

JUSTICE SCALIA’S RULE OF LAW AND LAW OF TAKINGS

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INTRODUCTION

The United States Supreme Court decided more than two dozen cases raising Fifth Amendment “takings” claims during Antonin Scalia’s 30-year tenure.¹ By my count, Justice Scalia authored only three of the majority opinions in these cases (and one of them was partially a plurality opinion), although he joined the majority in most of the rest.² Somewhat surprisingly, Justice Scalia authored only one dissenting opinion in a takings case during his 30 years on the Court,³ along with a handful of concurrences. The members of this panel have been assigned the task of assessing the impact of these opinions on the Court’s takings jurisprudence. I strongly suspect that, as the sole conservative on the panel, the group implicitly assigned me the role of defending Justice Scalia’s decisions against charges of unprincipled

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1. ROBERT MELTZ, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY, CONG. RES. REP. NO. 97-122 (July 20, 2015), <https://www.fas.org/sgp/crs/misc/97-122.pdf>.

2. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827, 841 (1987) (holding that the Fifth Amendment’s Property Clause “is more than a pleading requirement and compliance with it [is] more than an exercise in cleverness and imagination”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006 (1992); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 707, 719 (2010) (plurality opinion) (holding that the Florida Supreme Court’s action did not meet the standard for a judicial taking).

3. *Brown v. Legal Found. of Wash.*, 538 U.S. 214, 241–52 (2003) (Scalia, J., dissenting).

judicial activism. I am happy to embrace that charge, although my assessment of Justice Scalia's opinions falls slightly short of a full-throated defense.

My answer to the question posed to the panel:⁴ Justice Scalia's decisions had a modestly significant impact on takings law. He penned the majority opinion in two of the most significant cases in recent years, *Nollan v. California Coastal Commission* and *Lucas v. South Carolina Coastal Council*.⁵ As expanded in subsequent decisions,⁶ *Nollan* arguably has proven the most significant in terms of real-world impact. But, the extent of that impact is largely the result of subsequent exactions opinions that Justice Scalia joined but did not author. *Lucas*, on the other hand, is more interesting as a matter of constitutional and property theory than *Nollan*, but subsequent decisions have arguably limited the opinion's impact.⁷ Justice Scalia's opinions—especially several of his concurrences and one dissent from a denial of certiorari—also anticipated important aspects of the future trajectory of the Court's takings jurisprudence.

My assessment of whether these opinions diverge from the jurisprudential principles that guided much of Justice Scalia's work on the Court is mixed. Justice Scalia was an "original meaning" originalist who loosely adhered to the principle of stare decisis, and strongly preferred clear legal rules over vague standards.⁸ Takings questions pose a particular challenge for originalists, including myself, because so little is known about the original meaning of the Takings Clause. And they also pose a particular challenge for jurists who, like Justice Scalia, favor clear, generalizable rules over fact-dependent balancing tests. After all, the question of whether

4. "What is the takings legacy of the late Justice Antonin Scalia?"

5. The most significant sections of Justice Scalia's opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* did not command a majority, or else I would have included it on the "most important" list.

6. See *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994) (answering the question left open in *Nollan* concerning the "required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development"); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591, 2607 (2013) (expanding *Dolan*'s proportionality test).

7. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341–42 (2002) (restricting the *Nollan* test and applying the *Penn Central* approach toward takings). But see Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322, 364–66 (2005) (arguing that *Lucas*'s significance flows from unintended consequences).

8. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1174 (2006) ("Rather than embracing precedent as critical to the rule of law, [Scalia] view[ed] it as an obstacle to correct constitutional interpretation . . ."); Antonin Scalia, *The Rule of Law as the a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("For when, in writing for the majority of the Court, I adopt a general rule . . . I not only constrain lower courts, I constrain myself as well."); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1989-90) ("Besides its centrality to the rule of law in general, consistency has a special role to play in judge-made law . . ."); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78 (1992) ("[F]or Justice Scalia, the rule's the thing; originalism and traditionalism are means, not ends.").

government regulation “goes too far” is about as vague and fact-specific as legal questions come.⁹ In light of these difficulties, and Justice Scalia’s jurisprudence, I think that some of Justice Scalia’s takings opinions (e.g., *Lucas*) are more “principled” than others (e.g., *Nollan*).

I. JUSTICE SCALIA’S LAW OF TAKINGS

There is little question that takings law evolved significantly during Justice Scalia’s tenure and that the trend was generally (but not exclusively) in a pro-property-owner direction. Justice Scalia played an important role in that development; although, perhaps not as important as others, especially the late Chief Justice Rehnquist. Justice Scalia authored two of the most important takings cases in the past 30 years—*Nollan* and *Lucas*—and in those opinions, as well as in numerous concurrences, he anticipated in significant respects the course of future takings jurisprudence.

A. *Nollan v. California Coastal Commission*

Justice Scalia authored his first takings opinion, *Nollan v. California Coastal Commission*, during his first term on the Supreme Court.¹⁰ The facts of the case are familiar to law students and regulatory takings scholars and lawyers. The Nollans owned beach front property in southern California.¹¹ In 1982, they applied for a permit to demolish a small bungalow and replace it with a larger home.¹² The California Coastal Commission, which regulates development along the Pacific coast, granted the permit subject to the condition that the Nollans grant a public easement allowing access to the private beach that abutted their property.¹³ The Nollans challenged the condition as a violation of the Fifth Amendment’s Takings Clause.¹⁴ The California courts rejected the Nollans’ argument.¹⁵ But, in a closely divided decision, the U.S. Supreme Court reversed.¹⁶ Writing for a five-member majority, Justice Scalia found that the condition placed upon the building permit sought by the Nollans was not a legitimate exercise of the police power because there was no nexus between the condition demanded—physical access to the beach—and the stated harm caused by the proposed

9. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

10. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987).

11. *Id.*

12. *Id.* at 828.

13. *Id.*

14. *Id.* at 829.

15. *Id.* at 827.

16. *Id.* at 825, 841–42.

construction of the house—that the larger house would create a “psychological barrier” by blocking the public’s “visual access” to the ocean.¹⁷

I regard *Nollan* as Justice Scalia’s most significant takings opinion for three related reasons. First, *Nollan* created an entirely new category of regulatory takings claims: exactions. Before the decision, as the dissents vehemently contended, it was not clear that regulatory exactions posed a takings problem at all.¹⁸ *Nollan* arguably departed from the settled expectation, which, as a matter of federal constitutional law,¹⁹ treated exactions as presumptively valid economic regulations. These exactions were subject only to rational basis review, which merely asks whether the government’s demand advanced any *conceivable* governmental interest.²⁰ Moreover, *Nollan* did more than sweep exactions under the takings umbrella. It also removed them categorically from the multifactor balancing test for regulatory takings adopted in *Penn Central Transportation v. New York City*, which weighs the government’s interest against the property owner’s investment-backed expectations.²¹

Second, as Justice Scalia predicted in his opinion, *Nollan*’s nexus requirement proved to be “more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.”²² In *Dolan v. City of Tigard*, the Court clarified that exactions must be roughly proportional to the “impacts of the proposed development.” *Dolan*’s rule requires the government to show its math to a much greater degree than is the case in virtually all other challenges to the validity of economic regulations.²³ Most recently, in *Koontz v. St. John’s River Water*

17. *Id.* at 838.

18. *See id.* at 854 (Brennan, J., dissenting) (explaining that exactions were “commonplace conditions on approval of development”).

19. Prior to *Nollan*, most state courts had subjected exactions to heightened scrutiny; California was an exception. *Id.* at 834, 839; Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 624–26 (2004).

20. *See, e.g.*, Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 602–03 (1998) (observing that *Nollan* represented the first departure from previous rational basis review of property regulations); Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1607 (1988) (“Prior to *Nollan*, a judicial determination of a property regulation’s validity . . . to the extent that it involved any means-ends appraisal, involved only scrutiny of the public purposes plausibly ascribed to the regulation.”).

21. Eduardo M. Penalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2196 (2004) (“[T]he Court has created a different, and more stringent, takings analysis for claims that government permission to develop property has been conditioned on the unconstitutional ‘exaction’”); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127, 130 (1978) (finding that when a state statute furthers important public policies, to the detriment of certain investment expectations, a taking may occur).

22. *Nollan*, 483 U.S. at 841.

23. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Management District, the Court ruled that *Dolan*'s rough proportionality test applied to monetary as well as in-kind exactions and to permit denials.²⁴

Finally, and perhaps most importantly in terms of real-world impact, exactions are a ubiquitous feature of land use planning practices.²⁵ The *Nollan/Dolan/Koontz* canon subjects the day-to-day decisions of local regulators to constitutional scrutiny in a way that other takings decisions do not. This is particularly true after *Koontz*, which eliminates the regulatory option of shifting from in-kind to monetary exactions in order to avoid heightened scrutiny.²⁶ Moreover, while early indications suggested that state courts were reluctant to apply the *Dolan* proportionality test with gusto,²⁷ later cases (and the number of Continuing Legal Education opportunities offered on the subject of exactions) clearly indicate that *Dolan* has had a "trickle down" effect on state court practice. Roughly half of these litigated exactions "flunk the test."²⁸ And, perhaps most importantly, *Nollan* (followed by *Dolan* and *Koontz*) armed property owners with the credible threat of subjecting exactions to heightened judicial scrutiny—a threat that they undoubtedly wield liberally in the regulatory bargaining process.²⁹

B. *Lucas v. South Carolina Coastal Council*

Justice Scalia also authored what is, in my opinion, the second most-significant takings case in the past 30 years—*Lucas v. South Carolina Coastal Council*.³⁰ In *Lucas*, the Court carved out another exception to *Penn*

24. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597–98, 2607 (2013).

25. See generally ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ WITH ARNOLD M. HOWITT, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 1–139 (1993) (discussing and analyzing the history and interconnectedness of exactions with land use planning); Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE: J. POL'Y DEV. & RES. 139, 141 (2005).

26. See John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 3 (2014) (arguing that the *Koontz* decision "will make the land use regulatory process more cumbersome, expensive, and time-consuming").

27. See, e.g., David A. Dana, *Land Use Regulations in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1260–61 (1997) (discussing how state courts shied away from applying the *Dolan* test with rigor); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 555 (1995) (stating that the Supreme Court decision has had less of an impact on individual controversies than initially expected).

28. See Echeverria, *supra* note 26, at 8 ("A recent survey of the published appellate decisions applying the 'rough proportionality' test, generally regarded as the more demanding of the two exactions tests, shows that the government flunks the test about half the time—a significant figure.") (footnote omitted).

29. Ann E. Arlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 106 (2001); Richard Duane Faus, *Exactions, Impact Fees and Dedications—Local Government's Responses to Nollan/Dolan Takings Issues*, 29 STETSON L. REV. 675, 677 (2000) (arguing that the property owner's negotiation stance changed from "let's make a deal" to "let's make a claim").

30. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006 (1992).

Central's multi-factored approach to determining if a regulation effects a taking. The petitioner, David Lucas, challenged a state regulation that prohibited the construction of any permanent physical structure on certain beachfront lots, including one that Mr. Lucas had purchased to develop before the restriction was in place.³¹ The Court ruled that, since the regulation deprived Mr. Lucas of "all economically beneficial uses" of his property, he was *categorically* entitled to compensation under the Fifth Amendment, except under certain seemingly narrow conditions.³² Writing for the majority, Justice Scalia opined: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."³³ Justice Scalia reasoned, "regulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."³⁴ In other words, drawing upon a long line of cases holding that the government may always prescribe nuisances without compensating the owners for the resulting loss,³⁵ Justice Scalia argued that "total takings" claims are binary: Either compensation is categorically due, or it is categorically not due.³⁶

In my view, *Lucas* is more interesting theoretically, but less significant practically, than *Nollan*. *Lucas* is interesting—and fun to teach to first-year Property students—because, at heart, Justice Scalia's opinion is an exegesis on what property *is*. Scalia's theory of property clearly reflects a classical liberal understanding that property rights preexist the state, and therefore cannot be legislated away without compensation.³⁷ But, it also acknowledges that even Blackstone's conception of absolute ownership—*cuius est solum, eius est usque ad coelum et ad infernos* ("whoever owns the soil, it is theirs up to heaven and down to hell")—recognized that all property titles are *encumbered* by pre-existing claims (of neighbors and the state).³⁸ *Lucas* helps

31. *Id.* at 1008–09.

32. *Id.* at 1019.

33. *Id.* at 1027.

34. *Id.* at 1029.

35. *Id.* at 1022 (citing *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); and *Mugler v. Kansas*, 123 U.S. 623 (1887)).

36. *Id.* at 1027–29.

37. See *infra* Part II (discussing and analyzing Justice Scalia's approach to property law).

38. II WILLIAM BLACKSTONE, COMMENTARIES *18; I WILLIAM BLACKSTONE, COMMENTARIES *138 ("The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."). See *Legal Definitions*, U.S. LEGAL, <https://definitions.uslegal.com/c/cuius-est->

to elucidate this point, since Justice Scalia's exception to the categorical rule for total takings stands for the proposition that an owner cannot lose what he or she never had.³⁹

To illustrate why this is so, I frequently teach *Lucas* along with the original decision of the European Court of Human Rights ("ECHR") in *J. A. Pye (Oxford) Ltd. v United Kingdom*. This ECHR case ruled that the British law of adverse possession resulted in the uncompensated confiscation of property in violation of the European Convention on Human Rights.⁴⁰ Most students regard this decision, which the ECHR's Grand Chamber subsequently reversed,⁴¹ as bizarre. They understand, at least by the third week of Property class, that adverse possession laws cannot "take" property because ownership always carries the risk of adverse possession.⁴² It is as if adverse possession encumbers every real property title with a "no sleeping on your rights" clause.⁴³ Title shifted from the record holder to the possessor because the original owners in the *Pye* case failed for over a decade to evict their tenants following the expiration of a grazing lease.

Justice Scalia's conception of the scope of preexisting encumbrances that might justify total takings has been vehemently challenged. Many scholars have criticized him for misapprehending the nature of nuisance law. These criticisms more broadly accuse Justice Scalia for leaving the exceedingly difficult task of determining exactly which preexisting limitations on property can be fairly characterized as "background principles" to other courts.⁴⁴ In my view, these challenges (and limitations) make the opinion more interesting, because they raise rather than answer the question that *Lucas* (via Scalia) invites us to ask: What is ownership?

On the other hand, *Lucas* is less significant practically than *Nollan* for two related reasons. First, regulations depriving owners of all economically beneficial use are relatively uncommon—certainly far less common than

solum-eius-est-usque-ad-coelum-et-ad-inferos (last visited May 10, 2017) (translating and defining the Latin phrase).

39. *Lucas*, 505 U.S. at 1026.

40. *JA Pye (Oxford) Ltd. v. United Kingdom*, 46 Eur. Ct. H.R. 1083, 1094 (2007).

41. *Id.* at 1106.

42. See William C. Marra, *Adverse Possession, Takings, and the State*, 89 U. DET. MERCY L. REV. 1, 29 (2011) ("[I]t is unlikely that the Takings Clause was intended to abrogate the centuries-old common law rule of adverse possession.").

43. See CHRISTOPHER SERKIN, *THE LAW OF PROPERTY* 56-57 (2013) (discussing the "sleeping" theory of adverse possession).

44. See, e.g., Louis A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 337-38, 352 (1995) (criticizing Scalia's use of nuisance law as applied to takings as ambiguous "background principles"); William W. Fisher III, *The Trouble With Lucas*, 45 STAN. L. REV. 1393, 1397 (1993) ("[T]he majority opinion in *Lucas* is rife with confusion and ambiguity. Although the source of those problems is uncertain, one possibility is that Justice Scalia has not adequately thought through the foundations of his constitutional theory.").

exactions, although the Court's decision this term in *Murr v. Wisconsin* promises to shed further light on exactly how capacious the universe of total takings is.⁴⁵ Second, the Court held in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency* that *Lucas's* categorical rule for "total takings" applies only to permanent regulations. However, this rule does not apply to temporary moratoria or delays attendant to the deliberations attending regulatory approval.⁴⁶ Since such delays—and, to a lesser extent, temporary moratoria—are quite common, *Tahoe Sierra* dramatically constrained the universe of regulations subject to categorical review.⁴⁷ Somewhat ironically, the "background principles" exception to *Lucas's* categorical rule may prove to have a far greater impact than the rule itself. As Michael Blumm and Lucas Ritchie have demonstrated, courts have not only interpreted the exception liberally, but also have begun to apply the exception as a defense to both total and partial regulatory takings challenges.⁴⁸

C. Justice Scalia's Vote and Voice

Beyond *Nollan* and *Lucas*, Justice Scalia influenced the evolution of the Court's takings jurisprudence in the same ways that he exerted his influence over all areas of the law: Through his voice and his vote. His was one of five votes in several important takings decisions, and he voiced his views in separate opinions to other decisions. As Richard Lazarus has observed, Justice Scalia's voice—in oral argument and in his opinions—transformed the way the Court does business.⁴⁹ Many of Justice Scalia's opinions reflected his penchant for raising difficult questions (in engaging prose), and chastising (sometimes in colorful language) his colleagues for neglecting to address them.⁵⁰ In some opinions, he predicted the future course of the Court's takings jurisprudence. For example, in *Lucas*, he clearly anticipated the Court's decision in *Palazzolo* that the exception to the total takings rule

45. *Murr* concerns the rule articulated in *Penn Central* that, when determining the impact of a regulation on an owner, the relevant property is the "parcel as a whole" rather than some subpart of the parcel that was restricted by virtue of the challenged regulation. The Court will resolve how the parcel-as-a-whole rule should be applied when a single person owns two contiguous parcels. *Murr v. State*, 2015 WI App. 13, 359 Wis. 2d 675, 859 N.W.2d 628, *cert granted*, 136 S. Ct. 890 (2016).

46. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333, 337–38 (2002).

47. *Id.* at 333, 351–52.

48. Blumm & Ritchie, *supra* note 7, at 365–66.

49. Richard Lazarus, Opinion, *How Justice Scalia Transformed the Court*, CNN (Feb. 15, 2016, 3:50 PM), <http://www.cnn.com/2016/02/13/opinions/justice-scalia-death-lazarus>.

50. *Id.*

was more than a notice requirement.⁵¹ That is to say, regulations do not transform into “background principles” encumbering title merely because an individual assumes ownership with notice of the restrictions.⁵²

In others, he flagged issues that the Court has yet to resolve. For example, in 1994, he dissented from a denial of certiorari in a case called *Stevens v. City of Cannon Beach*,⁵³ which raised the so-called “judicial takings” issue—that is, the question whether and when judicial actions can constitute takings.⁵⁴ Sixteen years later, he authored the plurality opinion addressing the issue in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*,⁵⁵ but the portion of Justice Scalia’s opinion addressing the judicial takings issue did not (for procedural reasons) command a majority.⁵⁶ Writing separately in *Suitum v. Tahoe Regional Planning Agency*, Justice Scalia argued that the Court erroneously assumed that the government’s decision to grant aggrieved property owners transferable development rights (“TDRs”) mitigates regulatory takings concerns.⁵⁷ Instead, he asserted, TDRs are a form of compensation—and therefore irrelevant to the question of whether a regulatory taking occurred.⁵⁸ The Court has yet to squarely address the question except in dicta.

In still other cases, Justice Scalia’s efforts to influence the development of takings jurisprudence fell flat. A number of Justice Scalia’s early takings opinions might be read as suggesting that all regulatory takings problems, not just exactions, should be subject to heightened means-ends review.⁵⁹ This view was squarely rejected (in opinions that he joined) in *City of Monterey v. Del Monte Dunes*⁶⁰ and *Lingle v. Chevron U.S.A.*,⁶¹ although the Court arguably reopened the question in *Koontz* by holding that the rough-

51. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

52. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

53. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1207 (1994) (Scalia, J., dissenting from denial of certiorari).

54. *Id.* at 2011–12.

55. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 713–24 (2010) (plurality opinion).

56. *See id.* at 733–42 (Kennedy, J., concurring in part and concurring in the judgment), 742–45 (Breyer, J., concurring in part and concurring in the judgment).

57. *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., concurring in part and concurring in the judgment).

58. *Id.* at 745–50.

59. *See, e.g., Dusquesne Light Co. v. Barasch*, 488 U.S. 299, 317 (1989) (Scalia, J., concurring) (mentioning that “prudent investment” may need to be considered in assessing the constitutionality of takings issues); *Pennell v. City of San Jose*, 485 U.S. 1, 19–24 (1988) (Scalia, J., concurring in part and concurring in the judgment) (arguing that regulatory takings, generally, should be carefully scrutinized).

60. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03 (1999).

61. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005).

proportionality analysis applies to permit denials in the exaction context.⁶² Finally, Justice Scalia repeatedly predicted that the Court would overturn *Kelo v. New London*. While this has not come to pass as a matter of federal constitutional law, Scalia's negative opinion of *Kelo* has been reflected in numerous state court opinions, and state statutes reflect Justice Scalia's negative opinion of *Kelo*.⁶³

II. JUSTICE SCALIA'S RULE OF LAW

My review of Justice Scalia's impact on takings jurisprudence reflects, to the best of my ability, an intentional agnosticism about whether his views were the correct ones. The members of the panel were asked to evaluate his impact on the law, not whether his opinions were right, justifiable, or consistent with his own judicial principles. I strongly suspect, however, that—as a conservative who admired Justice Scalia immensely—I was asked to participate in this discussion in part because the conference organizers hoped that I would address the claim that his takings opinions were unprincipled or, as my co-panelist Peter Byrne has previously argued, “activist.”⁶⁴ This final section reflects my effort to address those claims by evaluating Justice Scalia's takings opinions according to his own stated principles. I take those principles to be the following (in order of importance). First, Justice Scalia strongly preferred clear rules to fuzzy standards and inexact balancing tests. Second, Justice Scalia was an “original meaning” originalist, which is to say that he thought the Court should interpret the words in the Constitution in light of their original public meaning (as opposed to the intended meaning of the men who wrote them).⁶⁵ Finally, Justice Scalia weakly adhered to the principle of stare decisis. He understood the need for

62. See Echeverria, *supra* note 26, at 20 (noting the “direct conflict” between *Koontz* and *Del Monte Dunes*).

63. Ilya Somin, *Justice Scalia on Kelo and Korematsu*, WASH. POST (Feb. 8, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/08/justice-scalia-on-ke-lo-and-korematsu>.

64. J. Peter Byrne, *Judicial Activism in the Regulatory Takings Opinions of Justice Scalia*, 1 GEO. J.L. & PUB. POL'Y, 93, 94 (2002). See also Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 61–63 (1994) (characterizing Scalia's takings opinions as uncharacteristically activist).

65. Antonin Scalia, *Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986)*, in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (U.S. Dep't of Justice ed., 1987) (urging originalists “to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”); *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008) (“In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”) (alteration in original). See also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 554–55 (2003) (noting that most originalists have accepted Justice Scalia's suggestion).

stability in the law, but he generally believed that his job was to get cases right, and expressed deep reservations about adhering to past decisions that were clearly wrong.⁶⁶ Judged against these standards, I think that some takings opinions (e.g., *Lucas*) fare better than others (e.g., *Nollan*).

A. Rules, Not Standards

Justice Scalia's effort in *Lucas* to carve out a categorical exception to the *Penn Central* balancing test aligns with his preference for rules over standards. Even after nearly two decades of teaching *Penn Central*, I remain somewhat uncertain about how courts should apply the factors in the multifactor balancing test articulated in the decision. And, while *Lucas*'s categorical exception (and categorical exception to the categorical exception) have proven far less clarifying than Scalia undoubtedly intended, it strikes me that they both reflect his desire for legal clarity. Mark Fenster has suggested that *Nollan* (and the other exactions cases) reflect similar impulses.⁶⁷ He has argued:

Like the Court's other categorical takings tests, the nexus and proportionality tests represent a clear desire to circumscribe judicial discretion in reviewing exactions, and do so to establish broader protections for property rights and for the integrity of property generally. On the continuum between an impossibly absolute, mechanical rule and an impossibly indeterminate standard, the exactions decisions lie significantly closer to the rule.⁶⁸

I am not sure that I agree. *Nollan*, in my view, replaced a legal standard—rational basis review—that results, predictably, in government victories, with more exacting and less predictable means-ends review.

In my view, *Nollan* and its progeny (*Dolan* and *Koontz*) are more justifiable as unconstitutional conditions cases than as regulatory takings cases. And, subsequently, the Court reframed them as exactly that.⁶⁹ I suspect that I have less of a problem with the exactions cases than many scholars because I have no principled objection to the doctrine of unconstitutional conditions. (Indeed, I am fearful enough of the power of the government

66. *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (stating his position on *stare decisis*).

67. Fenster, *supra* note 19, at 629.

68. *Id.*

69. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547–48 (2005).

purse to favor relatively close scrutiny of the conditions placed on government benefits.) But, it is a fair criticism to point out that Justice Scalia did not share my view outside the exactions context. On the contrary, he made no mention of the unconstitutional conditions problem in *Nollan*, and he expressed deep skepticism of the unconstitutional conditions doctrine in other contexts.⁷⁰

B. The Original Meaning of the Takings Clause

Except for his concurrence in *Del Monte Dunes*, which addressed the nature of a § 1983 claim in the takings context rather than the meaning of the takings clause itself, Justice Scalia's opinions make little reference to history.⁷¹ This omission pervades the Court's takings jurisprudence generally; original historical analysis rarely makes an appearance in takings opinions.⁷² But, it is out of step with Justice Scalia's stated commitment to interpreting the provisions of the Constitution in light of their original public meaning. I confess that I am in no position to criticize Justice Scalia for failing to rectify the history problem in takings law since I am myself an "original meaning" originalist. Admittedly, my own (relatively limited) scholarship on constitutional takings problems is practically history-free and full of the soft law and economic utilitarian analysis that Michael Treanor has correctly observed dominates academic discussions of takings problems.⁷³

The dominant academic view—which has itself been forcefully challenged—is that the Takings Clause, as originally understood, extended only to physical appropriations or invasions of private property by the government.⁷⁴ I do not attempt to resolve the debate here, although elsewhere

70. See, e.g., *Agency for Int'l Dev. v. All. for Open Soc'y, Inc.*, 133 S. Ct. 2321, 2323–25 (2013) (Scalia, J., dissenting) (discussing concerns with the unconstitutional conditions doctrine).

71. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 723–32 (Scalia, J., concurring in part and concurring in the judgment).

72. With the exception of *Kelo v. New London*, 545 U.S. 469 (2005), and Justice Blackmun's dissent in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

73. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 104–05 (2006) (explaining that most academic discussions fail to address the important role that non-judicial actors play in the eminent domain process); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936–37 (2003) (advocating heightened means-ends scrutiny of the exercise of eminent domain). See also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 811 (1995) (characterizing the dominant analysis in takings literature). This characterization of my own work is not intended to denigrate the excellent law and economics commentary, of both the soft and hard varieties, on the Takings Clause.

74. See Nicole Stelle Garnett, "No Taking Without a Touching?" *Questions from an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 762 (2008) (reviewing literature) [hereinafter Garnett, *No Taking Without a Touching*].

I have challenged several of the assumptions undergirding the standard historical account.⁷⁵ The reality is that the original meaning of the Takings Clause is a puzzle for a number of related reasons. The most important reason is the following: The historical record on the meaning of the Takings Clause is exceedingly thin.⁷⁶ Not only is the Takings Clause the *only* provision of the Bill of Rights that the states did not request at the ratifying convention, but also there was apparently no discussion about it at the time it was proposed and ratified—not in Congress, either before or after its proposal, or in the states, either before or after its ratification.⁷⁷ Moreover, unlike many other Constitutional provisions, the Takings Clause had no colonial or British antecedents. No colonial charter mandated compensation, even for physical appropriations, in all cases.⁷⁸ Only two colonies provided any per se protection against seizures, and only Massachusetts implemented one of these protections—requiring compensation for seizures of personal property.⁷⁹ The first state to adopt a takings clause, post-Revolution, was Vermont in 1777; many States did not adopt takings clauses until well into the 19th century.⁸⁰ While colonial, and later state, governments routinely compensated owners for their seized property, compensation was a matter of legislative grace, rather than a fundamental entitlement.⁸¹ The Takings Clause represented a profound departure from voluntary remuneration practices, by mandating just compensation for all takings by the federal government.⁸²

75. *Id.* See also generally Eric R. Claeys, *Takings, Regulations and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1563 (2003) (challenging the standard account).

76. Garnett, *No Taking Without a Touching*, *supra* note 74, at 763–65.

77. See, e.g., Treanor, *supra* note 73, at 791 (“State ratifying conventions sought as amendments to the Constitution every provision in the Bill of Rights except the Takings Clause.”).

78. *Id.* at 785.

79. *Id.* at 785–86 nn.12 & 14 (citing Mass. Body of Liberties § 8 (1641); and FUNDAMENTAL CONSTITUTIONS OF CAROLINA art. 44 (1669)) (“Perhaps because the attempts to put the Fundamental Constitutions of Carolina into operation were unsuccessful . . . leading accounts have considered the Massachusetts [provision] . . . the only colonial precursor of the Takings Clause.”).

80. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 63–64 (1977).

81. See, e.g., *id.* at 65–66 (discussing the various ways states and courts compensated property takings, despite the lack of a constitutional guarantee); Treanor, *supra* note 73, at 785, 788–89 (finding that, historically, courts did not mandate compensation when regulations merely affected property values).

82. One side effect of the Takings Clause’s ahistorical status has been the dominance of “original intent” scholarship seeking to recover the subjective meaning of the Clause’s terms to the elite group of men who proposed and ratified it. The writings of James Madison, who proposed the provision—apparently out of the blue—play a significant role in these academic exercises, for obvious reasons, as does the intellectual and ideological backdrop against which the Clause was proposed and ratified. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 29–34, 54–58 (3rd ed. 2008) (discussing the intellectual history of Takings Clause); RICHARD EPSTEIN, *TAKINGS PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 25–31 (1985) (explaining the use of historical sources to understand the original intent of the Takings Clause).

A related difficulty for “original meaning” originalists like Justice Scalia is the lack of relevant regulatory practice to draw upon and discern the objective historical meaning of the term “takings.” A number of scholars, especially John Hart, have pointed to pervasive state and local land use regulations in an effort to discredit “regulatory takings” claims.⁸³ When ratified, however, the Fifth Amendment only reached federal actions, making these practices largely irrelevant to the question.⁸⁴ Moreover, in most cases, the federal government lacked authority to enact the kinds of police-power regulations that tend to raise regulatory takings questions. In other words, the enumerated powers provided far more comprehensive protection against regulatory takings than the Takings Clause.

Since the federal record is so thin, scholars have mined 19th century state court “takings” cases in the hopes of unearthing the Founding Era meaning of the Fifth Amendment term.⁸⁵ Elsewhere, I have raised two concerns about this exercise. The first concern is temporal: State jurisprudence can be quite useful in understanding the original meaning of constitutional terms. Especially since, during the early years of the Republic, state courts did the lion’s share of judicial work—including interpreting the federal constitution.⁸⁶ As Justice Thomas observed in *Kelo v. New London*, however, the probative value of state court decisions diminishes dramatically over time.⁸⁷ Since judicial interpretations of constitutional provisions may evolve over time, the further away from the Founding, the greater the risk that a decision reflects a modern, rather than a Founding Era understanding.⁸⁸ The second concern is substantive: It is not entirely clear that the 19th century state court decisions interpreting state takings clauses were asking the same

83. See, e.g., John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–81 (1996) (describing colonial land use regulations); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1147–54 (2000) (arguing that early land use regulations support the conclusion that the Takings Clause did not extend to regulatory takings).

84. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Takings Clause only applies to takings by the federal government).

85. See, e.g., Treanor, *supra* note 73, at 792–94 (analyzing early state law to determine the meaning and purpose of the Takings Clause). See also Claey's, *supra* note 75, at 1553–54 (describing the history and use of 19th century state takings cases to better understand the Founding Era meaning); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far”*, 49 AM. U. L. REV. 181, 228–40 (1999) (referencing the important role state courts play in interpreting federal statutes); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1285–87 (citing state court decisions from the antebellum and Civil War era as the beginning of regulatory takings analysis).

86. Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1504–07 (2006).

87. *Kelo v. City of New London*, 545 U.S. 469, 513–14 (2005) (Thomas, J., dissenting) (noting that mid-19th century cases are “not deeply probative” of the Fifth Amendment’s original meaning).

88. See *id.* at 514 (arguing that modern interpretations of the Public Use Clause have rejected the Founders’ natural readings and make little reference to history or original meaning).

questions raised by modern takings cases. Bradley Karkkainen has argued that modern courts and scholars have misread two seminal federal decisions, *Chicago B & Q Railroad* and *Pennsylvania Coal*, as the cases that incorporated the Takings Clause and invented regulatory takings. In fact, Karkkainen argues, both cases were due process decisions.⁸⁹ Justice John Paul Stevens, the author of the *Kelo* majority, endorsed this view in a lecture at the University of Alabama in 2011, observing: “It is somewhat embarrassing to acknowledge that the *Chicago* case did not even cite the Fifth Amendment. In fact, neither that case nor any later Supreme Court case with which I am familiar explained how or why the Takings Clause might have been made applicable to the states.”⁹⁰

To say that the original meaning of the Takings Clause is a puzzle is not to excuse Justice Scalia's failure to attempt solving it. The closest that he came to nodding in that direction was in *Lucas*. In that case, he both acknowledged and took a slight swipe at the standard academic account's suggestion that, at the time of the Founding, there could be “no taking without touching.”⁹¹ I also think it fair to characterize Justice Scalia's invocation of “the restrictions that background principles of the State's law of property and nuisance already place upon land ownership”⁹² as an effort to reconcile the natural-rights thinking of the Founding Era view with the oft-repeated admonition that state law is the source of property rights. And while my copanelist has suggested that any departure from the latter assumption was “unprincipled,”⁹³ it strikes me that any honest effort to come to terms with the Founding Era understanding of what “property” is and when it is “taken” has to grapple with the fact that the Founders believed that property was a natural right that preexisted the State.⁹⁴ This understanding leads inexorably to the question of whether and when positive-law restrictions on property “go too far.” Or, to borrow from Justice Kennedy, how to avoid infringing on

89. *Chicago B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (establishing that, while the government may regulate property, if the regulation “goes too far” the Court will consider it a taking); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle”*, 90 MINN. L. REV. 826, 843–51, 862–67 (2006) (arguing that both *Chicago B. & Q.* and *Pennsylvania Coal* were due process decisions).

90. Justice John Paul Stevens, *The University of Alabama School of Law Albritton Lecture: Kelo, Popularity, and Substantive Due Process* (Nov. 16, 2011).

91. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (“[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all”); *id.* at 1028 n.15 (“The practices of the States prior to incorporation of the Takings and Just Compensation Clauses . . . were out of accord with any plausible interpretation of those provisions.”).

92. *Id.* at 1029.

93. Byrne, *supra* note 64, at 93.

94. See ELY, JR., *supra* note 82, at 63–64 (“Observing that ‘the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man’”).

property rights when placing a potent “Hobbesian stick” in a “Lockean bundle.”⁹⁵

In the end, Justice Scalia’s takings opinions were far more influenced by the dependence on stare decisis than pure originalists would have preferred. The same is likely also true of his adherence to the doctrine of incorporation, which enables most takings challenges.⁹⁶ Justice Scalia’s observance of stare decisis was not unwavering, to be sure. From the beginning of his tenure on the Court, he made clear that he did not always feel duty-bound to adhere to erroneous constitutional precedents. Indeed, in some cases, he felt duty-bound to overturn them.⁹⁷ But he also tacitly chided Justice Thomas for his willingness to reopen settled constitutional questions, observing that Thomas “does not believe in stare decisis, period.”⁹⁸ Notably, one of the only justices to have engaged in a full originalist analysis of the original meaning of the Takings Clause is Thomas, not Scalia, and in a context (public use) where far less ink has been spilled than the regulatory takings context.

CONCLUSION

I admire Justice Scalia immensely. He dramatically reshaped the way the Court thinks—indeed, how we all think—about the law. Time will tell whether his jurisprudential mark proves indelible. In some areas of law, I suspect it will. I do not put takings on that list, and I doubt that Justice Scalia would disagree. I am grateful to him for giving me a fun case to teach in *Lucas*, and government attorneys across the land are less grateful to him for opening up exactions to heightened judicial scrutiny in *Nollan*. But, perhaps precisely because these opinions are not particularly “Scalia-esque,” they are more likely to fade away into the rest of the takings muddle.

95. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 627 (2001).

96. In a 2009 speech, Scalia remarked that the doctrine of incorporation was a “mistake” and “probably false.” *Why Can’t Justice Scalia Get It Right More Often?*, CONST. ACCOUNTABILITY CTR.: TEXT & HISTORY BLOG (Oct. 28, 2009), <http://theusconstitution.org/text-history/1391>.

97. In his dissent in *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989), Justice Scalia stated: “I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible . . . I agree with Justice Douglas: ‘A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.’”

98. Adam Liptak, *Thomas Is Getting a New Chance to Break Precedent (if Not Silence)*, N.Y. TIMES (Feb. 24, 2014), <https://www.nytimes.com/2014/02/25/us/another-test-of-precedent-no-not-thomass-silence.html>.