is better left to the legislatures.158 Moreover, some applaud the Lingle decision as providing a much needed distinction between the Fifth Amendment’s Takings Clause and the Due Process Clause.159 The Due Process Clause protects “life, liberty and property” and further specifies that no person shall be deprived of property without due process of the law.160 The

153 Id. supra note 7, at 222.
154 Id.
155 Id.
156 Id.
157 See id.
159 Id. at 301.
160 Id.
Due Process Clause has been widely held to prevent government behavior that is arbitrary or does not pass a means-related-to-ends test.\textsuperscript{161}

Therefore, before \textit{Lingle}, there was no clear line demarcating the difference between the rights protected under the Takings Clause and those protected under the Due Process Clause, since both protected property against irrational government behavior.\textsuperscript{162} This problem was further compounded by the fact that different standards of review were applied to takings claims and due process claims.\textsuperscript{163} Takings claims are typically reviewed under the non-deferential standard of heightened scrutiny, and the government’s eminent domain claims are subjected to rigorous judicial review.\textsuperscript{164} Conversely, substantive due process claims are reviewed under the very deferential “arbitrary and capricious” standard.\textsuperscript{165} This further confused the differences between the two clauses—since they both were claimed to protect the same right, but they essentially reviewed the government’s claims under different standards.\textsuperscript{166}

3. \textit{Lingle}’s Focus on Individual Rights

Essentially, the \textit{Lingle} ruling suggests that compensation is only necessary when \textit{individual} rights have been harmed; that is, the government’s regulation has risen to the level of eviscerating “the owner’s right to exclude others from entering and using her property.”\textsuperscript{167} In focusing on the individual, the court found that the “substantially advances” test provides no indication of how a “burden is distributed among property owners.”\textsuperscript{168} Thus, only when the burden is higher on one individual than on the rest should compensation be provided.\textsuperscript{169}

IV. Ambiguity of the \textit{Lingle} Standard

In \textit{Lingle v. Chevron U.S.A. Inc.}, the Supreme Court mandated that in evaluating if a regulatory taking had occurred, the “character of government action” was to be evaluated, not whether the regulation substantially advanced the government’s stated purpose.\textsuperscript{170} However, the

\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Regulatory Takings, \textit{supra} note 158, at 301.
\textsuperscript{165} Radford, \textit{supra} note 7, at 220.
\textsuperscript{166} Id.
\textsuperscript{168} Id. at 542.
\textsuperscript{169} Id.
\textsuperscript{170} Id at 539.
Court failed to provide a sufficiently clear definition for the “character of government action” test.\(^\text{171}\) In describing how to evaluate the character of such an action, the Court merely stated that it should consider “whether [the government action] amounts to a physical invasion or instead merely reflects property interest through ‘some program adjusting the benefits and burdens of economic life to promote the common good.’”\(^\text{172}\) However, since a regulatory taking by definition is not a “physical invasion,” the only relevant guidance for a regulatory taking is whether the action promotes the common good.\(^\text{173}\) After looking at why the Court rejected the \textit{Agins v. City of Tiburon} “substantially advances” test, this Note argues that no substantive difference exists between the “character of government action” test and the “substantially advances” test.

The Court’s rejection of the “substantially advances” test is rooted in its reasoning that a regulatory takings analysis must be focused on individuals, not society.\(^\text{174}\) \textit{Agins}’ “substantially advances” test was focused on society, not an individual, because the test looked to see if the government’s action substantially advanced its purpose in terms of societal goals.\(^\text{175}\)

\section*{A. Political Process Failure}

\textit{Lingle}’s rejection of the \textit{Agins}’ standard is often cited to support the proposition that the Fifth Amendment should not be employed to correct political process failure.\(^\text{176}\) However, while one could argue this proposition, in practice the result of the \textit{Lingle} and \textit{Agins} tests are functionally equivalent.\(^\text{177}\)

Political process failure is when a government action fails to “protect a small group from exploitation by a larger number of beneficiaries.”\(^\text{178}\) Arguably, rent controls could exhibit political process failure since they have the potential to exploit a small group—the property owners—for the good of the beneficiaries of rent controls.\(^\text{179}\) The “substantially advances” test does address the problem of political process failure.

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item \textit{Lingle}, 544 U.S. at 539–40.
\item See id. at 539–45.
\item \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980).
\item See Regulatory Takings, supra note 158, at 305.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
failure, since the scope of its view is broader than just the individual.\textsuperscript{180} The test examines whether the control reaches a stated societal goal or if it exploits landlords by forcing them to shoulder a burden that society as a whole should carry.\textsuperscript{181}

However, \textit{Lingle}'s rejection of political process failure is difficult to reconcile with the Court’s preoccupation of fairness, as evidenced by their continuous reference to burdens, explicitly stating that a takings analysis should focus on the “severity of the burden” the government imposes on individual landowners.\textsuperscript{182} However, political process failure often exhibits unfairness on an individual level. Even if political process failure and individual burden are theoretically different, in practice they are extremely similar because of the unfair effects upon a small societal group will migrate down to the individual members. This migration has the effect of disproportionally burdening individuals, which is a valid basis for finding a taking under \textit{Lingle}.\textsuperscript{183}

\textbf{B. The Holding of Chastleton After Lingle}

In \textit{Chastleton Corp. v. Sinclair}, the Supreme Court overturned rent controls which were enacted to lower rental values during World War I.\textsuperscript{184} At the end of the war, the Court found that the rent controls were no longer justified, stating “if all that remains of war conditions is the increased costs of living that is not in itself a justification of the [rent controls].”\textsuperscript{185} Even though \textit{Chastleton} preceded \textit{Agins}, the Court’s message was clear: rent controls are only to be allowed when furthering some societal goal.\textsuperscript{186} Moreover, the Court did not let the rent control stand under a state’s general police powers.\textsuperscript{187} The Court even went further to lay the foundation for \textit{Agins}, finding that when a law is justified by a set of facts, the law is no longer justified if the facts on which it rests change.\textsuperscript{188} Therefore, as early as 1924, the Supreme Court had set forth the precedent that rent controls cannot be established ad hoc; they must be justified by some social condition or emergency.\textsuperscript{189}

\begin{footnotesize}
\begin{itemize}
\item[180] Id.
\item[181] Id.
\item[183] See id.
\item[184] 264 U.S. 543, 548 (1924).
\item[185] Id.
\item[186] Id.
\item[188] \textit{Chastleton}, 264 U.S. at 547.
\item[189] See id.
\end{itemize}
\end{footnotesize}
By rejecting Agins’ “substantially advances” test, the Lingle Court found that rent controls do not have to be justified by social conditions.\textsuperscript{190} However, the character of the government action must be taken in account.\textsuperscript{191} Lingle's standard is whether the regulation is a public program “adjusting the benefits and burdens of economic life to promote the common good.”\textsuperscript{192} The crucial word in this standard is “common,”\textsuperscript{193} which suggests that rent controls must be evaluated in light of what is good for all parties involved: both landlords and tenants.\textsuperscript{194} Furthermore, the word “common” invokes images of reciprocity and fairness, because “common good” means that the good of more than one party is being considered.\textsuperscript{195} The Lingle Court was obviously quite concerned with fairness, since it explicitly mentions that property owners should not be forced to shoulder severe burdens.\textsuperscript{196}

Therefore, if the Lingle standard were to be applied to Chastleton, the outcome of Chastleton would be the same.\textsuperscript{197} The rent controls in Chastleton were implemented to promote the common good of ensuring available housing during wartime.\textsuperscript{198} However, when the war ended, the rent controls were essentially being used to promote nothing, since the common good of having housing during wartime had ceased to exist.\textsuperscript{199} When viewed in this light, the “character of government action” test conforms to the “substantially advances” test.\textsuperscript{200}

Moreover, even though the Lingle Court declared that they were only concerned with a regulation’s effect on individual property rights, they still employed a “common good” analysis.\textsuperscript{201} If the Court was so concerned with individual rights, they could have simply redefined the regulatory test to only be concerned with the government’s impact on the property owner, and the extent to which it interferes with her investment-backed expectations.\textsuperscript{202} There was no need to insert the

\begin{footnotesize}
\textsuperscript{191} See id. at 539.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} See id.
\textsuperscript{195} See id.
\textsuperscript{196} Lingle, 544 U.S. at 537, 542.
\textsuperscript{197} Chastleton Corp. v. Sinclair, 264 U.S. 543, 549 (1924).
\textsuperscript{198} Id. at 547.
\textsuperscript{199} Id.
\textsuperscript{200} See Lingle, 544 U.S. at 539; Chastleton, 264 U.S. at 549.
\textsuperscript{201} Lingle, 544 U.S. at 539.
\textsuperscript{202} Id.
\end{footnotesize}
“common good” language, thus making the “character of government action” analysis very similar to a “substantially advances” one.\textsuperscript{203}

C. Penn Central’s Definition of “Character of Government Action”: Promotion of General Welfare

\textit{Penn Central} defines the “character of government action” prong to be the ability of the action to generally promote societal welfare.\textsuperscript{204} In defining the “character of government action,” \textit{Penn Central} recognizes the need to assess whether the government action accomplishes a broader good.\textsuperscript{205} \textit{Penn Central Transportation Co. v. New York City} explicitly states that the character of the government action should be evaluated to ascertain if the “health, safety, morals or general welfare would be promoted” by regulations.\textsuperscript{206} The word “promote” is synonymous with “advance.”\textsuperscript{207} Therefore, \textit{Penn Central}'s use of the word “promote” implies that the government action must advance a purpose, that purpose being health, safety, morals or general welfare.\textsuperscript{208} However, \textit{Penn Central} sets a lower standard for measuring the success of a regulation.\textsuperscript{209} The regulation need only promote, not substantially promote, general welfare.\textsuperscript{210} Although promote is a weaker standard than “substantially advance,” promotion of general welfare is easier to accomplish than promotion of a stated, narrow goal.\textsuperscript{211} \textit{Penn Central} explicitly specifies that the statute must “substantially further important public policies.”\textsuperscript{212} Therefore, while \textit{Lingle} quotes \textit{Penn Central}'s use of the term “character of the government action,” the \textit{Lingle} Court fails to recognize \textit{Penn Central}'s requirement that the regulation promote some end, even if its standard is quite low.\textsuperscript{213} \textit{Lingle} seems to imply that the character of the government action should be viewed in a vacuum, independ-

\textsuperscript{203} \textit{Id.}
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.}
\textsuperscript{208} See \textit{Penn Cent. Transp.}, 438 U.S. at 125.
\textsuperscript{209} See \textit{id.; Thesaurus.com—Promote, supra note 207.}
\textsuperscript{210} \textit{Penn Cent. Transp.}, 438 U.S. at 125.
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id. at 127.}
\textsuperscript{213} \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528, 539 (2005); \textit{Penn Cent. Transp.}, 438 U.S. at 125.
ent of the action’s ability to promote general welfare.\textsuperscript{214} Upon close examination of \textit{Penn Central}, this is false.\textsuperscript{215}

1. \textit{Seawall} Under \textit{Penn Central}'s Weaker Standard

The “means-end” test as specified in \textit{Penn Central} does not require as close a nexus as the \textit{Agins} “substantially advances” test, because \textit{Penn Central} merely requires that the regulation generally promote welfare, not the stated purpose of the regulation.\textsuperscript{216} Using this standard, the holding of \textit{Seawall Associates v. City of New York} would not be different, because while the \textit{Seawall} regulations failed to accomplish their stated purpose, they did promote the general public good.\textsuperscript{217}

In \textit{Seawall}, mandatory “rent-up” provisions forced property owners to make available vacant apartments for homeless housing.\textsuperscript{218} However, these units were put into a general pool for single room occupancy units and were not specifically earmarked for homeless people.\textsuperscript{219} Due to this lack of earmarking, the regulation failed to accomplish its stated goal, thus effectuating a taking.\textsuperscript{220}

Under \textit{Lingle}, \textit{Seawall}'s regulations must be evaluated without considering whether it advances the purpose of providing housing for the homeless.\textsuperscript{221} \textit{Lingle} would reason that such an inquiry of advancement is better left for a due process claim.\textsuperscript{222} However, under a \textit{Penn Central} analysis, the question would seem to be whether the regulation in \textit{Seawall} substantially furthers an important public policy.\textsuperscript{223} The meaning of an “important public policy” is unclear.\textsuperscript{224} If important public policy is defined as the stated goal of the regulation, then \textit{Seawall} would be no different after \textit{Lingle}.\textsuperscript{225} However, if “important public policy” is any important public policy, then by generally providing affordable housing,
the Seawall regulation would pass the “character of government action” prong.226

D. Manocherian After Lingle: Burden Is a Relative Term and “Character of Government Action” Examines Individual Burdens

Manocherian v. Lenox Hill Hospital highlights the fact that a regulation’s purpose and the burden it places on individual landowners are often inextricably intertwined.227 In Manocherian, a New York regulation required property owners to offer renewal leases on rent-stabilized apartments to employees of not-for-profit hospitals.228 The court distinguished this regulation from general rent control and stabilization regulations by finding that these hospital-specific regulations failed to advance a “closely and legitimately connected State interest.”229 These regulations did not protect apartment dwellers from an overheated rental market.230 Instead, they provided an employment perk to a very small segment of the rental population, employees of not-for-profit hospitals.231

The court found that not only was the regulation’s purpose invalid, but also the landowners were forced to shoulder the burden of the hospitals.232 The court reasoned that employers should provide employment perks, not individual landlords.233 The court’s reasoning was clear: because the purpose of the regulation was not valid, the burden it placed on the landowners was excessive.234 If the regulation’s purpose had been to provide rent-stabilized units to the general population that could not otherwise afford such units, the court would have deemed such a purpose valid.235 In that case, the burden on the individual property owners would not have been excessive.236 The different outcomes illustrate that a property owner’s burden must not be viewed in absolute terms. 237 The same burden may rise to the level of a taking

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226 See Penn Cent. Transp., 438 U.S. at 125; Seawall, 542 N.E.2d at 1068.
228 Id. at 480.
229 Id.
230 Id.
231 Id.
232 Id.
233 Manocherian, 643 N.E.2d at 484.
234 See id.
235 See id. at 480.
236 See id. at 484.
237 See id.
depending on the reason behind the imposition of the burden. The burden on the individual is colored by the purpose of the regulation.\textsuperscript{238}

In a post-\textit{Lingle} world, the \textit{Manocherian} ruling would not be affected because \textit{Manocherian} examines the nature of the stated purpose, not whether that purpose substantially advances a stated goal.\textsuperscript{239} \textit{Manocherian} examines the burden placed on the individual landowners, a perspective that \textit{Lingle} clearly condoned.\textsuperscript{240} Therefore, \textit{Manocherian} provides one possible interpretation for \textit{Lingle}'s "character of government action" factor, namely whether the government action constitutes a valid public purpose.\textsuperscript{241} Such an interpretation would be consistent with \textit{Lingle}'s mandate that a determination of the character of the government action should be based on whether it promotes a "common good."\textsuperscript{242}

\section*{E. Lingle and Untraditional Rent Controls}

Courts have been more amenable to overturning non-traditional rent controls; those that differ from the model of imposing a rent ceiling once the landlord has already made the decision to rent out his units.\textsuperscript{243} This tendency is the result of a judicial recognition that using traditional rent controls to protect consumer welfare is a valid use of a state’s police power.\textsuperscript{244} In contrast, non-traditional rent regulations have typically been held unconstitutional because they often impose a greater burden on landowners.\textsuperscript{245} For example, the \textit{Seawall} regulation was found unconstitutional because it forced landowners to accept tenants, thus straying from the accepted model of policing rental amounts once a tenant was already accepted.\textsuperscript{246} This non-traditional form of rent control imposed a very high burden on the individual landowners.\textsuperscript{247} Additionally, in \textit{Richardson v. City and County of Honolulu}, a regulation that imposed a ceiling on the amount of rent that could be charged for the land on which condominiums sat was found to be unconstitutional.


\textsuperscript{239} \textit{Manocherian}, 643 N.E.2d at 484.

\textsuperscript{240} \textit{Lingle}, 544 U.S. at 539; \textit{Manocherian}, 643 N.E.2d at 484.

\textsuperscript{241} \textit{Lingle}, 544 U.S. at 539; \textit{Manocherian}, 643 N.E.2d at 484.

\textsuperscript{242} \textit{Lingle}, 544 U.S. at 539.


\textsuperscript{244} \textit{Pennell v. City of San Jose}, 485 U.S. 13, 13–14 (1988).

\textsuperscript{245} \textit{Seawall}, 542 N.E.2d at 1067.

\textsuperscript{246} \textit{Id.}

\textsuperscript{247} See \textit{id.} at 1068.
because it failed to have the effect of actually making the rent of the condominiums more affordable.\textsuperscript{248}

A regulation imposes a greater burden on an individual when that regulation fails to accomplish its stated purpose.\textsuperscript{249} If the “character of government action” were interpreted simply to mean a valid public purpose, without regard to individuals, then presumably the cases of \textit{Seawall} and \textit{Richardson} would turn out differently.\textsuperscript{250} However, \textit{Lingle} explicitly mandates that the burden on an individual property owner must be considered.\textsuperscript{251} In \textit{Seawall}, the public purpose of providing more housing for the homeless is considered valid.\textsuperscript{252} Furthermore, in \textit{Richardson}, the public purpose of providing more affordable housing is considered valid.\textsuperscript{253} Yet, the \textit{Seawall} and \textit{Richardson} regulations, while having a valid public purpose, were held unconstitutional because they failed to accomplish their stated purpose.\textsuperscript{254} Uncoincidentally, these cases involve variations of the classic form of rent control.\textsuperscript{255} Courts have implicitly reasoned that when a regulation fails to accomplish its stated purpose the burden imposed on the individual landowner is greater than if the regulation were successful.\textsuperscript{256} The burden in absolute terms is the same regardless of whether the regulation substantially advances its stated purpose.\textsuperscript{257} That is, independent of a regulation’s success, if a landowner has a rental ceiling of seven hundred dollars a month, then that burden is constant.\textsuperscript{258} However, if the burden placed on the landowner is viewed not in absolute terms but in qualitative ones, then a burden is greater if it is being created for no reason.\textsuperscript{259} Therefore, \textit{Lingle}’s focus on an individual’s burden implicitly evaluates a regulation’s effectiveness, because ineffective regulations place a higher burden on individuals.\textsuperscript{260}

The crux of the \textit{Lingle} argument is that the constitutionality of regulatory takings should focus on the burdens the regulations im-

\textsuperscript{248} \textit{Richardson}, 124 F.3d at 1166.
\textsuperscript{249} See \textit{Richardson}, 124 F.3d at 1166; \textit{Seawall}, 542 N.E.2d at 1067.
\textsuperscript{250} See \textit{Richardson}, 124 F.3d at 1166; \textit{Seawall}, 542 N.E.2d at 1067.
\textsuperscript{252} \textit{Seawall}, 542 N.E.2d at 1068.
\textsuperscript{253} \textit{Richardson}, 124 F.3d at 1165.
\textsuperscript{254} See \textit{Richardson}, 124 F.3d at 1166; \textit{Seawall}, 542 N.E.2d at 1067.
\textsuperscript{255} See \textit{Richardson}, 124 F.3d at 1166; \textit{Seawall}, 542 N.E.2d at 1067.
\textsuperscript{256} See \textit{Richardson}, 124 F.3d at 1166; \textit{Seawall}, 542 N.E.2d at 1067.
\textsuperscript{257} See \textit{Richardson}, 124 F.3d at 1166; \textit{Seawall}, 542 N.E.2d at 1067.
\textsuperscript{258} See \textit{Richardson}, 124 F.3d at 1166; \textit{Seawall}, 542 N.E.2d at 1067.
\textsuperscript{259} \textit{Richardson}, 124 F.3d at 1166; \textit{Seawall}, 542 N.E.2d at 1067.
posed on individual landowners. Regulations which inappropriately and overly burden landowners are unconstitutional. Therefore, regulations that fail to accomplish their stated purpose place a disproportionately large burden on landowners. As such, these regulations must be declared unconstitutional. Under this reasoning, the character of the government action in imposing rent controls may be invalid because rent controls often fail to accomplish their goal of providing affordable housing for lower income individuals. This failure results in a larger burden imposed on owners of rent-controlled buildings. Accordingly, when this burden becomes disproportionate, rent controls should be considered unconstitutional.

Conclusion

*Lingle v. Chevron U.S.A. Inc.* mandates that a regulatory taking which disproportionately burdens an individual must be considered unconstitutional. The character of the government’s action is central to the burden inquiry. Part of the character of the government action inquiry should focus on whether the regulations accomplish their goals. Further, regulations that fail to accomplish their stated purpose impose a larger burden on individuals than regulations that accomplish their goals. Burdens must therefore be viewed in relative, not absolute, terms. This burden should also be considered when examining the character of the government action. Regulations which fail to accomplish their stated purpose must be declared unconstitutional, because they impose large burdens on those they regulate.

Rent controls often fail to accomplish their stated purpose of providing affordable housing to lower income individuals. As such, the relative burden that the regulations impose on landowners whose buildings are subject to rent controls is disproportionately large. This burden necessitates the result that the character of the government action is unacceptable. Due to this burden, rent controls may be found unconstitutional.

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261 Id.
262 Id.
263 See *Regulatory Takings*, supra note 158, at 305.
265 See id.
266 See *Regulatory Takings*, supra note 158, at 305.
267 Id.