

# A HOBBSIAN BUNDLE OF LOCKEAN STICKS: THE PROPERTY RIGHTS LEGACY OF JUSTICE SCALIA

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## INTRODUCTION

No modern United States Supreme Court Justice has stimulated more thought and debate about the constitutional meaning of property than Antonin Scalia. He sought to change the prevailing interpretation of the Takings Clause. In doing so, he grounded it in clear rules embodying a reactionary defense of private owners' prerogatives against environmental and land use regulation. While adamant about the importance of property as a civil right, he displayed little interest in the complexities of property law as a nuanced, dynamic, and sometimes contested body of law, defining rights among people in places and things. Fundamentally, he viewed property from a public law perspective, rather than from a private law perspective. He sought to enhance its constitutional role as a bulwark of liberty against government. Thus, he aimed to recast the regulatory takings doctrine in clear constitutional rules, which authorized federal judicial oversight for state property law developments, whether through legislative or judicial innovation.

Justice Scalia authored only two opinions for the Court construing the Takings Clause: *Nollan v. California Coastal Commission*,<sup>1</sup> and *Lucas v. South Carolina Coastal Council*.<sup>2</sup> He also penned one plurality opinion, one dissent, and four separate opinions.<sup>3</sup> He probably was not the most influential justice in shaping contemporary regulatory takings doctrine, a distinction more arguably due to Chief Justice Rehnquist<sup>4</sup> or to Justice Stevens.<sup>5</sup> But

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

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

3. *See infra* notes 33, 35, 37, 45, 143, 145 (identifying examples of opinions that Scalia authored).

4. *See Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994) (clarifying the required nexus "between the exactions imposed by the city and the projected impacts of the proposed development" in regulatory takings cases); *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304, 305 (1987) (discussing the regulatory takings doctrine); *Kaiser Aetna v. United States*, 444 U.S. 164, 165 (1979) (holding that, although the government has domain over navigable waters, it cannot force a marina to be open to the public without compensation); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 138 (1977) (Rehnquist, J., dissenting) (disagreeing with the majority that the State's Landmark Law, which limited development, did not constitute a taking).

5. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 305 (2002) (applying the regulatory takings doctrine to a moratorium on development); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473-74 (1987) (deciding whether a Pennsylvania statute seeking to protect the public interest from harm caused by coal mines violates the Takings Clause).

Scalia's various opinions shaped critical perceptions about regulatory takings because his approach was conceptually ambitious. His vivid rhetoric also seemed to foretell more radical reinterpretations of private property's role in the constitutional order. His plurality and separate opinions present a revival of the high formalist approach to property rights prevalent in the Supreme Court prior to the New Deal. He justified his approach through extraordinary pessimism about democratic self-government. Thus, an assessment of his legacy in this area requires an understanding of his distinctive vision and its limitations.

This essay will highlight three distinct features of Scalia's approach to regulatory takings interpretation.<sup>6</sup> First, it will review his eschewing of any interpretation based on the original meaning of the Takings Clause. The fact of this departure has been previously observed,<sup>7</sup> but its significance in the takings field has not been fully considered. Second, it is important to consider his embrace of per se rules in a field previously swamped by ad hoc decisions. Finally, this essay examines and assesses Scalia's conceptualization of state property law as a fixed body of clear rules. This last topic raises important questions both about the nature of law, including common law, and also about federalism. In hindsight, Scalia stands in a long tradition of conservative judges in seeking specious constitutional grounds by which to restrain innovation. The intellectual means he used, however, reflect distinct jurisprudential and policy challenges in our contemporary period. These are primarily the legacy of legal realism and the growth of environmental regulation.

### I. UNTROUBLED DEPARTURE FROM ORIGINAL MEANING

By now it is well-understood that the regulatory takings doctrine has no basis in the original meaning of the Takings Clause of the Fifth Amendment.<sup>8</sup> Dean Treanor showed long ago that the Takings Clause, as originally understood, "required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used."<sup>9</sup> Treanor argued that, at the time, the Court

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6. Scalia joined the dissent in *Kelo v. City of New London*, 545 U.S. 469, 472, 494 (2005), the Court's only important Takings Clause decision addressing actual expropriation rather than regulation of use during his tenure, but he did not write the opinion.

7. E.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 12 (2006) (explaining Scalia's lack of adherence to traditional originalist philosophy).

8. The Takings Clause reads: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

9. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995). Treanor suggests a "translation" of the original meaning for contemporary review of use regulations focusing on minority owners systematically

understood the Takings Clause only to require the government to compensate for expropriated property.<sup>10</sup> He further argued that, at the time of the adoption of the Bill of Rights and throughout the early Republic, land use regulations were common and appropriate.<sup>11</sup> Even though some scholars have contested this dominant interpretation of its original meaning (unconvincingly in my view),<sup>12</sup> the Supreme Court itself consistently held that the Takings Clause did not reach land-use regulation until its unexplained and ambiguous embrace of a regulatory takings doctrine in *Pennsylvania Coal v. Mahon*.<sup>13</sup> Indeed, Justice Scalia himself readily acknowledged that, prior to *Pennsylvania Coal*, “it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’”<sup>14</sup>

Scalia nonetheless justified applying the Clause to regulations of use, not on any revised claim about its original meaning, but on the need to adapt the clause to modern conditions of comprehensive regulation. His assessment of property use regulations was warped by his fear that if “the uses of private property were subject to unbridled, uncompensated qualification under the

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disadvantaged in the political process, an approach finding no resonance in Justice Scalia’s decisions. *Id.* at 859–79.

10. *Id.* at 839.

11. *Id.* at 792. This view has had additional support. See, e.g., WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1, 3, 6, 10, 16 (1996) (describing 19th century property rights and how they evolved); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1100 (2000) (discussing land use regulation in the United States around the time the Constitution and Bill of Rights were adopted).

12. See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Law Property Rights*, 88 CORNELL L. REV. 1549, 1549 (2003) (examining “federal regulatory-takings law in light of” cases decided on “Founding Era principles of natural law”); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1286–87 (1996) (describing ante bellum state court applications of state constitutional provisions to government actions that reduce the value of private property).

13. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). “A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.” *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887).

14. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citation omitted) (citing *Legal Tender Cases*, 12 Wall. 457, 551 (1871)). Scalia also wrote in *Lucas*: “Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all . . .” *Id.* at 1028 n.15 (emphasis removed). He argued that such an objection was irrelevant because the Takings Clause was not incorporated into the Fourteenth Amendment until *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878) (“[T]he constitution of every State” has a restriction against “private property” being “taken for public use without just compensation . . .”). This argument is extremely weak because states were construing identical or analogous language in state constitutions. Moreover, the Supreme Court’s interpretation of the Takings Clause, not to include use regulations, was consistent with the early state interpretations before *Mahon*. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 407–08, 414 (1915) (deciding that a state ordinance did not constitute a “taking” because “[t]here was no specific denial of the value of the property”); *Mugler*, 123 U.S. at 668–69 (1887) (discussing the limits of the takings doctrine).

police power, ‘the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].’<sup>15</sup> Thus, he justified applying the Takings Clause to use regulations on the basis of his perception of social need combined with a gross and dark generalization about the inevitability of political overreaching.<sup>16</sup>

Such disregard for the original meaning of the Takings Clause might not be a problem for many jurists, but it contradicts the approach to constitutional interpretation that Justice Scalia frequently invoked as essential, and which provided the foundation for some of his most consequential constitutional opinions.<sup>17</sup> His commitment to the original meaning of the Bill of Rights was stated most emphatically in *Heller v. District of Columbia*, where he wrote the opinion for the Court. His opinion held that the Second Amendment protects an individual’s right to possess and bear firearms and invalidated statutes that prohibit keeping handguns in the home ready for immediate firing.<sup>18</sup> Scalia grounded his opinion in what he took to be the original meaning of the Second Amendment.<sup>19</sup> He emphasized that the meaning of the Amendment must be found in the words used, taken in their natural—rather than technical—meaning, and in how they were understood at the time of enactment.<sup>20</sup> To the plea that 18th century reliance on self-defense should not preclude reasonable contemporary judgments by police and legislatures about the contributions of modern firearms to urban criminal violence, Scalia replied:

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15. *Lucas*, 505 U.S. at 1014 (emphasis in original) (quoting *Mahon*, 260 U.S. at 415).

16. The force of the latter point would seem to be weakened by the survival of private property in the United States before the Supreme Court applied the Takings Clause to use regulations. It is also undercut by thriving private property institutions in the many other countries that lack the vigorous U.S. regulatory takings doctrine, such as the United Kingdom and Canada. See RACHELLE ALTERMAN, TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 27–29 (2010) (discussing regulatory takings laws in other countries, including Canada and the United Kingdom); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 86, 106–11 (1995) (comparing constitutional regulatory takings protections around the world); Bryan P. Schwartz & Melanie R. Bueckert, *Regulatory Takings in Canada*, 5 *WASH. U. GLOBAL STUDS. L. REV.* 477, 477 (2006) (explaining that the Canadian regulatory takings doctrine is not robust).

17. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 852, 864 (1989) [hereinafter Scalia, *Originalism*] (arguing that an originalist approach to Constitutional interpretation renders more moderate decisions that take into account important historical support). Some scholars who are committed originalists have argued that Scalia in practice is either an inconsistent originalist or no originalist at all. See, e.g., Barnett, *supra* note 7, at 24 (arguing that Scalia did not adhere to true originalism); Ilya Somin, *Scalia and Constitutional Property Rights*, *WASH. POST* (Feb. 15, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/15/justice-scalia-and-constitutional-property-rights/?utm\\_term=.8ebaf39aafd6388dc85d5a53](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/15/justice-scalia-and-constitutional-property-rights/?utm_term=.8ebaf39aafd6388dc85d5a53) (observing that although “Scalia is best known for his strong advocacy of originalism in constitutional law,” [h]is regulatory takings opinions largely rely on a combination of textual arguments, intuition, and precedent”).

18. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

19. *Id.* at 624–25.

20. *Id.* at 584.

Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.<sup>21</sup>

The essential principle expressed here is that the Court must give effect to constitutional provisions as they were understood at the time of adoption without regard to whether or not they satisfy contemporary needs. “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether future legislatures or (yes) even future judges think that scope too broad.”<sup>22</sup> Scalia purported to follow this principle in constitutional adjudication and severely chastised other justices when he determined that they departed from it.<sup>23</sup>

Regulatory takings is an area where Scalia most conspicuously departed from reliance on the original meaning of a constitutional text. He sought means to expand the Clause’s reach, rather than resist a doctrine admittedly inconsistent with the original and traditional understanding (before 1922). Thus, in *Lucas*, he justified the persistence of a regulatory takings doctrine on the need to restrain government from overreaching into property rights.<sup>24</sup> For him, use regulations present an ongoing “risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”<sup>25</sup> He rejected the Court’s consistent refusal before 1922 to apply the Takings Clause to use regulations reasonably intended to prevent harm to the public:

The “harmful or noxious uses” principle was the Court’s early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a

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21. *Id.* at 636.

22. *Id.* at 634–35.

23. For example, in the pages of the United States Reporter immediately preceding his opinion in *Lucas*, Justice Scalia’s dissent in *Planned Parenthood of Southeastern Pennsylvania* criticized the Court’s Due Process Clause retention of a woman’s right to abortion in some circumstances. In his dissent, Justice Scalia stated that the Court relied on “value judgments” rather than on the appropriate method of “reading text and discerning our society’s traditional understanding of that text.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

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

25. *Id.* at 1018.

reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.<sup>26</sup>

Whatever the merits of this interpretation,<sup>27</sup> it hardly comports with an interpretive commitment to “reading text and discerning our society's traditional understanding of that text.”<sup>28</sup> In *Lucas*, Scalia created a new per se rule condemning any regulation that eliminates all the economic value of a parcel of land. He created this rule without regard to the harm that government reasonably believed it was preventing unless the harm could constitute a common law nuisance.<sup>29</sup> He justified this rule on loose dicta in a prior decision upholding restrictive zoning.<sup>30</sup>

Justice Scalia formulated or advocated other new doctrines to strengthen the regulatory takings doctrine on behalf of property owners. He forged a federal constitutional limit on government conditioning the grant of a development permit on the owner conveying a property interest in mitigation.<sup>31</sup> This innovation applied the Takings Clause to a practice long regulated by state constitutional law and reintroduced heightened means-ends scrutiny into judicial review of property regulations.

Scalia's rhetoric and reasoning raised the specter of greater judicial scrutiny of land use regulations generally. He argued that the Takings Clause systematically imposed higher standards of review than the Due Process or Equal Protection Clauses, analogous to how express provisions of the Bill of Rights, such as the First Amendment, necessitated heightened scrutiny.<sup>32</sup> He subsequently elaborated on this view in a separate opinion, where he advocated striking down a rent control ordinance because it offered

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26. *Id.* at 1022–23.

27. This raises a tangled doctrinal problem. Early cases, such as *Mugler v. Kansas*, 123 U.S. 623, 668 (1887), held that the Takings Clause does not apply to use regulations, but also applied a more robust application of the Due Process Clause as permitting regulations of property use to prevent harm to the public. The question of what a legislature could reasonably consider harm remained unclear. The Court eventually held that a state statute limiting the hours that a baker could work did not prevent harm to workers, but merely transferred valuable contract rights to them. *Lochner v. New York*, 198 U.S. 45, 46 (1905). See also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (characterizing the takings matter before the Court as a private interest issue to distinguish it from *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), which concerned a law addressing miners' safety).

28. *Casey*, 505 U.S. at 1000 (Scalia, J., dissenting).

29. *Lucas*, 505 U.S. at 1019.

30. As John Echeverria shows in another paper in this Issue, Justice Scalia heavily used the dicta in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), abrogated by *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), that land use regulations effect a taking if they do not “substantially advance legitimate state interests.” John D. Echeverria, *Antonin Scalia's Flawed Takings Legacy*, 41 VT. L. REV. 689, 696–99 (2017). As Echeverria notes, this language is contained in a unanimous decision upholding a five-acre zoning scheme, issued at the very end of the term. *Id.*

31. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987).

32. *Id.* at 834–35.

additional protections to the old and infirm. He argued that any restriction on land use that did not mitigate a harm caused by the property owner must be held to be a taking per se.<sup>33</sup> Such reasoning inflates an owner's property rights to the status of an express constitutional guarantee, such as the free exercise of religion, even though the dimensions of property rights are defined and set by state law. The Federal Constitution addresses only the "taking" of property.<sup>34</sup> His reasoning makes the courts a guardian of economic liberty, as in the *Lochner* era of substantive due process, a body of law Scalia otherwise eschewed. In the *Lingle* case, the Court unanimously rejected the means-ends Taking Clause scrutiny of use regulations, arguing this approach as indistinguishable from substantive Due Process.<sup>35</sup> Indeed, in the *Lingle* oral argument, Scalia asked Deputy Solicitor General Edwin Kneedler whether the Court needed to "eat crow."<sup>36</sup>

Scalia also advocated for a rule finding a taking per se whenever a new statute or judicial innovation in the common law eliminated an established right of property. Thus, in *Stop the Beach*, he wrote for the plurality, upholding public title to a new dry sand beach. The State of Florida constructed the beach with public money to remedy erosion. The Court held that this would be a judicial taking of private littoral owners' right to touch the water, unless the Supreme Court found it to be consistent with prior Florida common law rulings.<sup>37</sup> This approach would institute remarkable federal supervision over state elaboration of its own common law. It failed, however, to become law because Justice Kennedy, often Scalia's doctrinal nemesis, concurred only in the judgment.<sup>38</sup> Scalia's opinion makes two breathtaking extensions of the Takings Clause. First, it applies a clause admittedly directed primarily at specific property expropriations of identifiable individuals, such as when government condemns a parcel for a bridge, to changes in legal rules of general applicability.<sup>39</sup> The change transforms a provision originally aimed at providing compensation to individuals unfairly burdened by the public into a control instrument over general legal developments. Second, Scalia's opinion—for the first time—

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33. *Pennell v. City of San Jose*, 485 U.S. 1, 18–24 (1988) (Scalia, J., concurring in part and dissenting in part).

34. *Id.* at 19.

35. *Lingle*, 544 U.S. 528, 545 (2005).

36. Oral Argument at 22:48, *Lingle*, 544 U.S. 528 (2005), <https://www.oyez.org/cases/2004/04-163>.

37. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 713–17 (2010).

38. *Id.* at 733–34. Kennedy concurred in some parts of the plurality opinion, but not the parts defining a judicial taking.

39. *Id.* at 720–22.

applies the Takings Clause to state court judges' decisions interpreting their own law.<sup>40</sup>

Scalia's opinion in *Stop the Beach* provides the fullest statement of his judicial takings doctrine. He frankly admits there that, "the Framers did not envision the Takings Clause would apply to judicial action."<sup>41</sup> He justifies embracing the doctrine nonetheless on the extraordinarily naïve or disingenuous claim that "the Constitution was adopted in an era when courts had no power to 'change' the common law."<sup>42</sup> He adds the bizarre textual argument that the Clause literally does not restrict its command to any category of state officials.<sup>43</sup> But it is one thing to read language of the Fifth Amendment as not foreclosing such an interpretation, and quite another to read its employment of the passive voice as justifying such an interpretation. Public meaning at the time of the adoption, not linguistic acrobatics, should inform original meaning interpretations of constitutional provisions.<sup>44</sup> The original meaning of the Clause required compensation for expropriation, a power of the legislature (which can be delegated to the executive), and not the judiciary. When the Fifth Amendment was adopted, no one would have imagined that it applied to judges interpreting the common law in deciding cases.

Scalia also argued unsuccessfully for other, more minor doctrinal changes advantageous to property owners.<sup>45</sup> The Supreme Court held in *Palazzollo* that there was no per se rule barring an owner from bringing a regulatory takings claim if the owner obtained title after the regulation went into effect; the Court stated that the time of title acquisition should be considered in every case as part of the owner's reasonable investment backed expectations.<sup>46</sup> Scalia argued in a separate opinion that the timing of title acquisition should *never* weigh against the merits of a takings claim.<sup>47</sup> In

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40. *Id.* at 714–15.

41. *Id.* at 722.

42. *Id.* The absurdity of this claim as a matter of legal history is explained in J. Peter Byrne, *Stop the Stop the Beach Plurality!*, 38 *ECOLOGY L Q.* 619, 622 (2011) [hereinafter Byrne, *Stop the Stop the Beach Plurality*].

43. *Id.* at 713–14.

44. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOYOLA L. REV.* 611, 620 (1999) (claiming that originalism is now based on the "original meaning of the text," not the "subjective intentions of the framers").

45. See *Palazzollo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring) (arguing that in cases of regulatory takings, the Court should consider a property restriction without regard to when the current owner took title to determine substantiality of the restriction); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 750 (1997) (Scalia, J., concurring) (claiming that he "would resolve the question of whether there has been a 'final decision' in this case by looking only to the fixing of petitioner's rights to use and develop her land").

46. *Palazzollo*, 533 U.S. at 626, 630.

47. *Id.* at 636–37 (Scalia, J., concurring).

doing so, he explicitly distinguished his views from those of his more moderate conservative colleagues, Justices O'Connor and Kennedy.<sup>48</sup> In a concurring opinion in *Suitum*, he urged the Court to reverse its earlier decision in *Penn Central*, which held that transferable development rights (TDRs) should be considered as part of the owner's property "as a whole."<sup>49</sup> He argued rather, following Justice Rehnquist's dissent in *Penn Central*,<sup>50</sup> that courts should characterize TDRs granted to an owner as compensation for a taking, rather than as rights retained as part of a regulatory program, which militate against a court concluding that the regulation effects a taking.<sup>51</sup> The effect of Scalia's view would be to treat more regulations as takings, despite the economic value retained by the owner.<sup>52</sup> Interestingly, Rehnquist did not join Scalia's separate opinion in *Suitum*.<sup>53</sup>

None of these doctrinal innovations or elaborations have anything to do with original meaning. In each, Scalia sought to simplify rules, making it easier for property owners to prevail. He advocated for them with characteristic rhetorical vigor that encouraged property rights advocates, terrified regulators and environmentalists, and enriched scholarly debate about constitutional property.<sup>54</sup> Scalia's new rules and proposed departures constitute judicial activism on a scale comparable to Warren or Burger Court innovations, such as *Miranda* warnings or substantive due process protections for abortion rights. Yet, Scalia excoriated these departures from original meaning as judicial activism.<sup>55</sup>

Scalia never offered an explanation for why he played such an active role in seeking to refashion the regulatory takings field. In a law review article, he wrote: "Our modern society is undoubtedly not as enthusiastic

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48. *Id.* at 636. See also Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the U.S. Supreme Court*, 57 HASTINGS L.J. 759, 816–17 (2006) (discussing Scalia's isolation in *Palazzollo*).

49. *Suitum*, 520 U.S. at 749 (Scalia, J., concurring).

50. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 138 (1977) (Rehnquist, J., dissenting).

51. *Suitum*, 520 U.S. at 749–50 (Scalia, J., concurring).

52. J. Peter Byrne, *Judicial Activism in the Regulatory Takings Opinions of Justice Scalia*, 1 GEO. J.L. PUB. POL'Y 93, 94 (2002).

53. *Suitum*, 520 U.S. at 745 (Scalia, J., concurring). See also Lazarus, *supra* note 48, at 814–15 (speculating that Rehnquist gave writing the opinion for the Court to Justice Souter, rather than to Scalia, to secure a narrower opinion that would garner a larger majority).

54. See, e.g., *Palazzollo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring) (proposing an analysis of preexisting property restrictions that favors property owners); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 (1992) (noting that protecting land for ecological purposes can still constitute a taking).

55. See *Dickerson v. United States*, 530 U.S. 428, 444, 465 (2000) (Scalia, J., dissenting) (claiming that the majority decision stretches beyond the bounds of the Constitution); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting) (accusing the majority of making "value judgments" instead of interpreting the text of the law).

about economic liberties as were the men and women of 1789; but we should not fool ourselves into believing that because we like the result the result does not represent a contraction of liberty.”<sup>56</sup> Perhaps Scalia, like some other conservative thinkers, viewed the Constitution as highly protective of private property through its structural principles and such specific, but under-enforced, provisions, as the Privileges and Immunities Clause.<sup>57</sup> Given that the general tenor of judicial interpretation over the years has enhanced both federal and state regulatory authority, Scalia may have seen expanding the power of the regulatory takings doctrine as restoring the primacy of private property in the overall constitutional scheme. This may be hinted at in his invocation of “the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”<sup>58</sup> This essay further explores that hypothesis below, discussing Scalia’s positing the common law of property as threatened by legislative authority.<sup>59</sup>

## II. A REGULATORY TAKINGS DOCTRINE OF PER SE RULES

Given his general approaches to constitutional doctrine, it is not surprising that Scalia often fashioned or advocated for clearly defined rules for regulatory takings. In a law review article, he argued that clear rules contribute to the rule of law by decreasing judicial discretion in individual cases:

[W]hen, in writing for the majority of the Court, I adopt a general rule, and say, “This is the basis of our decision,” I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, “on balance,” we think the law was violated here—

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56. Scalia, *Originalism*, *supra* note 17, at 856.

57. See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 43, 47 (3d ed. 2008) (describing how the Constitution was crafted to protect property rights, especially in light of revolutionary-era concerns).

58. *Lucas*, 505 U.S. at 1028.

59. See *infra* Part III (showing that Scalia relied on a “rigid common law baseline to assess” whether regulations effected takings).

leaving ourselves free to say in the next case that, “on balance,” it was not.<sup>60</sup>

Scalia consistently adopted or argued for clear rules without any balancing of interests in his regulatory takings opinions. Conspicuous among these were the *Lucas* rule, providing that regulations that eliminate all economic value will be takings per se; the *Stop the Beach* plurality, holding that state judicial interpretations of state property law that eliminate an established property right are per se takings; and his concurrence in *Pennell*, arguing that rent control laws could never take into account tenant hardship without effecting a taking.<sup>61</sup>

Undoubtedly he preferred such relatively clean rules in regulatory takings cases, reflecting his general concern that more standard-based approaches or balancing tests gave judges too much discretion to implement their own social views. Extraordinarily broad, fact-based standards have long dominated the regulatory takings arena, going back to Justice Holmes’s statement in *Pennsylvania Coal* that a regulation that “goes too far” constitutes a taking.<sup>62</sup> This open-textured approach was canonized in *Penn Central*, when the Court admitted that it “quite simply, has been unable to develop any ‘set formula’ for determining” whether a regulation had effected a taking, but engaged in “essentially ad hoc, factual inquiries.”<sup>63</sup> It seems plausible that simply as a matter of judicial function and aesthetics, this degree of vagueness irritated Justice Scalia. He believed that categorical rules advanced the rule of law by increasing predictability and shielding judges from making political calculations in individual cases.<sup>64</sup>

Such jurisprudential concerns hardly explain the categorical rules Scalia actually advocated in the regulatory takings area. First, every one of his rules favors private property owners over public regulations. Indeed, each of them provides more protection than was granted private property under the *Penn Central* test. In most cases, his rules offer more complete protection to property owners than the approaches actually followed by the Court. For example, in *Palazzolo*, the Court held that a mere change of title after a

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60. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) [hereinafter Scalia, *The Rule of Law*].

61. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 713–14 (2010) (holding that the Takings Clause applies to court actions); *Lucas*, 505 U.S. at 1026–27 (arguing that a regulation constitutes a taking when that regulation “wholly eliminate[s] the value of the claimant’s land”); *Pennell v. City of San Jose*, 485 U.S. 1, 15–16 (1988) (questioning that a tenant hardship law’s application in “regulating the use of particular property so severely reduced the value of that property as to constitute a taking”).

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

63. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1977).

64. Scalia, *The Rule of Law*, *supra* note 60, at 1179.

regulation has been enacted cannot bar a regulatory takings claim, but courts must consider title changes in light of fairness to the owner's reasonable expectations about lawful development.<sup>65</sup> Scalia alone urged that a change of title should never impair a takings claim.<sup>66</sup> As in other cases, Scalia's movement toward a categorical rule would expand the ability of owners to prevail in regulatory takings claims, apart from a normative consideration of whether their particular economic losses "in all fairness and justice, should be borne by the public as a whole."<sup>67</sup>

Scalia's rules often eliminate any room for the Court to assess the significance of public policy addressed by a regulation of private property. Thus, in *Lucas*, he held that a land use regulation cannot be upheld on the traditional ground (relied on by the South Carolina Supreme Court) that it protects the public from environmental or other harm.<sup>68</sup> He dismissed the harm/benefit distinction as arbitrary and politically manipulable, so that the failure to allege that a regulation protects the public from harm results only from a legislature having a "stupid staff."<sup>69</sup> The effect of this is to require a court to ignore the public need for regulation whenever the regulation deprived the owner of all economic value, regardless of the degree of risk the owner's use might pose.<sup>70</sup>

At the same time, Scalia consistently described the public motivation for regulation in the most cynical terms and without any reference to the record in the case before him. He posited that government restrictions on private ownership are nearly always bad because government officials have a pathological desire to extend their authority indefinitely. He characterized the California Coastal Commission's condition on a construction permit that required owners to allow the public to pass laterally on the beach behind their house as "extortion."<sup>71</sup> In *Palazzolo*, he referred to the government that diminishes private economic value as the "malefactor."<sup>72</sup> In *Pennell*, he stated more generally, "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with

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65. *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001).

66. *Id.* at 637 (Scalia, J., concurring).

67. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

68. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023–24 (1992).

69. *Id.* at 1026 n.12.

70. Scalia did allow that a regulation that duplicated a restriction inherent in the land title could eliminate all economic value without working a taking, because the owners never had a right to engage in such uses as a matter of property law. But this exception ignores the inadequacies of nuisance law and other common law limitations to deal with harms widely distributed upon the public. Nuisance law has shown itself powerless to address modern forms of environmental harm.

71. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

72. *Palazzolo v. Rhode Island*, 533 U.S. 606, at 637 (2001) (Scalia, J., concurring).

relative invisibility and thus relative immunity from normal democratic processes.”<sup>73</sup> Characteristically, Scalia disempowered the democratic process we actually have in service to some ideal of a perfectly efficient democracy we will never have, with the result that private power remains unchecked.

Scalia’s rules also are indifferent to degree of economic harm that a regulation imposes on an owner. He replaced *Penn Central*’s primary focus on economic harm with an abstract conceptual protection of property. *Nollan*, for example, enshrined a logical nexus between the land use harm avoided and the condition imposed to test the constitutional validity of an exaction, rather than any economic harm to the owner.<sup>74</sup> It was only in the subsequent *Dolan* (an opinion by Chief Justice Rehnquist) that the Court added a pragmatic test of whether the quantity of economic loss that the condition imposed on the owner was roughly proportional to the public harm avoided.<sup>75</sup> Similarly, the Court in *Pennell* (another opinion by Chief Justice Rehnquist) remanded a case challenging a rent control ordinance to determine the economic effect on landlords. But Justice Scalia wrote an opinion urging that the ordinance effectuated a taking simply because it allowed the permitted rent to be based in part on hardship to the tenant.<sup>76</sup> In his view, restricting the amount that the landlord could charge violated the Takings Clause whenever the restriction considered social needs not caused by the landlord.<sup>77</sup> His dissent in *Washington Legal Foundation* argued that the Court should remedy a taking, even when the Court had found that the owners had suffered no economic harm, and thus were entitled to no compensation.<sup>78</sup> Similarly, in *Stop the Beach*, Scalia was prepared to find a taking if the Florida courts changed their interpretation of the State’s common law of property to eliminate an established riparian right without any showing of harm to the upland owners.<sup>79</sup> *Lucas* might be thought of as a strong exception to the indifference to economic harm to owners, because it announced a per se rule

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73. *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988).

74. “Scalia put economic losses to the owners to one side and concentrated on the loss of personal dominion that comes from the inability to exclude others. He said little about the economic character of the *Nollan*’s [sic] loss, but much about the ‘extortion’ of trading permission to build for access rights.” J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239, 247 (1990).

75. *Dolan v. City of Tigard*, 512 U.S. 364, 391 (1994).

76. *Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part).

77. *Id.* at 21.

78. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 242–43 (2003) (Scalia, J., dissenting).

79. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 722 (2010). Indeed, in oral argument, Justice Scalia pursued a line of questioning indicating that he thought that the landowners had gotten a “pretty good deal” from the beach restoration at public expense, even if their rights had been abrogated. Transcript of Oral Argument at 22, *Stop the Beach*, 560 U.S. 702 (No. 08-1151).

solely based on the regulation eliminating all of the land's economic value.<sup>80</sup> However, the Supreme Court accepted, without analysis, the implausible finding of the trial court that Lucas had lost all of the property's economic value. This left the concept of complete economic loss from regulation such an abstract concept that the Court came to construe it as applying to a vanishingly small category of cases.<sup>81</sup> Thus, the *Lucas* rule plays no practical role in the economic protection of landowners.

Thus, Scalia's rule-based approach eliminates factual inquiry into either the significance of the government purposes for regulation, or the degree of economic loss that the regulation imposes on the owner. For this reason, he sought to invent remedies for regulatory takings other than government compensation. In the 1987 *First English* case, the Court had held that the Constitution required the government to pay compensation whenever a regulatory taking was found.<sup>82</sup> Scalia needed to devise remedies to block government regulations when there was no showing that any compensation was due. Accordingly, he frequently came to suggest that offending regulations be invalidated or enjoined.

Scalia's approach also stacks the deck in favor of private property against government regulation. The government's purpose is presumed to seek property without payment through cupidity. The owner can then complain about any diminishment of traditional property rights.<sup>83</sup> Fashioning new hard rules consistently in one policy direction not only embodies social choices in the case in which they are announced, but also seeks to bind future courts to the same social choices by eliminating their room for maneuver.<sup>84</sup> Thus, contrary to what Justice Scalia claimed as a virtue of clear rules in constitutional adjudication, his regulatory takings rules embody his strong policy choice in the cases before him and seek to bind all future judges to the same policy choice.<sup>85</sup>

Another practical significance of Scalia's bright-line rules in regulatory takings cases is that they reduce the costs of litigation. Litigating the *Penn Central* standard is expensive for both property owners and the government. One reason is that the breadth of the factors considered under the *Penn Central* approach opens so many issues to discovery and factual controversy. Moreover, the legal standard's vagueness makes it hard to estimate the

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

81. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Auth.*, 535 U.S. 302, 332 (2002) (applying the *Lucas* rule); *Lucas*, 505 U.S. 1003 (holding that prohibiting development constitutes a taking per se).

82. *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304, 322 (1987).

83. *Lazarus*, *supra* note 48, at 776.

84. Scalia, *The Rule of Law*, *supra* note 60, at 1179.

85. *Id.*

chances of success.<sup>86</sup> This combination of factors impacts plaintiffs' lawyers looking to statutory attorney's fees for a prevailing party, since they must contemplate substantial investment in discovery and trial without being able to form reliable estimates of likely success.<sup>87</sup> Property rights lawyers have consistently argued for bright-line rules that provide a better chance for summary judgment in favor of landowners.<sup>88</sup> Here, Scalia's preference for rules over standards favors plaintiffs, even beyond their consistent protection for owners, by reducing litigation costs and increasing the predictability of outcomes. Landowner threats of regulatory takings litigation inhibit land use regulators, who dread financing such litigation with limited public funds.

### III. BOGUS BASELINES

The third and most significant character of Scalia's takings jurisprudence was his strong reliance on a rigid common law baseline to assess whether a use regulation affected a taking. He depicts the common law of property as a simple, unchanging set of clear rules and maxims. In this, he reverted to the orientation of the pre-New Deal Court, which often used a common law baseline to assess and invalidate legislation.<sup>89</sup> His first takings decisions demonstrate this strategy. Scalia's strategy became more pronounced during his tenure, reaching its more complete statement in his plurality opinion in *Stop the Beach*, where he explicitly rejects evolution in the common law itself.<sup>90</sup> Neither he nor any ally on the Court ever offered justification for using a crude caricature of the common law of property as a constitutional baseline.

Scalia's first and most convincing invocation of a common law baseline is in *Nollan*, where he repeatedly characterized the condition permitting the public to traverse the beach behind the Nollans' house as an easement. This gave common law solidity to the building permit's condition.<sup>91</sup> The Court in *Loretto* foolishly invented the shibboleth that the right to exclude was such an essential stick in the property bundle, that any regulation authorizing

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86. Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 528 (2009).

87. Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 692 (2005).

88. *Cf. id.* at 716 (asserting that courts have been unable or unwilling to create bright-line rules to help property owners pursue regulatory takings claims, thus implying that property owners' attorneys have argued for these clear rules).

89. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 918 (1987) (explaining that cases built on *Lochner* use common law as a baseline).

90. See Byrne, *Stop the Beach Plurality*, *supra* note 42, at 629 (discussing Scalia's opinion in *Stop the Beach* and the common law's role in determining judicial takings).

91. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828–29, 834, 837, 842 (1987).

permanent access was a per se taking.<sup>92</sup> But the Court's opinion in *Loretto* had not characterized the problem as the taking of an easement. It had employed the modern "bundle of sticks" portrait of property, arguing that allowing a permanent physical occupation "chops through the bundle, taking a slice of every strand."<sup>93</sup> Scalia's rhetorical move from the bundle of sticks to the taking of a common law interest dramatized the legal gravity of the public access, and helped justify the heightened means-ends scrutiny to be afforded such permitting conditions.

Scalia reasonably grounded his characterization of the public access as an easement by referring to California state decisions requiring prescription to create public easements across private land.<sup>94</sup> But the common law nature of public beach access was actively in flux at the time, as courts in many states were considering the implications of the Public Trust Doctrine for such access.<sup>95</sup> California had affirmed a broad public trust interest allowing public access to tidelands (i.e., the beach seaward of the mean high-tide line), but had not discovered a public right to cross the dry sand beach to reach the tidelands.<sup>96</sup> California's Constitution suggested a public right of access to navigable waters.<sup>97</sup> The State had given the Coastal Commission a mandate to enhance such public access.<sup>98</sup> And the state court below had upheld the

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92. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

93. *Id.* at 435.

94. *Nollan*, 483 U.S. at 829.

95. *See, e.g.*, *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Ore. 1969) (finding that the public has a right to access the beach); *Matthews v. Bay Head Improvement Ass'n.*, 471 A.2d 355, 358 (N.J. 1984) (considering whether the Public Trust Doctrine gives the public a "right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body"). Several European countries have elaborated in recent years a "right to roam," which is a public right of access to unimproved private land for recreation. *See, e.g.*, John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV., 739, 741 (2011) (discussing how Scottish law has changed to allow for more public access on lands "privately owned or public"); Kevin Gray & Susan Frances Gray, *The Idea of Property in Land*, in *LAND LAW: THEMES AND PERSPECTIVES*, 15, 38–39 (Susan Bright & John Dewar eds., 1998) (arguing that, with the need for recreation for a growing urban population, "an unanalysed, monolithic privilege of arbitrary exclusion is no longer tenable").

96. *Nollan*, 483 U.S. at 827–29, 841–42.

97. The California Constitution provides:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

CAL. CONST. art. X, § 4.

98. The California Coastal Act provides:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public

Commission's imposing of this condition on the Nollans partly because the exactions program implemented the public's interest in access to tidelands.<sup>99</sup> Thus, the California courts seemingly accepted the Coastal Commission's exactions policy of trading building permits for larger oceanfront houses in exchange for lateral public access along the dry sand beach as a reasonable accommodation of competing values.<sup>100</sup> The Commission sought to balance its statutory mandates of regulating private development and permitting public access on environmentally and culturally sensitive lands.<sup>101</sup>

Scalia's characterization of the case as involving the "extortion"<sup>102</sup> of an easement lifted the property law question out of its complex legal context, stripping it to a question of the abstract rights of a landowner. The permit condition of public beach access becomes a "conveyance of property," and the common law becomes the baseline of rights that the Takings Clause protects through heightened scrutiny.<sup>103</sup> Scalia's approach restricted the State to imposing an exaction only when the condition remedied a public harm directly caused by the permitting. In this way, the opinion prevented the State from resolving discord among legal principles and creating a broader accommodation between private and public interests, in a unique resource that has elements of an inherently public character.<sup>104</sup> Scalia stripped a multidimensional California property scheme into a black-letter formula that protected the private owner's interest. While this opinion displays Scalia's impressive legal rhetorical craft, it initiates the pattern of abstracting the

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safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

CAL. PUB. RES. CODE § 30210 (2017).

99. *Nollan v. Cal. Coastal Comm'n*, 223 Cal. Rptr. 28, 31 (1987).

100. *See id.* at 30 (reaffirming the law as laid out in prior California cases).

101. The situation is analogous to *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 76–77, 83 (1980). There, the California state constitutional rule permitting political demonstrations in private shopping centers was challenged as a taking of the right to exclude. The Court rejected that claim in an opinion by Justice Rehnquist, finding that, "[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." *Id.* at 83. Scalia's approach in *Nollan* is noteworthy for ignoring whether there was any impairment of the Nollans' value or use of their property, while deciding the case solely on a conceptual basis.

102. *Nollan*, 483 U.S. at 837.

103. The opinion states:

[O]ur cases describe the condition for abridgment of property rights through the police power as a 'substantial advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

*Id.* at 825 (second alteration in original). Thus, reasonable settlement of conflicting interests generated by different California legal instruments is reduced to an "abridgement of property rights" in violation of the federal constitution. *Id.* at 841.

104. *Id.* at 836–37.

property issues involved to simplified common law principles unqualified by the actual state law of property.<sup>105</sup> Jurisprudentially, it turns from conceiving property as a bundle of rights that can be adjusted to achieve socially desirable legal contours, to classical property rights with clear and impermeable outlines. Scalia does not offer an explanation for the shift. He simply presents classical property rights as natural and correct. Scalia's notion of property is all crystals and no mud.<sup>106</sup>

Scalia's use of a classical common law baseline for assessing the scope of the Takings Clause became more conspicuous in *Lucas*. His opinion characterizes the regulatory prohibition on Lucas, from building seaward of the historic tideline, as imposing a servitude.<sup>107</sup> He rejected the older principle that a public regulation that prevents harm to the public cannot affect a taking. Instead, he held that a land-use regulation that eliminated all economic value from a parcel of land would be a takings per se, unless it would "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."<sup>108</sup> The paradigmatic example used was the common law of nuisance, so that regulations prohibiting what would have been a nuisance at common law could not be a taking because they did not eliminate a property right.<sup>109</sup> In *Lucas*, the Court doubted that prohibiting construction of single-family houses, the "'essential use' of land,"<sup>110</sup> could be a nuisance. The Court remanded the case with a warning: "South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found."<sup>111</sup> Not only is the common law the baseline for the constitutional propriety of regulations, but also the Supreme Court should review state court decisions to see that they remain within the traditional context of state property law.

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105. The first circulated draft of Justice Brennan's dissent in *Nollan* raised the influence of the public trust interest as a factor of support in the State's position, arguing that the Court's opinion failed to appreciate that "the State has employed its regulatory power not to acquire a 'classic right-of-way easement,' but to fulfill its public trust duty to preserve the common resources of the State for the use of its citizens." William J. Brennan, Jr., First Draft of Dissenting Opinion, *Nollan v. Cal. Coastal Comm'n*, The Harry A. Blackmun Papers (June 3, 1987) (on file with the Collections of the Manuscript Division, Library of Congress), quoted in J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 921 (2012).

106. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577-79 (1988) (referring to crystals as clear property rules and mud as murky rules).

107. *Lucas v. S.C. Coastal Council* 505 U.S. 1003, 1024 (1992).

108. *Id.* at 1029.

109. *Id.* at 1022.

110. *Id.* at 1031 (quoting *Curtin v. Benson*, 222 U.S. 78, 86 (1911)).

111. *Id.*

*Lucas* highlights the perversity of using the common law as the baseline for assessing regulations, as commentators at the time noted.<sup>112</sup> Land use regulations evolved because of structural limits on common law remedies to prevent public harms.<sup>113</sup> Private nuisance law requires an adjoining landowner to allege harm to her property caused by the defendant's use of her property. However, many uses generate serious harms on the public as whole, such as air pollution, but only minimal harms on the few adjoining landowners.<sup>114</sup> In such circumstances, the individual plaintiff suffers insufficient harm to present a strong case, or even justify spending money to bring the suit. Public nuisance law was an early form of site-specific land-use regulation; however, it was cumbersome and unsystematic, relying on inexperienced attorneys general and courts to address increasingly complex public effects. As public land-use regulation became ubiquitous, nuisance law atrophied as courts refused to wield it against uses of land causing widespread harms and instead looked to public regulation as a superior legal instrument.<sup>115</sup> In making common law the touchstone of constitutional appropriateness, Scalia thus inverted legal history and ignored the challenge of effectively addressing widespread public harms. Combined with the opinion's express repudiation of the doctrine that regulations reasonably preventing harm to the public cannot be takings,<sup>116</sup> using a common law baseline seemed to expose many environmental regulations to takings challenges.

Scalia's opinion in *Lucas* created paroxysms in the environmental community. This was not primarily because of the outcome, but because of the reasoning. The Court could have applied the *Penn Central* approach to David Lucas without serious reshaping of the law of regulatory takings. But the open-ended, fact specific *Penn Central* approach ran counter to Scalia's jurisprudential instincts, as well as his deep distrust of discretionary government power. *Penn Central* embodies the most open-ended standard in

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112. *Id.* at 1030. "The legislature's role in land use is limited to codifying the common law of private disputes." Louise Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 337 (1995).

113. The Supreme Court itself stated long ago: "A person has no property, no vested interest, in any rule of the common law . . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

114. *See, e.g., Herring v. Lisbon Partners Credit Fund, Ltd.*, 823 N.W.2d 493, 500 (N.D. 2012) ("[A] landowner is entitled to use his own property, consistent with the law, in a manner calculated to maximize his own enjoyment, a concomitant of this right is that the use and enjoyment of his estate may not unreasonably interfere with or disturb the rights of adjoining landholders . . . .").

115. James W. Sanderson & Ann Mesmer, *A Review of Regulatory Takings After Lucas*, 70 DENV. U. L. REV. 497, 507 (1993).

116. *Id.* at 507–08.

constitutional law because decisions will always be fact-specific. However, Scalia sought doctrinal clarity, which also erected a barrier against the growth of environmental regulation. The creation of the new per se rule, the rejection of the public harm approach, and the use of the common law nuisance baseline seemed to foretell a vigorous use of the Takings Clause to assault environmental regulations, which enjoyed substantial public support.

In the last 25 years of his tenure, Scalia did not write another opinion for the Court in the area of regulatory takings. Most other justices, even those sympathetic to property rights claims, preferred a more pragmatic, less conceptual approach to accommodating individual rights and the need for regulation.<sup>117</sup> Justice Kennedy concurred separately in *Lucas*, urging a more pragmatic approach, and he became an important swing vote in property rights cases.<sup>118</sup> Chief Justice Rehnquist's opinion for the Court in *Dolan* added a flexible proportionality inquiry to the conceptual *Lucas* test and specifically affirmed the public value of land-use regulation.<sup>119</sup>

Scalia continued to advocate his more conceptually radical approach to constitutional property rights in his dissenting, concurring, and plurality opinions. His separate opinion in *Pennell* is revealing.<sup>120</sup> The case involved a regulatory takings challenge to a rent control ordinance listing several factors that the city agency could consider in permitting rent increases, including whether the landlord's proposed increase placed a severe economic hardship on a tenant.<sup>121</sup> The Court, in an opinion by Chief Justice Rehnquist, remanded the case because the record lacked evidence as to whether the city had ever actually reduced rents due to a tenant hardship, precluding any inquiring into the economic effect on landlords.<sup>122</sup>

[I]n this case we find that the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here.<sup>123</sup>

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117. Richard Lazarus's analysis of the Blackmun papers suggests that Justice Scalia's ideological rigidity alienated potential allies in takings cases, making it difficult to assign him opinions for the Court in the area. Lazarus, *supra* note 48, at 761.

118. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring).

119. *Dolan v. City of Tigard*, 512 U.S. 364, 391, 396 (1994).

120. *Pennell v. City of San Jose*, 485 U.S. 1, 15-24 (1988) (Scalia, J., concurring in part and dissenting in part).

121. *Id.* at 22.

122. *Id.* at 15, 18.

123. *Id.* at 10 (majority opinion).

Scalia's separate opinion pressed the view that the power of the city to adjust rents based on the needs of the tenant was enough to violate the Takings Clause. The basic normative principle was "the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation."<sup>124</sup> He argued that this principle, guaranteed by the Takings Clause, requires government to pay, and thus spread the costs of redistributive measures.<sup>125</sup> "Here the city is not 'regulating' rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants."<sup>126</sup> The Takings Clause must resist such regulations to protect the integrity of the political process. "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes."<sup>127</sup> In Scalia's view, "there is no end to the social transformations that can be accomplished by so-called 'regulation,' at great expense to the democratic process,"<sup>128</sup> if the regulation is not based on harm caused by the regulated owner.

Scalia's doctrinal approach here closely resembles that in the substantive due process cases of the pre-New Deal era. Thus, in *Adkins v. Children's Hospital*, for example, the Court invalidated a statutory minimum wage for women and children.<sup>129</sup> The Court explained:

To the extent that the [wage] fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.<sup>130</sup>

As the contractual wages in *Adkins* could not be regulated to address the needs of the workers, so the leases in *Pennell* should not be regulated to address the hardship of the tenant. In both cases, the rights created by the common law cannot be varied except for permissible public purposes. Both

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124. *Id.* at 23 (Scalia, J., concurring in part and dissenting in part).

125. *Id.* at 21.

126. *Id.* at 22.

127. *Id.*

128. *Id.*

129. *Adkins v. Children's Hosp. of the D.C.*, 261 U.S. 525, 562 (1923).

130. *Id.* at 557–58.

the *Adkins* Court and Scalia in *Pennell* invoke natural justice in support of their views. However, Scalia adds to it a specious rationale of protecting the political process against itself.<sup>131</sup> Ironically, Scalia joined the Court's rejection of a substantive due process claim against the legislation, while duplicating the due process analysis under the auspices of the Takings Clause.<sup>132</sup> Moreover, Scalia makes no attempt to justify his approach based on the original meaning of the Takings Clause. He refers only to "our traditional constitutional notions of fairness," and says that the "fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription—perhaps accidental, perhaps not."<sup>133</sup>

Scalia's legal and normative claims in *Pennell* are thin and highly contestable. The federal constitution does not deprive states of power to impose social duties on landlordship in relation to tenant hardship. Rent control legislation does not need to take the current distribution of economic power between landlords and tenants, or between employers and employees, as a baseline.<sup>134</sup> Property rules are frequently tempered by equity, which may generously consider the circumstances of the parties. Statutory eviction rules contain protections for elderly people and people subject to cold weather.<sup>135</sup> Scalia's concept of property would render anything of this nature unconstitutional because it imposes duties on lessors for tenant problems not caused by the lessor. Such legal duties, even if based on humane social morality, may be counterproductive in practice. Also, if confiscatory, they would be found a taking under ordinary regulatory takings law.<sup>136</sup> But to maintain such a substantive limitation on the regulation of property elevates a simplified understanding of the common law to constitutional status.

Scalia was prepared to require compensation in *Pennell* without evidence of economic scale or effect. Again, as noted in the previous section,

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131. See Daryl J. Levinson, *Making the Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (compensation remedy does not cause the government to internalize costs of regulation).

132. *Pennell v. City of San Jose*, 485 U.S. 1, 28 (1988) (Scalia, J., concurring in part and dissenting in part) (citing the New Jersey state due process case, *Property Owners Association of North Bergen v. Township of North Bergen*, 378 A.2d 25, 27 (N.J. Sup. Ct. 1977)).

133. *Id.* at 22–23. See also, *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (finding a rent control ordinance constitutional).

134. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937) (asserting that state legislation regarding minimum wages does not need to apply uniformly to men and women).

135. See, e.g., *Troy Ltd. v. Renna*, 727 F.2d 287, 290 (3d Cir. 1984) (referencing New Jersey's Tenancy Act, which protects elderly people from unjust evictions); D.C. CODE § 42-3505.01(k) (2017) ("Notwithstanding any other provision of this section, no housing provider shall evict a tenant on any day when the National Weather Service predicts at 8:00 a.m. that the temperature at the National Airport weather station will fall below 32 degrees fahrenheit or 0 degrees centigrade within the next 24 hours.").

136. Scalia has made his view clear in other contexts that states may legislate morality so long as they do not contravene specific prohibitions in the constitution. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (describing the effect of the courts on legislating morality).

he evinces little interest in the economic impact on the owner in any of these cases. He is far more interested in vindicating the integrity of property rights as he understands them. This can be seen again in the Court's decisions in the *IOLTA* cases.<sup>137</sup> That litigation addressed takings challenges to state programs, sometimes created by legislation and sometimes by state supreme court rules. These required lawyers to hold client funds too small in amount to justify individual client interest-bearing accounts to be placed in collective accounts where the interest would go to fund legal services for indigents.<sup>138</sup> The genius of these programs was that they took nothing from the client that he or she would otherwise have, since banks could not even open individual interest-bearing accounts in the small sums involved.

The disputes, brought by property rights organizations, resulted in two Supreme Court decisions. In the first, *Phillips v. Washington Legal Foundation*, the Court held five to four in an opinion by Chief Justice Rehnquist that the interest generated in IOLTA funds belonged to the principal's client owner.<sup>139</sup> The opinion stressed heavily the common law maxim that ownership of interest follows that of the principal, an unusual example of majority reliance on a common law principal abstracted from context.<sup>140</sup> The Court elevated the maxim above the actual law of the states, as applied to a novel circumstance, where the owner of the principal could never possess the interest.<sup>141</sup> In the second, *Brown v. Legal Foundation of Washington*, the Court held, again five to four (O'Connor switched), that even if the program affected a taking, no compensation was due to petitioners because they suffered no net loss from the program.<sup>142</sup> Justice Scalia wrote the dissent in *Brown*, which concluded:

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137. See *infra* text accompanying notes 137–42 (discussing the Court's opinions in *Phillips Legal Foundation* and *Brown v. Legal Foundation of Washington*).

138. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003).

139. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 158, 160 (1998).

140. *Id.* at 167.

141. The crudity of the Court's interpretation in *Brown* can be seen by comparing its reasoning to that in the chestnut case of *Hinman v. Pacific Air Transport*, 84 F.2d 755, 758 (9th Cir. 1936), in which the court held that commercial air flights did not trespass whenever they flew over private land unless the owner could show actual and substantial damage. Accord *United States v. Causby*, 328 U.S. 256, 260–61 (1946) (stating that ancient "common law ownership of the land extended to the periphery of the universe . . . [b]ut that doctrine has no place in the modern world"). The landowners had relied on the *ad coelum* rule that the owner of land owned all the way from the center of the earth to the heavens. The court rejected this argument on several grounds: that the owner could not physically possess the airspace that the planes flew through; had suffered no harm; and that the practical results of finding for the owners would cripple air travel. All of these points apply to the IOLTA accounts, where: the clients' funds could never earn any interest but for the collective trust; they could never individually possess the interest and thus suffered no harm; and finding a taking would destroy the capacity of the IOLTA trusts to generate funds for legal representation of indigents.

142. *Brown*, 538 U.S. at 240.

Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended.<sup>143</sup>

It is arresting but legally obtuse to describe the government's actions as "larcenous." It is striking that the government's benign purposes in the IOLTA program are held against the government in the constitutional calculus.

For Scalia, it is the articulation of constitutional rules protecting private property that are important, rather than compensating owners for unfair economic losses. The effect of finding the IOLTA programs to constitute takings would be to terminate the programs, not to restore wealth to the clients. As Justice Breyer convincingly explained:

The most that Texas law here could have taken from the client is not a right to use his principal to create a benefit (for he had no such right), but the client's right to keep the client's principal sterile, a right to prevent the principal from being put to productive use by others.<sup>144</sup>

The *IOLTA* cases exemplify Scalia's and his conservative colleagues' focus on using property to restrain government, rather than safeguard the specific economic assets at stake.

Scalia's embrace of common law property interests as baselines for constitutional protection is most clear in his judicial takings opinions. His interest in checking judicial expansion of public rights at the expense of private property dates to his dissent from the denial of certiorari in *Stevens v. City of Cannon Beach*.<sup>145</sup> That case goes to the heart of the power of state supreme courts over the common law of property in their states. The Oregon Supreme Court had held 25 years previously that by customary usage the public had lawful access to the dry sand area of the State's beaches, notwithstanding that private titles extended to the mean high tide line.<sup>146</sup> In *Stevens*, the Oregon courts reaffirmed *Thornton* and the superiority of public

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143. *Id.* at 252 (Scalia, J., dissenting).

144. *Phillips*, 524 U.S. at 181.

145. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1207 (1994).

146. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 678 (Or. 1969).

rights by upholding the denial of a permit to a private owner for development on their dry sand beach.<sup>147</sup> In dissenting from the denial of certiorari, Justice Scalia wrote:

As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate “background law”—regardless of whether it is really such—could eliminate property rights.<sup>148</sup>

In support of his claims that the Oregon doctrine was a pretext or a “fiction,” Scalia argued further that the Oregon court misread Blackstone on the doctrine of custom rights.<sup>149</sup> But it seems hard to conclude that a state supreme court’s interpretation of non-statutory property law that applies to the whole state is a “pretext,” regardless of how deficient the court’s reasoning was; it is actually what the law of the state is. U.S. courts relied on custom more broadly to permit access to unimproved private land than Blackstone knew.<sup>150</sup> Several states have invoked custom or some notion of inherently public property to open the dry sand area of the state’s beaches to public access, thereby limiting private development.<sup>151</sup> The common law has often developed through the reinterpretation of doctrines and even through the elaboration of fictions.<sup>152</sup> The beach cases turn on the nature of the resource and its customary usage, rather than on any invidious assault on particular landowners or singling out of disfavored classes. But in *Cannon*

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147. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 451, 460 (Or. 1993).

148. *Stevens*, 510 U.S. at 1211 (citation omitted) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455–58 (1958)).

149. *Id.* at 1212 n.5.

150. *McConico v. Singleton*, 9 S.C.L 244 (Constitutional Court S.C. 1818), noted in THOMAS W. MERRILL AND HENRY E. SMITH, *PROPERTY* 77 (2010) (custom permits hunters to enter unimproved private lands in the pursuit of game).

151. See, e.g., *Severance v. Patterson*, 370 S.W.3d 705, 714–15 (Tex. 2012) (explaining the public right established by historic use); *Diamond v. St. Bd. of Land & Nat. Res.*, 145 P.3d 704, 717 (Haw. 2006) (arguing that public policy is served by “extending to public use and ownership as much of Hawaii’s shoreline as is reasonably possible”); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77–78 (Fla. 1974) (discussing the importance of maintaining a public right to beaches). See also Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 713 (1986) (suggesting that some lands ought to be reserved for the public, and that “cases expanding public access to waterfront property” recognize this “inherent publicness”).

152. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 112–16 (discussing the evolution of common law and how judges act as legislators).

*Beach*, Scalia sought to find a federal constitutional handle on state property law changes that disadvantage private owners.<sup>153</sup>

Justice Scalia finally advanced a full theory of judicial takings in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.<sup>154</sup> He wrote for a plurality of four justices, arguing that a state supreme court's interpretation of its common law that eliminated an established property right must be invalidated as a taking.<sup>155</sup> The Court concluded that the Florida Court had not changed its interpretation of littoral owners' rights in the foreshore and thus did not take property.<sup>156</sup> Scalia's opinion is a travesty of the common law. Maintaining that judicial innovations in the common law of property present takings problems misconstrues the nature of the judicial function. Courts have and must evolve law in a tension that preserves legitimate expectations of owners and adapts the rules to changing social, economic, and environmental conditions.<sup>157</sup> As Professor Joseph Sax wrote in regard to *Lucas*, "Historically, property definitions have continuously adjusted to reflect new economic and social structures, often to the disadvantage of existing owners."<sup>158</sup> Standard property law casebooks brim with cases and legislation that adopt new substantive and remedial rules. No property rule can be changed without eliminating somebody's established right.<sup>159</sup>

*Loretto* held that a regulation abridging the right to exclude was a per se taking,<sup>160</sup> on the ground that the right to exclude is the most crucial aspect of property. Scalia's opinion in *Stop the Beach* elevates all property rights to that status.<sup>161</sup> In that case, he was prepared to hold that a state interpretation of common law that reduced littoral rights to touch the sea could be a taking without regard to its economic effect or reasonableness.<sup>162</sup> The only question

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153. *Stevens*, 510 U.S. at 1211–12.

154. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 715 (2010).

155. *Id.*

156. See Byrne, *Stop the Beach Plurality*, *supra* note 42, at 619 (criticizing this opinion).

157. "[T]he idea of a 'taking' by a court denies the court's function, competence, and interpretative mission. Judicial decision-making, frozen in time, is a functional oxymoron. Imposing takings penalties on courts, in an effort to enforce that idea, makes no sense either." Laura Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203, 211 (2011). See generally, BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 19–20 (1924) (explaining that the law must adapt to a changing society).

158. Joseph L. Sax, *Property Rights and The Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1446 (1993).

159. For an example of a recognition of an implied warranty of habitability in a residential lease, see *Javins v. First National Realty Co.*, 428 F.2d 1071 (D.C. Cir. 1970). *Javins* eliminates the landlord's right to obtain immediate possession of the premises upon the tenant's failure to pay rent.

160. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

161. *Id.*

162. *Id.*

was whether the state court's current decision could be squared with state precedent. This is formalism on steroids and deeply reactionary. Scalia offered no normative or jurisprudential justification for such a rule; he assumed constitutional protection for all established rights, and directed his arguments to extending the principle from legislation to common law adjudication.<sup>163</sup>

"Judicial takings" claims should be analyzed under substantive due process because they attack changes in rules rather than applications of a rule to particular properties. The constitutional issue is whether the state court's change of a rule is a legitimate exercise of its authority, not whether it imposes a loss on some people. This becomes apparent in Justice Scalia's view as to how a judicial taking is to be remedied: the state supreme court must reverse its holding and adhere to the older state property rule.<sup>164</sup> In short, the state court's decision is invalidated—the typical remedy for a due process violation. Scalia posits that the law could be changed by the legislature as some kind of categorical exercise of eminent domain, and the state can appropriate funds to compensate all affected property owners.<sup>165</sup>

Judges interpret gaps and ambiguities in precedent to make new law much more often than they simply announce a change in rule. *Stop the Beach* and *Lucas* both portend Supreme Court review of state court decisions to evaluate whether the current interpretation of property law is consistent with past interpretations. This erects a falsely clear and static image of the common law of property as a bulwark against regulation. It had nothing to do with the Takings Clause. The Court unanimously stated in *Lingle* that regulations are takings when their "effect is tantamount to a direct appropriation."<sup>166</sup> Scalia's approach departs from this functional inquiry into economic effects and fairness to individuals. Instead, he uses property to limit the scope of regulatory authority.

#### CONCLUSION

The title of this essay plays upon Justice Kennedy's statement in *Palazzolo*. He rejected a per se rule that would bar an owner from bringing a takings claim against a regulation enacted before the owner acquired the property subject to the regulation.<sup>167</sup> He said, "[T]he State may not put so potent a Hobbesian stick into the Lockean bundle."<sup>168</sup> To claim that Justice

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163. *Id.*

164. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 723–24 (2010).

165. *Id.* at 724.

166. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

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

168. *Id.*

Scalia puts Lockean sticks into a Hobbesian bundle is to argue that he employs pre-political natural property rights to ward off government regulators insatiably hungry for private property. His opinions display no real interest in property law as such. His consideration of common law doctrines is summary and simplistic. The opinions reveal no concern about the economic effects of land use regulation or the complex intertwining of crystals and mud.<sup>169</sup> Despite serving on the Court during a virtual Golden Age of property law scholarship, encompassing many different jurisprudential and political perspectives, he rarely cited and never discussed this literature. He seems to have viewed property law from the outside, as a bulwark against government regulation, rather than as a complex system of resource allocation and usage rights. In short, he embraced property from a public law perspective as a check on government power.

Scalia depicts government purposes in land use regulation as consistently malevolent, driven by a lust for power. The complex patterns of government decision-making get reduced to “legislative fiat” or “judicial decree.”<sup>170</sup> In Scalia’s rhetoric, government uses regulatory power irrationally, engages in extortion, creates nature preserves on private land, forces landlords to pay to address social problems they did not create, engages in larceny, and relies on fictitious legal doctrines to eliminate property rights. Justice Scalia rarely and grudgingly recognized that government regulation can prevent harm to the public from pollution or environmental degradation, or enhance public goods. He articulated a consistently dark vision of democracy and human nature.

We can speculate that Scalia was alarmed by the potential claims of environmentalism on traditional private rights. Many of his cases addressed regulations of sensitive environmental areas, such as the waterfront, where regulations of land use have increased. Environmental science has made apparent the many ways in which development of private land can impair air and water quality, habitat for wildlife, or the value of ecological services. Environmental understanding reveals ubiquitous externalities from private property use that could justify nearly any reasonably thought-out regulation as seeking to force their internalization in order to prevent harm to the public. Scalia seems to have believed that a police power of such breadth would inevitably become oppressive.

Scalia’s regulatory takings jurisprudence creates a conceptual barrier against regulation of land use for environmental ends. The use of per se rules eliminates the Court’s weighing of public purposes. His *Pennell* approach narrows the range of permissible government ends, and *Nollan* raises the bar

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169. Rose, *supra* note 106, at 610.

170. *Stevens v. City of Cannon Beach*, 507 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from denial of certiorari).

for achieving them. Requiring compensation for any elimination of an established property right locks in place the current distribution of rights without regard to the public needs. These doctrinal innovations block wholesome environmental regulations as well as interest group rent seeking; they do not seek to distinguish between them.

Professor Margaret Radin wrote a perceptive analysis of Scalia's approach in *Nollan* soon after the opinion was announced, which captures important aspects of his overall body of opinions regarding regulatory takings. She wrote:

The model of rules is a conservative interpretation of the Rule of Law, or at least congenial to conservatives, because it ties in so well with the Hobbesian view of politics. If majority rule is a shifting coalition of rent seekers, then democratic government is a Leviathan to be restrained. . . . Unless judges can be so completely restrained as to be rendered mere tools of implementation of the real social contract—without which citizens cannot be expected to yield their arbitrary powers against others—citizens are caught between the predations of the majority and the predations of the judiciary, and the social contract dissolves. . . . In this model of human nature, limitless self-interest and the consequent urgent need for self-defense require the most expansive possible notion of private property, indeed, the classical liberal conception of property. Nothing will get produced unless people are guaranteed the permanent internalization of the benefits of their labor; nobody will restrain herself from predation against others unless all are restrained from predation against her.<sup>171</sup>

Scalia took this conceptual cabining of regulation through the Takings Clause further than any other conservative justices concerned about excessive land use regulation. Justices Rehnquist, O'Connor, and Kennedy, all of whom wrote opinions strengthening the regulatory takings doctrine, also expressly recognized the validity and necessity of land use regulations. They also used analytic approaches that considered the fairness to and pragmatic effects of regulations on property owners. Scalia's approach was too doctrinaire and lacked grounding in shared legal reasoning.

The future of Scalia's property rights jurisprudence remains unclear. President Trump has named Scalia as the model of an ideal Supreme Court appointment. Chief Justice Roberts and Justice Alito seem more inclined to embrace his regulatory takings legacy, as evidenced by their joining the

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171. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1682–83 (1988) (footnotes omitted).

plurality opinion in *Stop the Beach*, than did Chief Justice Rehnquist or Justice O'Connor. One might envision the Court returning to the concepts sketched in Scalia's regulatory takings opinions, employing per se rules that ignore the public justification for regulations while protecting a static, fundamentalist right of property.

But the imperative of devising new laws to shape a healthier and more harmonious relation of advanced society to nature remains. Property law needs to evolve so that stewardship of resources and care for creation sit alongside economic efficiency and personal liberty. Climate change will drive the demand for reducing greenhouse gas emissions and the adaptation to accelerating ecological transformation. Rather than a model for the future, Justice Scalia's regulatory takings jurisprudence stands as a caution against refusing to confront the challenge environmental risk poses to our liberal legal order.