

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   LINDA LINGLE, GOVERNOR OF           :

4       HAWAII, ET AL.,               :

5                   Petitioners               :

6           v.                       :   No. 04-163

7   CHEVRON U.S.A. INC.               :

8   - - - - -X

9                                       Washington, D.C.

10                                      Tuesday, February 22, 2005

11                   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States at

13   11:13 a.m.

14   APPEARANCES:

15   MARK J. BENNETT, ESQ., Attorney General, Honolulu, Hawaii;

16       on behalf of the Petitioners.

17   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

18       Department of Justice, Washington, D.C.; on behalf of

19       the United States, as amicus curiae, supporting the

20       Petitioners.

21   CRAIG E. STEWART, ESQ., San Francisco, California; on

22       behalf of the Respondent.

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	MARK J. BENNETT, ESQ.	
4	On behalf of the Petitioners	3
5	EDWIN S. KNEEDLER, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioners	13
8	CRAIG E. STEWART, ESQ.	
9	On behalf of the Respondent	22
10	REBUTTAL ARGUMENT OF	
11	MARK J. BENNETT, ESQ.	
12	On behalf of the Petitioners	44
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:13 a.m.)

JUSTICE O'CONNOR: We will hear argument next in  
Lingle v. Chevron U.S.A.

Attorney General Bennett.

ORAL ARGUMENT OF MARK J. BENNETT  
ON BEHALF OF THE PETITIONERS

MR. BENNETT: Justice O'Connor, and may it  
please the Court:

For 70 years the Federal courts have  
deferentially reviewed both the efficacy and the wisdom of  
legislation, even when it affects property interests.  
This case squarely presents the question, should we now  
turn back the clock?

We make two main arguments: first, that the  
substantially advance test should not be a standalone test  
for determining whether regulation affects a taking  
because such a test is fundamentally divorced from a major  
principle of the regulatory takings doctrine itself,  
economic injury; and second, if there is such a standalone  
test, it ought to be no more searching than the rational  
basis test of due process.

As this Court has stated in First English, the  
Just Compensation Clause is not designed to interfere with  
the ability of government to affect property interests,

1 but rather to require just compensation in the event of an  
2 otherwise valid taking.

3 In this particular case, we had a circumstance  
4 where one single Federal judge conducted a fact trial  
5 where she evaluated the demeanor and credibility of one  
6 expert from Chevron and one expert from the State of  
7 Hawaii in order to make a determination of whether or not  
8 garden variety economic regulation was constitutional or  
9 unconstitutional. There was no -- the test applied would  
10 have been no different if this had been an act of Congress  
11 instead of an act of the Hawaii State legislature. In  
12 this case, what the district court did was wholly  
13 inconsistent, we submit, with any reasonable concepts of  
14 federalism, and if it had been an act of Congress that  
15 this district court judge was sitting in judgment of, it  
16 would have been entirely inconsistent with the respect  
17 that this Court has consistently said is due to a co-  
18 equal branch of government.

19 A particular irony of the way the Ninth Circuit  
20 applied what it believed to be the Agins test, which it  
21 indicated the standard of review fell somewhere between  
22 rational basis and rough proportionality, but the -- the  
23 supreme irony of that, we suggest, is that if that test  
24 were applied, it would have the effect of overruling the  
25 very cases that Agins cited in supporting the language it

1 -- it used, that if indeed you have this type of  
2 intermediate scrutiny, cases like Nectow and Euclid v.  
3 Village of Ambler could not stand because, as this Court  
4 has said, those cases set out a rational basis test,  
5 whether the object was in the power of the legislature or  
6 -- or the municipal authority and whether the means used  
7 to achieve it were rational. And the test the Ninth  
8 Circuit set up in this case, and as applied by the  
9 district court, would have overruled those very cases  
10 because there would have been a fact trial necessary to  
11 determine whether or not the -- the zoning ordinances at  
12 issue in that -- in those cases were efficacious or  
13 ineffectual.

14 JUSTICE O'CONNOR: Well, does the fact that  
15 discrete or individual property rights are being affected  
16 and, indeed, taken justify some higher level of scrutiny  
17 than we would apply to general economic regulation by the  
18 State?

19 MR. BENNETT: No, Your Honor. We -- we would  
20 think, first of all, this -- this Court has established  
21 that it doesn't look at whether some stick in the bundle  
22 of rights is affected by the regulation. It looks at the  
23 parcel as a whole.

24 And second, this Court has said that it is  
25 shying away from per se tests, and indeed, it -- it looks

1 at these types of cases under the rubric of Penn Central  
2 where the primary factor that the Court looks at is the  
3 extent of the economic injury and also the extent to which  
4 it interferes with reasonable investment-backed  
5 expectations.

6 A particular irony of this case is that the  
7 Ninth Circuit has said this particular statute of the  
8 Hawaii legislature affects a taking without any regard to  
9 whether or not it caused any economic injury to Chevron at  
10 all. This Court has found that when the major flaw in  
11 legislation or the -- the major argument as to why  
12 legislation should be deemed to be unconstitutional turns  
13 on the legitimacy of the legislation, that finds a natural  
14 home in the due process analysis, rather than in an  
15 analysis that looks at whether or not the legislation  
16 actually effects a taking or not.

17 Indeed, this Court, Your Honor, despite what it  
18 said in Agins in relying on the due process analysis, has  
19 never found a taking based upon doubt as to the likely  
20 efficacy of economic legislation.

21 JUSTICE SCALIA: Well, we've said it a lot,  
22 though, haven't we? Why do we keep on saying it?

23 MR. BENNETT: Well, Your Honor, I think that in  
24 -- in Del Monte Dunes, every opinion in the case discussed  
25 this language and -- and said that the Court has never

1 indicated that this sets out a more exacting test than  
2 rational basis other than in the rough proportionality  
3 context of Nollan and Dolan. And I think the language  
4 used in Agins, which came from due process cases, has  
5 somewhat taken on a life of its own, and the lower courts  
6 and the -- the supreme courts of the several States have  
7 had quite -- have had a great deal of difficulty in -- in  
8 dealing with what exactly the language means. We believe,  
9 as we've set forth in our brief, that to the extent it  
10 establishes this intermediate scrutiny, as the Ninth  
11 Circuit felt it did, that it would be dicta in Agins, but  
12 if the Court viewed it as not dicta, we think that the  
13 Court ought to reconsider the constitutional rule under  
14 the standards for such reconsideration that the Court has  
15 identified in cases like Payne v. Tennessee.

16 JUSTICE BREYER: Suppose -- suppose a person has  
17 a piece of property, and they zone it suddenly, no  
18 building -- no building -- which destroys the value of the  
19 property pretty much. Now, should we just -- I think  
20 those might be the cases where this language began to  
21 appear, something like that. Should that be just a simple  
22 rational basis review too? Because I'm trying to put the  
23 case where it might be -- arguably you should have  
24 something stronger since the property value is -- is  
25 seriously hurt and --

1           MR. BENNETT: Your Honor, if -- if the claim was  
2   that the legislation was irrational, that it --

3           JUSTICE BREYER: No. They're going to say,  
4   well, we can imagine a reason, but if you look at it  
5   realistically, you know there's no good reason.

6           MR. BENNETT: No --

7           JUSTICE BREYER: I mean, if you put your mind to  
8   it, you can make one up, which is sort of the test for  
9   rational basis in the economic context. But as soon as we  
10  become more realistic, there isn't much of a reason. It  
11  can't satisfy the stronger test, though it could satisfy  
12  the weaker.

13          MR. BENNETT: No, Your Honor. We would suggest  
14  that this Court's jurisprudence indicates that that type  
15  of a claim of a taking ought to be analyzed under the Penn  
16  Central test where you first do look at the extent of the  
17  economic devaluation, if you will, of the property and you  
18  look at whether there is an interference with reasonable  
19  investment-backed expectations --

20          JUSTICE BREYER: What are we supposed to do, to  
21  return to Justice Scalia's question, with the fact that  
22  this appears -- I counted about 12 cases, I mean, where it  
23  implicitly or explicitly appears, something like it. Are  
24  we supposed to just, oh, say all those cases were wrong  
25  and -- what are we supposed to do about that?



1 MR. BENNETT: Well, we would suggest, Your  
2 Honor, that what the Court does is say that -- that in  
3 Agins, what the Court was essentially doing was restating  
4 a due process test, and either say --

5 JUSTICE O'CONNOR: Would you speak up a little?

6 MR. BENNETT: I'm sorry, Your Honor. We would  
7 -- we would say that the Court ought to say that in Agins  
8 the Court was restating a due process test, and if this is  
9 to be a standalone test, it ought to be part of due  
10 process. But if it finds a home in the Just Compensation  
11 Clause, it ought to find a home in the -- in the public  
12 use portion of the Just Compensation Clause where if,  
13 indeed, the economic impact in a regulatory takings  
14 context is so severe that it constitutes a taking, then  
15 whether it rationally advances a State goal ought to be --  
16 ought to inform the question of whether or not it's a  
17 public use, but that it shouldn't be a standalone test for  
18 really sitting as a super-legislature to determine whether  
19 or not this really advances the government's goals as  
20 opposed to whether it could rationally have advanced  
21 the --

22 JUSTICE SCALIA: Why would you feel --

23 JUSTICE KENNEDY: So you want us to put --

24 JUSTICE SCALIA: Why would you feel better about  
25 our doing that in order to determine whether -- whether

1     there's a public use than you would feel our doing it in  
2     order to decide whether there's been a taking?

3             MR. BENNETT:   Well --

4             JUSTICE SCALIA:  I mean, wouldn't all of your --  
5     all of your objections apply equally?

6             MR. BENNETT:  Certainly if it were more than  
7     rational basis.  So we're -- we're suggesting that it  
8     oughtn't, wherever it's put, be more than a rational basis  
9     test.

10            JUSTICE SCALIA:  You're -- you're not really  
11     urging us to -- to defer the -- the evil day and simply  
12     say, well, this test, which is more than rational basis,  
13     may well apply to -- to whether there's been a -- a public  
14     use or not, but it certainly doesn't apply to whether  
15     there's been a taking.

16            MR. BENNETT:  No, absolutely not.  It shouldn't  
17     -- it shouldn't --

18            JUSTICE SCALIA:  I hope you won't do that.

19            MR. BENNETT:  -- it shouldn't apply to -- to  
20     either one, and wherever this -- if the Court wants to say  
21     that this language needs to find a home somewhere and it  
22     isn't in due process, then it shouldn't be more than a  
23     rational basis test wherever it's put.

24            In many ways, Your Honor, this statute, Act 257  
25     of the Hawaii legislature, is -- is almost identical,

1     although less intrusive, than the statute that this Court  
2     upheld in Exxon v. Maryland. The goal of the statute in  
3     both cases was the same. It was to preserve competition  
4     in the retail market, and in Hawaii, where we have at the  
5     refinery level a duopoly and at the wholesale level an  
6     oligopoly, it certainly was rational for the legislature  
7     to believe that trying to prevent the -- the oligopolist  
8     from projecting their market share into the retail level  
9     would have the effect of preserving competition. And it  
10    was certainly rational for the -- the legislature to  
11    believe that limiting the rents that oil companies could  
12    charge their independent service stations so that they  
13    couldn't charge excessive or predatory rents would serve  
14    the goal of preserving competition in the retail market in  
15    a State where the oil -- where the gasoline prices at the  
16    pump are the highest in the country and the -- the market  
17    at the two levels above the retail level is  
18    extraordinarily concentrated.

19                 This Court, indeed, has said --

20                 JUSTICE KENNEDY: Well, suppose it were clear,  
21    from what the legislature said, that the only purpose of  
22    this legislation was to help out some local dealers who  
23    were politically powerful and the gasoline prices would go  
24    up. I assume you would be here defending the statute.

25                 MR. BENNETT: Well, Your Honor, what we would

1 say is that this Court's jurisprudence is that in applying  
2 a rational basis test, one doesn't look at what the  
3 legislature said was the purpose of the statute, but one  
4 looks at what could be advanced as a purpose for the  
5 statute and --

6 JUSTICE KENNEDY: And you would be here  
7 defending the statute on -- in my hypothetical case.

8 MR. BENNETT: Yes, Your Honor, and we would --  
9 we would be, I imagine, positing additional reasons why  
10 the statute would pass a rational basis test than those  
11 actually reflected in the legislative history because I  
12 think, as this Court has indicated a number of times, that  
13 requiring the legislature to state reasons or, indeed,  
14 looking at the precise reasons stated by the legislature  
15 in deciding whether the statute furthers those goals as  
16 opposed to other goals the legislature might have had,  
17 simply sets this Court up as a -- as I said, a super-  
18 legislature, and -- and really opens the door to the type  
19 of intrusive review of legislative acts that this Court  
20 has not engaged in for more than 70 years.

21 The number of cases that the Court has looked at  
22 in which it has indicated that it is not going to get into  
23 the business of determining efficacy or wisdom is, indeed,  
24 legion, and really since the New State Ice era, the  
25 Lochner era, this Court has not engaged in that type of

1 review. And in fact, in Lochner itself, the -- the Court  
2 stated that we do not believe in the soundness of the  
3 views which uphold this law, and one can take that and  
4 look at the Ninth Circuit opinion in this case in which  
5 the Ninth Circuit does essentially the same thing.

6 Your Honor, in our representative democracy,  
7 decisions as to the wisdom of economic legislation are for  
8 the political branches, not the courts. The voters of  
9 Hawaii have a remedy if their elected officials fail them.  
10 It is in that forum that the wisdom of Act 257 should be  
11 debated.

12 Justice O'Connor, I'd ask to reserve the  
13 remainder of my time.

14 JUSTICE O'CONNOR: Very well, General Bennett.  
15 We'll hear next from Mr. Kneedler.

16 ORAL ARGUMENT OF EDWIN S. KNEEDLER

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

19 MR. KNEEDLER: Justice O'Connor, and may it  
20 please the Court:

21 The reasons why this Court has applied the  
22 rational basis standard to review economic legislation of  
23 the sort involved here go to the heart of the role of  
24 courts in our democratic society. Legislatures, not  
25 courts, are elected to enact the laws, and courts,

1     therefore, do not substitute their judgment for the  
2     economic wisdom of legislation for that of the  
3     legislature. And courts typically lack the fact-finding  
4     ability and expertise of legislatures, especially to make  
5     the sort of predictive judgments that the Ninth Circuit  
6     relied upon in this case.

7             These fundamental principles about the role of  
8     courts in our society would be greatly undermined if a  
9     plaintiff could simply -- could obtain heightened scrutiny  
10    of legislation by simply recasting his claim as a takings  
11    claim. And therefore, it's not surprising that this  
12    notion doesn't find support in the Just Compensation  
13    Clause.

14            When the government affirmatively exercises the  
15    power of eminent domain to take property, the requirement  
16    that compensation be paid doesn't rest on the proposition  
17    that the legislation is ineffective. To the contrary, the  
18    taking presupposes that the -- that the action will --  
19    will further a legitimate governmental purpose or at least  
20    that the legislature could have rationally so concluded.

21            Any inquiry into the legitimacy of the  
22    governmental purpose or whether it will be served,  
23    instead, arises under the Public Use Clause, not whether  
24    there is a taking. And if those purposes are not served  
25    or the legislature could not rationally so conclude, it is

1 not a public use and it's invalid and it should be  
2 enjoined, the consequences not to trigger the payment of  
3 -- of compensation.

4 And the -- the same analytical approach applies  
5 for regulatory takings. In deciding whether there is a  
6 regulatory taking, this Court has developed tests to look  
7 to see whether the nature of the government's restrictions  
8 are essentially the functional equivalent of the exercise  
9 of the power of eminent domain or appropriation. And that  
10 -- that the Court has done by looking principally at the  
11 impact on the property owner, not the rationality of what  
12 the legislature has done. That has not been part of it.

13 For example, in the Lucas case, the -- the test  
14 for finding a taking is whether all economic value has  
15 been destroyed. Or in the physical appropriation cases,  
16 the Court has said that's such a fundamental interference  
17 burden on the landowner that there is a per se taking.  
18 And similarly under the Penn Central test, the central  
19 inquiry is on the economic impact and the interference  
20 with investment-backed expectations, things that look to  
21 the impact on the -- on the landowner.

22 JUSTICE GINSBURG: Mr. Kneedler --

23 JUSTICE KENNEDY: Well, if you're going to use  
24 the public use prong of the -- of the -- the Constitution  
25 for what we think are regulatory takings, then what

1 happens is you just invalidate the regulation. You don't  
2 pay compensation.

3 MR. KNEEDLER: That's -- that's correct,  
4 although I -- although I should say --

5 JUSTICE KENNEDY: Because if it's not a public  
6 use, then you can't --

7 MR. KNEEDLER: Right. No. That -- that's  
8 correct. And I think that's -- that's the difference. If  
9 something doesn't -- if the legislature couldn't  
10 rationally conclude that -- that the measure will -- will  
11 serve a legitimate governmental purpose, it's invalid and  
12 -- and therefore not a taking. It's improper governmental  
13 action.

14 JUSTICE GINSBURG: What about substantially  
15 advances a legitimate State interest, which does sound  
16 like it's a higher standard? And it has been said, as was  
17 pointed out, in several cases of this Court -- not that it  
18 made any difference to the bottom line, but that language  
19 is -- sounds -- sounds like it's a more toothful standard  
20 than rational basis.

21 MR. KNEEDLER: Well, in -- in fact, the point  
22 you made that it has not actually affected the outcome I  
23 think is an important consideration for this Court. And  
24 -- and now that the Court is focusing on the question of  
25 whether this really does logically fit into the Just



1 Compensation Clause jurisprudence, I -- I think it -- I  
2 think it's important to consider that the Court has not  
3 actually ever struck down a measure under the Just  
4 Compensation Clause outside the exactions situation which  
5 present the different consequence of -- of a physical  
6 appropriation. The Court has not ever actually struck  
7 down a statute on -- on that basis.

8 But with respect to that language, it -- it  
9 arose in Agins. There was a little bit of discussion  
10 along those lines in Penn Central, but in Agins, which  
11 most people see as -- as the origin of it, the Court, as  
12 was pointed out, relied upon Village of Euclid and upon  
13 Nectow, both of which were due process cases and both of  
14 which applied a rational basis test. And in fact, on  
15 pages 24 and 25 of our brief, we set out the quotations  
16 from Nectow and Euclid which show that the Court -- the  
17 Court there was using the notion of whether the measure  
18 will -- will further a substantial or has a substantial  
19 relation to the public health, really in contradistinction  
20 to something that is irrational.

21 JUSTICE BREYER: What about Moore?

22 MR. KNEEDLER: Excuse me?

23 JUSTICE BREYER: What about Moore?

24 MR. KNEEDLER: Moore?

25 JUSTICE BREYER: Yes, City of East Cleveland

1 where they had the grandmother and the -- the --

2 MR. KNEEDLER: Right. Well, cases -- cases  
3 involving the -- the family unit I think -- I mean, those  
4 are -- those go beyond simply the question of the -- of  
5 regulating property. Those -- those get into -- those get  
6 into questions of -- of who's occupying -- who's occupying  
7 the house. But -- but in Village of Belle Terre, the --  
8 the Court applied a rational basis test to the --

9 JUSTICE BREYER: So -- so we might still keep a  
10 -- a stronger test where a zoning ordinance affects the  
11 number of people that could live in a house or --

12 MR. KNEEDLER: No, not the number -- not the  
13 number of people.

14 JUSTICE BREYER: Or who could live in the house.

15 MR. KNEEDLER: That case concerned --

16 JUSTICE BREYER: Grandparents --

17 MR. KNEEDLER: -- a family, the -- the question  
18 of interfering -- possible interference with a family  
19 unit. But in Village of Belle Terre, the Court applied a  
20 -- a rational basis test to a zoning ordinance that  
21 regulated unrelated people living in -- living in the same  
22 house.

23 So the phrase, substantially advance, while it  
24 may have that ring to it, in fact its origins, when you  
25 look at page 25 of our brief, the -- the Court in Nectow

1 explained the test as being a -- a court may not set aside  
2 the determination of public officers unless it's clear  
3 that it has no foundation in reason and is a mere  
4 arbitrary or irrational exercise, having no substantial  
5 relation to the public health. The Court was --

6 JUSTICE GINSBURG: Well, they don't sound like  
7 synonyms. So I'm asking you what you would recommend that  
8 this Court do. If you say that the standard is the same  
9 as rational basis, perhaps this confusing phrase should be  
10 eliminated.

11 MR. KNEEDLER: Yes. I'm sorry. I  
12 misunderstood, if that was the question. We think it  
13 definitely should be eliminated, and the -- and the Court  
14 should say that it is applying the rational basis test.

15 And I think it's instructive in the -- in the  
16 post-Agins era to look at the Keystone decision, both the  
17 dissent and the majority in that case. It was -- the  
18 Court was essentially unanimous that the -- that the  
19 taking provision of a clause does not authorize an inquiry  
20 into the efficacy of legislation. And in fact, on that  
21 point, the dissent quoted this Court's decision in  
22 Midkiff.

23 JUSTICE KENNEDY: Of course, when you have a  
24 physical invasion of property and a inverse condemnation  
25 is tantamount to a physical invasion, then we've built up

1 some doctrine in order to protect the concept of physical  
2 invasion so that that can't be avoided. Perhaps that's  
3 not applicable to a -- to an economic regulation.

4 MR. KNEEDLER: Well, I -- yes, this -- this --

5 JUSTICE KENNEDY: Even though this is a  
6 leasehold interest. I -- I understand that.

7 MR. KNEEDLER: But the Court applied a rational  
8 basis test in Pennell under the Due Process Clause and it  
9 would be odd to apply a -- a higher test.

10 I mean, it would be a different question if  
11 there was a claim of -- of confiscation of the property,  
12 but Chevron has stipulated that it could not make out a  
13 taking claim on the basis of -- of its economic impact.  
14 So we're talking about a standalone inquiry into the  
15 efficacy of the legislation.

16 JUSTICE SCALIA: But, Mr. Kneedler, simply  
17 giving -- giving the phrase, substantially advance, the --  
18 the more modest meaning that you argue for doesn't solve  
19 the problem. The -- the statement in Agins would still be  
20 incorrect. Agins says that the application of a general  
21 zoning law to a particular property effects a taking if  
22 the ordinance does not substantially advance legitimate  
23 State interests.

24 MR. KNEEDLER: Yes. Now I -- and that was the  
25 point --

1 JUSTICE SCALIA: I mean, so we have to eat crow  
2 no matter what we do. Right?

3 (Laughter.)

4 JUSTICE SCALIA: So why -- why go through all  
5 the trouble of, you know, redefining substantially  
6 affects?

7 MR. KNEEDLER: Right. No. I -- I didn't mean  
8 to say that -- that it should --

9 JUSTICE SCALIA: Yes.

10 MR. KNEEDLER: -- be a rational basis test and  
11 therefore the Court would conclude it was a taking. In --  
12 in the regulatory area, if the court -- if a taking is not  
13 made out on the basis of economic impact under -- under  
14 Penn Central or one of those tests, there's no taking.  
15 You don't get to the public use requirement then because  
16 that only kicks in if there is a taking. So it's the due  
17 process rational basis test that -- that would apply. And  
18 -- and as I said, I think Keystone, with -- with respect  
19 to applying a rational basis test on the efficacy question  
20 is -- is dispositive on that -- on that question.

21 Now, the -- the Court did say you can look at  
22 the character of the governmental action, what -- what the  
23 government is doing as part of the Penn Central test, but  
24 not this sort of means-end efficacy question. And we do  
25 think it would be appropriate for the Court to jettison

1     that.

2                 I would point out that throughout the course of  
3     history, the Court has sometimes used takings and due  
4     process kind of interchangeably. And we -- we quote, for  
5     example, the -- this Court's Rowan decision which refers  
6     to the plaintiff's constitutional claim as saying that the  
7     regulatory action violates the Fifth Amendment because it  
8     constitutes a taking without due process of law. I think  
9     sometimes the Court has used or parties have used those  
10    terms interchangeably, and that may well be what the Court  
11    was doing in Agins.

12                And I think if you look at Penn Central where  
13    that phraseology was -- was used, the same is true where  
14    the Court was -- was relying upon the due process part of  
15    Goldblatt, and the Court put the word taking in -- in  
16    quotes, I think perhaps indicating that it was not looking  
17    at a literal taking.

18                JUSTICE O'CONNOR: Thank you, Mr. Kneedler.

19                Mr. Stewart.

20                ORAL ARGUMENT OF CRAIG E. STEWART

21                ON BEHALF OF THE RESPONDENT

22                MR. STEWART: Justice O'Connor, may it please  
23    the Court:

24                The issue in this case is the content of this  
25    Court's regulatory takings doctrine and, in particular,

1 whether that doctrine includes the inquiries called for by  
2 the substantially advances test, which this Court  
3 articulated in Agins, but which is grounded in principles  
4 the Court has long recognized both before and after Agins.

5 JUSTICE KENNEDY: Is it a regulatory taking in  
6 your view because the substantially advances test is not  
7 met, or is a regulatory taking and then I ask if it  
8 substantially advances?

9 MR. STEWART: The --

10 JUSTICE KENNEDY: How do I know that this is a  
11 regulatory taking, in other words?

12 MR. STEWART: It's a -- it's a regulatory taking  
13 because the government has not physically appropriated the  
14 property or condemned it. Instead, by operation of its  
15 regulation, it has taken the property interest from  
16 Chevron. It's like --

17 JUSTICE SOUTER: No, but that -- that means if  
18 it's a taking at all, it's got to be a regulatory taking.  
19 But Justice Kennedy's question is what is the test for  
20 determining whether it is a taking.

21 MR. STEWART: And I believe that question, Your  
22 Honor, is answered by Pennsylvania Coal where the Court  
23 found that the fact that the statute at issue there  
24 prevented Pennsylvania Coal from mining a certain amount  
25 of the coal that was in the ground that it was otherwise

1   entitled -- be entitled to mine -- took that property just  
2   as assuredly as a condemnation of it would. And then the  
3   Court said, but the seemingly absolute protection of the  
4   Just Compensation Clause in the context of a -- of a  
5   regulation that affects that kind of appropriation, as  
6   opposed to an outright condemnation of it, that that  
7   protection is subject to an implied limitation that  
8   exists to allow the government to serve its purposes, as  
9   Pennsylvania Coal described it, if the government could  
10  hardly function at all, if it were required to pay for  
11  every interference with property rights occasioned by its  
12  regulation. So what we have growing out of Pennsylvania  
13  Coal is a -- a rationale for allowing the government to  
14  interfere with private property rights that would  
15  otherwise be protected and otherwise could not be taken  
16  without compensation in order that the government may  
17  serve its legitimate purposes.

18               JUSTICE BREYER: And then the question, of  
19  course, is let's imagine you're either right or you're  
20  wrong as to its being a regulatory taking. And maybe if  
21  it's -- they have no reason for it at all, they can't do  
22  it. Period. And if they have some reason for it, even a  
23  sort of bad one, they can do it. But if that's the  
24  context -- we're in the game where they can do it -- why  
25  should it matter, in respect to paying compensation,



1    whether their reason is quite a good one or just barely  
2    good enough?  And that's -- that's the puzzle, I think,  
3    that the other side is putting to you, and I must say I'm  
4    rather moved by their argument because it seems to me  
5    whether it's a very good reason or just a barely adequate  
6    reason has nothing to do with whether they should pay  
7    compensation.

8               MR. STEWART:  I think it goes to the difference,  
9    Your Honor, between the public use standard and the --  
10   which governs in a situation in which the government is  
11   paying compensation.  And in that standard, as we've been  
12   discussing today, in that context, the Court has applied  
13   a very deferential standard because the -- the burden on  
14   property rights is lesser and the -- the impediment --

15              JUSTICE BREYER:  But the burden on --

16              MR. STEWART:  -- to governmental action is  
17   greater.

18              JUSTICE BREYER:  Maybe I'm not -- I thought --  
19   are we in the world in which you agree the government can  
20   do it even though their reason -- or is your basic  
21   argument, no, they can't do this at all?  In which case  
22   it's not a compensation question.  It's a question of  
23   whether the Constitution of the United States forbids them  
24   from doing it.  Period.

25              MR. STEWART:  We -- we believe, Your Honor, that

1 it is a compensation issue.

2 JUSTICE BREYER: It's a compensation issue.

3 JUSTICE SOUTER: So you want money? You want a  
4 money judgment? I thought you wanted them to stop it.

5 MR. STEWART: We wanted a declaration from the  
6 court that the -- that they cannot proceed with a statute  
7 that takes our rents without paying -- paying for us.  
8 What's happened here is that this legislature has  
9 enacted --

10 JUSTICE SOUTER: But -- but isn't -- I thought  
11 your premise was that because the statute doesn't  
12 authorize any payment, that is a way of stopping it.

13 MR. STEWART: Yes. The statute does not  
14 authorize payment.

15 JUSTICE SOUTER: So if -- if Hawaii modifies its  
16 statute and says, we will give to you the difference  
17 between, you know, whatever the rent we -- if we can  
18 figure it out -- whatever the rent would be and -- and  
19 what our statute requires, you'd be perfectly happy.

20 MR. STEWART: Yes, Your Honor.

21 JUSTICE SOUTER: Okay.

22 MR. STEWART: What we are arguing about here is  
23 compensation, and the standard that we --

24 JUSTICE O'CONNOR: Well, it would seem that  
25 you're arguing about whether this amounts to a taking --

1 MR. STEWART: Yes.

2 JUSTICE O'CONNOR: -- at all. And you have to  
3 look at how severely the State law burdens the property  
4 rights. Don't you?

5 MR. STEWART: Your Honor, the -- in Lucas, this  
6 Court found that a -- a complete deprivation of the  
7 economic value of property constitutes a categorical  
8 taking. But the Court has not held -- it did not hold in  
9 Lucas and it has not otherwise held -- that a regulation  
10 that affects less than a complete destruction of economic  
11 value is categorically not a taking. The point of the  
12 Court's regulatory takings doctrine and the inquiries that  
13 it mandates is to determine those circumstances in which a  
14 deprivation that is less than a complete destruction of  
15 economic value require compensation.

16 JUSTICE BREYER: Well, the -- let me go back to  
17 my question because I haven't heard the answer. And I'm  
18 in a world, imaginative if you like, where Hawaii passes  
19 this statute, and what we're interested in is not whether  
20 they can do it, but whether they have to pay compensation.  
21 And my question is, what in heaven's name has the goodness  
22 or badness of their reason to do with that question?  
23 After all, I can imagine instances in which their reason  
24 for the regulation is pretty bad. It just barely  
25 survives, and they shouldn't have to pay. And I can

1     imagine cases where their reason is wonderful and they  
2     should have to pay or maybe they shouldn't.  It's neither  
3     a necessary nor a sufficient condition.  It has nothing to  
4     do with whether you should have to pay.

5             Now, that's their argument I think, or at least  
6     as I understand it, and I want you to explain to me why  
7     the goodness or badness of the reason, once it has passed  
8     the minimal point, has anything to do with whether you  
9     should have to pay compensation.

10            MR. STEWART:  And my answer to that, Your Honor,  
11     is that it goes -- it stems from the rationale expressed  
12     in Pennsylvania Coal for allowing the government to  
13     interfere with private property --

14            JUSTICE BREYER:  Holmes said, though he didn't  
15     hold that -- what he said was you have to pay when the  
16     regulation, a legitimate regulation, goes too far.  So I  
17     will repeat.  Why does the goodness or badness of the  
18     reason, past the minimal point, have anything to do with  
19     whether a regulation goes too far?

20            MR. STEWART:  Well, part of the question whether  
21     the regulation goes too far is whether there is a basis  
22     for imposing the burden on a particular property right.  
23     Here we have --

24            JUSTICE KENNEDY:  Yes, and in that respect,  
25     Holmes did not use the word legitimate.  He said just when

1 the regulation goes too far, and if it's illegitimate,  
2 that tends to show -- I suppose the jurisprudence is --  
3 that this is not an accepted form of regulation in the  
4 usual course and therefore unnecessary. I take it that's  
5 your argument.

6 MR. STEWART: Well, I think, Your Honor, that  
7 the -- growing out of Pennsylvania Coal, the Court has  
8 recognized that one of the critical factors, if not the  
9 most critical factor, in regulatory takings analysis is  
10 the character of the government's action and the nature of  
11 the government's interest. It's not simply a matter of  
12 how much property has been taken. The question is the  
13 government's basis for taking that property.

14 When we -- what we have here, Justice Breyer, is  
15 a -- is a -- a right specifically protected by the  
16 Constitution. The Constitution provides that private  
17 property shall not be taken for public use without just  
18 compensation. And Justice Holmes in Pennsylvania Coal was  
19 -- said that that seemingly absolute protection is  
20 qualified, and the --

21 JUSTICE BREYER: But he -- he didn't go into  
22 this question.

23 Let me give you an example that will make it  
24 clear. Let's take a case where there's the best reason in  
25 the world, fabulous reason. We're taking this property to

1 build a highway, which is absolutely necessary. Would you  
2 suggest that compensation doesn't have to be paid?

3 MR. STEWART: Compensation, of course, has to be  
4 paid.

5 JUSTICE BREYER: Of course, it does.

6 Now, let me suggest the other side of the coin,  
7 a really terrible reason. You cannot build your house  
8 without using metal pipes. That's our building reg in  
9 this State. Now, everybody knows -- I'm imagining anyway  
10 -- plastic pipes are just as good, but not quite, so they  
11 have a barely adequate reason. Do you think that they  
12 have to pay compensation to have a general building code  
13 saying you can't use plastic pipes?

14 MR. STEWART: Your Honor, I -- to me there's a  
15 threshold question of whether a general building  
16 regulation of that type really would be a -- a regulation  
17 that would implicate the Takings Clause at all.

18 JUSTICE BREYER: Well, it is an -- it does  
19 regulate the use of your property and it means added cost,  
20 in fact, several thousand dollars added cost, to the  
21 building of a house, and come up here and argue we agree  
22 there's a rational reason, but it isn't so you can do it,  
23 but it isn't a really good reason, not substantial. Now,  
24 do you think that has anything to do with paying  
25 compensation?

1           MR. STEWART: Yes, Your Honor, I do. And  
2     because the -- the -- assuming -- on the assumption that  
3     this is really a -- a burden on property rights that would  
4     be subject to the Takings Clause, then that burden  
5     requires compensation unless there's some limitation on  
6     the compensation principle. And the limitation that the  
7     Court has recognized, growing out of Pennsylvania Coal, is  
8     the need for the government to function. So we have an  
9     inquiry into whether this furthers the governmental  
10    purposes.

11           Now, in your example, Your Honor, I don't think  
12    there's any question that that inquiry would be satisfied.  
13    Our point is simply that the inquiry must be made.

14           JUSTICE GINSBURG: Mr. Stewart, I'm trying to  
15    understand not your theory but its concrete applications.  
16    Here we're dealing with the rent to be paid by a lessee of  
17    a gas station, but what you're saying, I take it, would go  
18    for any kind of rent control. You could make the same  
19    argument. So you're -- so you are saying that rent  
20    control is a taking and the State could do it with  
21    compensation?

22           MR. STEWART: Yes, and --

23           JUSTICE GINSBURG: And -- and the measure of  
24    compensation would be? How would the State -- let's take  
25    a -- an ordinary rental property, and the city puts a rent

1 control ordinance into effect. You say that's a taking,  
2 and how would one measure the compensation?

3 MR. STEWART: The compensation would be measured  
4 as the difference between the -- the rent that was allowed  
5 under the regulation or the statute and the rent that the  
6 -- that the landlord, the lessor, would otherwise be  
7 entitled to collect in the marketplace.

8 JUSTICE SCALIA: I didn't understand you as  
9 saying that all rent control constitutes a taking. I  
10 thought it is only unintelligent rent control that  
11 constitutes a taking.

12 (Laughter.)

13 JUSTICE SCALIA: Or do you not think that any  
14 rent control is intelligent?

15 MR. STEWART: No, that is not our position, Your  
16 Honor. The -- the -- and in fact, the -- the State has  
17 specifically disclaimed any contention that -- that this  
18 is like the typical residential rent control. So --

19 JUSTICE GINSBURG: I'm asking for not the  
20 State's position but your position.

21 MR. STEWART: And our --

22 JUSTICE GINSBURG: And let's -- let's assume  
23 that there's no better reason for the rent control for the  
24 building, residential building, than there is for the rent  
25 control on the lease for the gas station.



1           MR. STEWART: Your Honor, our -- the question  
2    would be, under our analysis, is not the validity of the  
3    -- of the ends, of the legislative ends. That would be  
4    taken care of in the inquiry under public use. So -- so  
5    the -- so the question of the legitimacy of the  
6    government's interest in controlling rent would not be at  
7    issue.

8           What would be at issue under our test is the  
9    connection between the -- the rent control, the burden on  
10   private -- private property rights that's imposed and the  
11   nature of the asserted interests and the degree to which  
12   that burden furthers that interest.

13          Now, in the typical residential rent control  
14   circumstance, where the purpose of the statute -- where --  
15   where the -- where the legislature is concerned about the  
16   -- the price, the rent -- the rental amount that residents  
17   are having to pay, in that circumstance, the test that  
18   we're proposing would be easily met because the purpose of  
19   the statute would be to grant rent relief to the -- to the  
20   tenants. And that --

21          JUSTICE SOUTER: And on your theory it would  
22   easily be met no matter how severe the control. I -- I  
23   take it on your theory, if -- if the -- if the rent  
24   control ordinance said, \$5 an apartment, that's the top  
25   rent, fine with you because it's extraordinarily efficient

1 in relieving poor renters from the -- from the burden of  
2 -- of high rents.

3 MR. STEWART: I think our --

4 JUSTICE SOUTER: That can't be the test.

5 MR. STEWART: Well, I think our position, Your  
6 Honor, is that there are -- this -- this is a threshold  
7 inquiry, the -- the hypothetical --

8 JUSTICE SOUTER: But -- but it would -- in any  
9 case it would pass the threshold inquiry on your test.  
10 You would say, boy, it doesn't get any more efficient than  
11 this until it gets to zero.

12 MR. STEWART: I think that it would pass the  
13 inquiry. I suppose you could -- you could --

14 JUSTICE SOUTER: So you would say at the  
15 threshold level, there's no taking.

16 MR. STEWART: Yes.

17 JUSTICE SOUTER: And what would you then do? Go  
18 on to Penn Central?

19 MR. STEWART: Yes.

20 JUSTICE SOUTER: Okay.

21 MR. STEWART: You would have an inquiry into  
22 whether there is a categorical taking under Lucas because  
23 it deprived essentially all economic value of the property  
24 and you would inquire under Penn Central whether --  
25 because the threshold inquiry into the nature of the

1 government's interest is satisfied, you then inquire into  
2 whether the burden is such in light of the purposes to be  
3 served that we believe it goes too far --

4 JUSTICE SOUTER: Okay. But if -- if the test is  
5 going to be as unhelpful as it would be in my extreme  
6 hypothetical, why have the test at all? Because in the  
7 more difficult case where it's not \$5 an apartment, but a  
8 case like this in which the justification is ultimately a  
9 justification in gasoline prices and so on, the -- the  
10 inquiry is going to be much more complex. Penn Central is  
11 a way of approaching that complexity. Why do we bother  
12 with this threshold test which produces a bizarre result  
13 in one case and is going to be very difficult to apply in  
14 another case, in which event I don't see the reason for  
15 having it as distinct from the Penn Central difficulty  
16 test. What's -- what's its value?

17 MR. STEWART: I mean -- part of my answer to  
18 that, Your Honor, is that this test, in our view, does  
19 have very narrow application, which is the reason why we  
20 don't believe that the State is correct in suggesting that  
21 it will result in the invalidation of all kinds of  
22 economic regulation.

23 Having said that, though, I do believe that it  
24 is an important threshold requirement that should be met,  
25 and if the government has not identified a basis for

1 singling out a given property right and imposing on that  
2 the burden of a regulation and if it has not demonstrated  
3 that the burden it is imposing is related in a -- in a --  
4 in advancing the purpose for which the burden is being  
5 imposed, then in that circumstance, the -- the rationale  
6 for imposing that burden without compensation, in  
7 contravention of the compensation requirement in the Fifth  
8 Amendment, is missing.

9 JUSTICE SOUTER: But isn't the sensible response  
10 to the situation you posit that the government shouldn't  
11 be doing it? I mean, it's a little crazy to say the  
12 Government is acting crazy. Therefore it -- it ought to  
13 contribute money so the net economic effect is somehow  
14 zero. There's simply a transfer. The taxpayers bear a  
15 burden as -- as opposed to somebody else.

16 On the -- on the justification you're giving for  
17 the test, you would say, look, if it's not substantially  
18 advancing this interest, why let the government do it at  
19 all? I'm not saying that should be the test for whether  
20 the government should do it at all. But isn't that kind  
21 of the sensible tendency of the test, to suggest that the  
22 government shouldn't even be doing it?

23 MR. STEWART: And I -- the distinction we're  
24 relying upon there, Your Honor, is -- is the question  
25 whether the government can proceed with compensation as

1 distinct from proceeding without compensation. When the  
2 government proceeds with compensation -- it's going to pay  
3 for the private property rights, the constitutionally  
4 protected private property rights, with which it's  
5 interfering -- then we demand a lesser showing. But when  
6 there is a constitutional right at stake, the -- the  
7 showing should be higher. We're not asking whether the  
8 government can proceed at all. We're simply asking  
9 whether the government can proceed without compensation.  
10 And the without compensation is what triggers and  
11 infringes upon the very rights that are protected by the  
12 Just Compensation Clause.

13 JUSTICE SCALIA: I must say I agree with Justice  
14 Souter. It seems to me if you say -- you're saying it  
15 doesn't make sense, so you got to pay for it. I think it  
16 -- it's much more reasonable to say it doesn't make sense,  
17 so you can't do it. Why isn't the latter the -- the  
18 intelligent reaction?

19 MR. STEWART: Your Honor, I -- the -- the  
20 question of whether it makes sense turns upon the standard  
21 of review that the Court is going to apply to answer that  
22 question. And when we are --

23 JUSTICE SOUTER: No. The -- I mean, it seems to  
24 me that the -- the whole point of the argument you're  
25 making is it won't hurt me, the landowner, quite so much,

1 but if it doesn't make sense at all, why should we even  
2 have to get to that question? Why isn't the more sensible  
3 thing to say to the government, stop doing it?

4 MR. STEWART: Because of the -- the -- the  
5 difference in the relative interests at stake when we're  
6 talking about proceeding with compensation as against  
7 without compensation.

8 In -- in the -- it's similar to the other  
9 protections extended under the Bill of Rights. The Court  
10 has indicated that the Just Compensation Clause is just as  
11 much a part of the Bill of Rights as any of the other  
12 protections of the Bill of Rights. And there are  
13 circumstances in which the government may proceed. There  
14 would be a rational basis for it to proceed under a very  
15 deferential standard that would be applied under the Due  
16 Process Clause, but the Court, nonetheless, requires a  
17 higher showing because of the intrusion on  
18 constitutionally protected rights.

19 JUSTICE GINSBURG: But isn't the effect of what  
20 you're arguing that you can't do it? Because you -- the  
21 government would have to pay the same amount that -- by  
22 the -- that the rent is being reduced. We'd have to  
23 figure out how much higher the rent would have been, and  
24 -- so it -- it would be a -- a nonsensical thing for the  
25 government to engage in.

1           MR. STEWART: Your Honor, the State's position  
2   in this case is that by preserving a network of lessee  
3   dealers, there will be benefits to the public in terms of  
4   lower gasoline prices. And I think their -- their theory  
5   is that those benefits would far outweigh the -- the  
6   modest decrease in rent, lost rent to the oil companies.  
7   And so that it -- it would make sense if the government  
8   wished to make that choice and -- and to pay compensation,  
9   if the government's theory were correct.

10           And one of the values of the Just Compensation  
11   Clause and the constitutional rights that it protects is  
12   that it forces that choice to be made. It -- it puts the  
13   decision on budget as opposed to off budget.

14           JUSTICE GINSBURG: Well, why wouldn't it make  
15   sense then for the government to say, Chevron, you charge  
16   what you want and, station owner, we, the government,  
17   gives you -- Hawaii gives you this money so you'll be able  
18   to pay the excess rent?

19           MR. STEWART: In fact, we believe that is -- is,  
20   in essence, what is occurring here. There -- there is no  
21   claim that the rents that Chevron or the other oil  
22   companies were charging are excessive or that they have  
23   been the cause of any problem in the State of Hawaii that  
24   Hawaii is trying to address.

25           JUSTICE BREYER: Explain it -- explain your

1 theory in terms of the example. That is, imagine that the  
2 benefits of the network of dealers of gasoline into the  
3 community are fabulous and obvious. So there's a great  
4 reason for doing this. Now, why is it that, on your  
5 theory, the government shouldn't have to pay compensation  
6 then, but it should have to pay compensation just because  
7 the benefits are not obvious, that they're bizarre, that  
8 they don't -- may not really exist? That's -- you see why  
9 I'm having a problem?

10 MR. STEWART: Let me see if I can get to it  
11 better, Your Honor. One reading of the Takings Clause,  
12 the Just Compensation Clause, would be that the government  
13 should pay compensation in those circumstances where it is  
14 depriving property owners of protected property rights.  
15 But in Pennsylvania Coal, the Court said in the regulatory  
16 takings area, because of the need for the government to  
17 function, we are going to allow the government in certain  
18 circumstances to -- to interfere with rights without  
19 paying for them. And the inquiry that we're saying the  
20 Court should make is whether that need exists and whether  
21 the burden being imposed serves that need.

22 And -- and again, I'd like to emphasize that  
23 this should not be considered an unfamiliar concept in  
24 constitutional law. This Court has consistently  
25 recognized that when the government seeks to intrude on



1   protected -- rights protected by explicit provisions in  
2   the Constitution, on the basis that its needs, its  
3   legitimate interests require that intrusion, then the  
4   court's role to enforce the constitutional protections is  
5   to make that inquiry into whether the need is -- is being  
6   actually served.

7               Now, I'd like to at -- at this point emphasize  
8   that our position is not that no deference may be given to  
9   legislative judgments under this test. Our position is  
10  simply that it must be more than a mere rational basis  
11  test. The reason why the Court, in repudiating the  
12  Lochner-era cases, has held that mere rationality is  
13  enough to satisfy the constitutional standard is that  
14  there was no specific constitutional prohibition. In the  
15  -- and -- and the Court specifically distinguished those  
16  circumstances in which there is a constitutional right --

17              JUSTICE GINSBURG: But there are so many things  
18  that you could dress up as being a taking. And -- and so  
19  it seems to me that it's up to the artful pleader to say  
20  whether this is a due process excessive regulation or this  
21  is intrusive to the point where it amounts to a taking.

22              I mean, the -- the -- would you -- rent control  
23  is one. What about -- suppose Hawaii had said, we're  
24  going to cap the price of gas so it will make it easier  
25  for these stations to survive.

1           MR. STEWART: I think, Your Honor, that most  
2 courts have recognized, although I don't know that it's  
3 settled, that a -- a control on the price of a product  
4 that -- that a business has produced would implicate the  
5 Takings Clause. And -- and in that circumstance, the  
6 substantially advances test almost certainly would be met,  
7 and our --

8           JUSTICE GINSBURG: Do we have a case involving  
9 price control where we have analyzed that as a taking?

10           MR. STEWART: Yes. The Florida Power case v.  
11 the FCC where there was a regulation on the prices that  
12 telecommunications companies could charge for access to  
13 their poles. Back in the war era, there was cases  
14 involving rent control where the Court found that the rent  
15 control was justified because there was a market  
16 distortion caused by the extraordinary imbalance in --

17           JUSTICE GINSBURG: I didn't know that those were  
18 treated as taking cases.

19           MR. STEWART: I believe they were, Your Honor,  
20 and that they have been -- that this Court has discussed  
21 them in those terms.

22           But I would like to, if I could, address the  
23 broader point that I believe Your Honor was -- was making,  
24 which is can these claims just simply be repackaged and --  
25 and sweep into the takings analysis all of the regulation

1 and apply to it the very same test that the Court has  
2 repudiated in Lochner. And the answer to that I believe  
3 is clearly no.

4           The -- the Just Compensation Clause is limited  
5 to rights of private property, would not extend -- and I  
6 don't believe there's anything in this Court's precedents  
7 that would require it that it extend to the kinds of laws,  
8 minimum wage laws, wage and hour provisions, regulations  
9 on the size of bread loaves, that were the professional  
10 licensing requirements that were the subject of the  
11 Lochner-era cases.

12           And the Due Process Clause extends even to  
13 expectancy interests or -- or reliance interests on  
14 governmental benefit programs. Nothing in our position  
15 here would -- would apply to that because those, we don't  
16 believe, have ever been held and -- and should not be held  
17 to be covered within the specific provision of the Just  
18 Compensation Clause.

19           Your Honors, in Nollan and Dolan and First  
20 English, this Court recognized that the Just Compensation  
21 Clause is not a poor relation among the provisions of the  
22 Bill of Rights. In First English, the Court recognized  
23 that the constitutional provisions by their very nature  
24 limit the freedom and flexibility of the government in  
25 order to protect constitutional rights. And the Court in

1 First English said that the Just Compensation Clause of  
2 the Fifth Amendment is one such provision.

3 And our position here is that this  
4 constitutional right, that private property shall not be  
5 taken without just compensation, should be entitled to the  
6 same protection as the other constitutional protections in  
7 the Bill of Rights, and that just as with respect to those  
8 rights, when the government seeks to intrude on those  
9 interests, the court should properly inquire into the  
10 nature of that intrusion and the justification for that  
11 intrusion.

12 Thank you.

13 JUSTICE O'CONNOR: Thank you.

14 Attorney General Bennett, you have 7 minutes  
15 remaining.

16 REBUTTAL ARGUMENT OF MARK J. BENNETT

17 ON BEHALF OF THE PETITIONERS

18 MR. BENNETT: Your Honors, this case is not  
19 about compensation. Indeed, Chevron's discussion of  
20 compensation -- the first time that that occurred in the  
21 entirety of this case was in its brief in this Court, as  
22 we point out, in particular, in footnote 6 at page 11 of  
23 our reply brief. This case is, indeed, about whether this  
24 economic regulation is legitimate. The Ninth Circuit's  
25 test was it doesn't work well enough, so it is

1     illegitimate. That type of a test belongs under the Due  
2     Process Clause, not under the Just Compensation Clause.

3             This Court has time and time again said that it  
4     is not going to set up separate per se tests except in  
5     very limited circumstances and, indeed, it's not going to  
6     divide parcels in the way Chevron suggests here and  
7     whether it's in Tahoe-Sierra or Penn Central or Keystone,  
8     the Court has said, absent taking all value or use of the  
9     property or in Loretto, in the case of a physical  
10    invasion, it is going to allow these types of regulatory  
11    takings tests to be judged under Penn Central.

12            What Chevron is arguing for here is a separate  
13    test outside of Penn Central, divorced from economic  
14    impact, that concerns solely the legitimacy of the  
15    regulation. We suggest that that belongs in due process.

16            We believe that what the Court should do is say  
17    that what was stated in Agins does not state a standalone  
18    test. Tests for judging the legitimacy of a regulation  
19    belong in due process based upon a rational basis test and  
20    that other than the very limited per se categories that  
21    this Court has established, regulatory takings claims  
22    depend on economic impact and belong under the Penn  
23    Central analysis.

24            Thank you.

25            JUSTICE O'CONNOR: The case is submitted.

1                   (Whereupon, at 12:06 p.m., the case in the  
2   above-entitled matter was submitted.)  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25