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## The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement within the U.S. Supreme Court

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# The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court

RICHARD J. LAZARUS\*

Commentators generally evaluate Supreme Court Justices based on their votes in individual cases, especially the consistency of their voting records over time. Justices are also most closely identified by the majority, concurring, and dissenting opinions that they author although, ironically, the most significant of the three—the majority opinions—are the least likely to reflect the actual views of the authoring Justice in all respects. Majority opinions are formally dubbed “Opinions of the Court” for a reason. The single Justice assigned responsibility for crafting the majority opinion is not charged with simply detailing his or her own personal views. Quite the opposite. The Justice instead has the far more challenging job of crafting the views of a majority of the Justices. To do so frequently requires that the author of the opinion for the Court shed her own views on one or more aspects of the case. That is why it is a classic mistake for an advocate before the Court to refer to a majority opinion by a specific Justice as that Justice’s opinion as though the opinion expresses the Justice’s own personal views. Advocates who do so at oral argument run the risk of being immediately stopped short by the

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\* Professor of Law and Faculty Director, Supreme Court Institute, Georgetown University Law Center. I would like to thank Kelly Falls, Georgetown University Law Center Class of 2007, for her excellent research and editorial assistance, and Georgetown Law Students JR Drabick, Seth Northrop (Class of 2006) and Abby DeShazo (Class of 2007), for their outstanding assistance in reviewing the papers of Justice Blackmun. This Article has benefited greatly from comments received on earlier drafts from John Echeverria, Tim Dowling, and Professors Peter Byrne, Tom Merrill, and Mark Tushnet, and Dean Bill Treanor. I served as counsel of record or co-counsel for parties or amicus in many of the regulatory takings cases discussed in this Article, including *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); and *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The views expressed herein are mine alone and do not necessarily represent those of my clients in any of those cases.

very Justice whose name they invoked to curry favor, but who instead admonishes the attorney that it was the *Court's* opinion.<sup>1</sup>

It is, moreover, the ability of a Justice to craft such a majority opinion that is ultimately the most important and least understood of the skills that distinguish between ordinary and truly extraordinary jurists. The Justice who is able to do so is the one most likely to produce Court opinions that, because of their persuasive force, promote the kind of public respect ultimately necessary for the Court's authority. They are the majority opinions also most likely to have staying power over time. A Justice less skilled in the crafting of majority opinions, by contrast, is more likely to lose the majority present at conference when the Justices initially voted on the case, producing a splintering of the Court expressed in a rash of separate concurring and partially dissenting opinions. The upshot is that the Justice may have remained very true to her own deeply held convictions, but at the expense of producing opinions of the Court that announce rulings of law that meet the test of time.

The Court's October Term 2004, along with the publication of the papers of Justice Harry Blackmun (*The Blackmun Papers*) in the spring of 2004,<sup>2</sup> provide an opportunity to assess the ability of one of the current Justices to promote Court opinions in an area of law centrally important to him. Justice Antonin Scalia's arrival on the Court twenty years ago in September 1986 coincided with a major strategic effort by advocates of stronger constitutional protections of property rights to enlist the Supreme Court in support of their cause. While it is far from clear that property rights protections had previously been one of Justice Scalia's primary concerns, he quickly championed those interests on the Court and, with the arrival of Justice Clarence Thomas only five years later, the property rights movement had good reason to be optimistic. Justice Scalia appeared to have the makings of a solid majority on the Court that he could use to produce a series of rulings based on the Fifth Amendment's Taking Clause that limited government's ability to interfere with private property rights, especially in land and other natural resources.

No such significant legal precedent favoring property rights, however, has resulted. The property rights movement has instead

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1. See CLERK OF THE UNITED STATES SUPREME COURT, GUIDE TO COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 7 (October Term 2004) ("Do not refer to an opinion of the Court by saying: 'In Justice O'Connor's opinion.' You should say: 'In the Court's opinion, written by Justice O'Connor.'").

2. The papers of Harry A. Blackmun, lawyer, judge, and Associate Justice of the United States Supreme Court were given to the Library of Congress by Justice Blackmun in 1997, with the understanding that they would not be made generally available to researchers at the Library of Congress until five years after his death. The papers became available in March 2004. See Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1. The papers are referred to hereinafter as "The Blackmun Papers."

recently suffered several losses in the Supreme Court, culminating in spring 2005 with substantial defeats in all three property cases then before the Court.<sup>3</sup> While no single Justice is likely to be the primary cause of such a legal trend over several decades, the Blackmun Papers provide support for the proposition that Justice Scalia may well be partly responsible for the property rights movement's surprising lack of success. They reveal a Justice not only failing to craft majority opinions for the Court with persuasive staying power, but one who instead repeatedly alienated over time the individual Justices with whom he needed to forge a stable, workable majority favoring constitutional protection of property rights. His penchant for bright line *per se* tests<sup>4</sup> favorable to takings plaintiffs ultimately had no legs within the Court.<sup>5</sup> As applied to regulatory takings, the resulting analytic framework proved both incoherent and hard to square with any of the other competing themes of judicial conservatism within the Court: originalism and federalism. And, as applied to the other Justices, it prompted Scalia likewise to use a bright-line approach in condemning those moderate and conservative Justices on the Court who failed to follow his lead. Justice Scalia steadfastly refused to embrace the kind of balancing approach favored by potential allies, especially Justices Kennedy and O'Connor, and therefore lost the opportunity to produce significant precedent that might have aided property rights advocates far more than the narrowly drawn *per se* rules that Scalia personally favored.

Justice Stevens, by contrast, appears to have succeeded against high odds where Justice Scalia has not, resulting in a series of rulings more favorable to government regulators in property rights cases. Once seemingly relegated to the role of the iconoclastic separate dissenter, with the arrival of Justice Scalia and then Justice Thomas, Justice Stevens has become the most influential member of the Court in property rights cases as he proved willing to embrace a more contextual analysis that he once rejected and, unlike Scalia, to join with those on the Court whose views he did not entirely share.

The purpose of this Article is to take the measure of Justice Scalia's ability to produce significant opinions for the Court, rather than just for himself, by focusing on the Court's property rights cases during the past several decades. Much of the analysis will rely on the Blackmun Papers, because they provide a virtual treasure trove of information revealing the Court's deliberative process while Blackmun was on the Court from 1971

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3. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S. Ct. 2491 (2005); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

4. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court 1991 Term Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 65-66 (1992).

5. See *infra* Part III.

to 1994. Almost all of this information, including Justice Blackmun's handwritten notes on what each Justice said at the Court's private deliberations and initial voting on the cases at conference, has never before been revealed and analyzed.

The Article is divided into three Parts. Part I briefly describes the scope, content, and organization of the Blackmun Papers. Part II describes what happened behind the curtain in each of the many property rights cases before the Court between 1971 when Justice Blackmun joined the Court and 1994 when he resigned. The discussion covers the Court's regulatory takings precedent both immediately before Justice Scalia joined the Court and during the time that Justices Blackmun and Scalia served together on the Court. It includes a discussion of what was at stake in each case, what the Justices said at conference, how they initially voted, and then how the actual opinion of the Court evolved prior to its final publication. Finally, Part III offers a broader assessment of Justice Scalia's effectiveness in moving the Court's jurisprudence in a direction favoring greater constitutional protection of property rights. This final analysis extends in time beyond Blackmun's tenure on the Court to include the property rights cases since decided by the Court.

### I. THE PAPERS OF JUSTICE HARRY A. BLACKMUN

Justice Harry A. Blackmun served on the Supreme Court from 1971 until 1994, leaving the bench soon after the Court announced its final opinions in June 1994 for October Term 1993. During his entire life, including his years on the Court, Justice Blackmun kept detailed records and notes on all aspects of his personal and professional life. The Official Library of Congress Register of the Blackmun Papers, which simply describes in the most general terms the contents of the Papers, is itself 362 pages long.<sup>6</sup> Not only did he maintain a diary and keep copies of personal and professional correspondence and speeches,<sup>7</sup> he kept an amazing array of records of his life's activities: his "mechanical drawings"<sup>8</sup> and report cards and grades in high school,<sup>9</sup> his "financial papers" from 1925 to 1932,<sup>10</sup> "dance cards" during his college days at Harvard,<sup>11</sup> and even his notebooks for each of his classes at Harvard Law School.<sup>12</sup> The Blackmun Papers, publicly available in the Library of

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6. Manuscript Division, Library of Congress, Harry A. Blackmun—A Register of his Papers in the Library of Congress (2003) (prepared by Connie L. Cartledge with the assistance of others) [hereinafter *The Blackmun Papers Register*].

7. *Id.* at 3–8.

8. *See* *The Blackmun Papers Register*, *supra* note 6, Container 7.

9. *Id.*

10. *See* *The Blackmun Papers Register*, *supra* note 6, Container 1.

11. *Id.*

12. *Id.* at Containers 1–5.

Congress as of March 2004, extend to 1,576 containers of meticulously organized files.<sup>13</sup>

For scholars interested in the work of the Supreme Court, the Blackmun Papers relating to his years on the Court are extraordinary.<sup>14</sup> For each of the hundreds of cases heard by the Court on the merits during Justice Blackmun's tenure, there are documents revealing of not only the deliberations within his own chambers, but also the thinking of the other Justices. Documents for each case heard on the merits include:

- **Case docket sheets** showing how every individual Justice voted on every case at both the jurisdictional stage and on the merits, and the subsequent assignments of opinion writing within the Court;
- **Memoranda at the jurisdictional stage** written either by Blackmun's own clerks or the clerks of other chambers concerning whether the Court should grant review in a specific case;
- **Bench memoranda** written by one of the Justice's clerks in anticipation of oral argument in the case, summarizing the briefs, discussing the merits, and proposing possible questions to be posed at oral argument;
- **Blackmun's pre-oral argument notes** prepared by Justice Blackmun himself (typically handwritten) immediately before the oral argument, in which he would outline his initial thinking about a case, his likely vote, and sometimes also his prediction of how the Court as a whole might vote;
- **Oral argument notes** taken by the Justice during oral argument, which included brief discussion of substantive points made at argument, but also included references to the age, law school, and distinct physical characteristics of each advocate, along with a letter or numerical grade of the quality of their advocacy;
- **Conference notes** taken by the Justice during the Court's private conferences during the weeks of oral argument, when the Justices would, without any other persons present, discuss the cases together and cast their votes (Blackmun wrote down what each Justice said during the conference as well as their votes);
- **Draft majority, concurring, and dissenting opinions** prepared within Blackmun's own chambers and by other chambers, often with Blackmun's notations and comments on the drafts;

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13. See *The Blackmun Papers Register*, *supra* note 6.

14. *New York Times* reporter Linda Greenhouse, who received early access to the Blackmun Papers, has published an outstanding book that considers what the papers reveal about Justice Blackmun's evolution on the Court, especially as it relates to *Roe v. Wade*, 410 U.S. 113 (1973), and his longstanding personal relationship with Chief Justice Warren Burger. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005).

- **Opinion clerk memoranda** prepared by Justice Blackmun's clerks for the Justice, commenting on the draft opinions of other chambers and recommending their modification; and
- **Opinion Justice Correspondence** between Justices concerning circulating draft opinions. In such correspondence, a Justice typically notifies the Justice authoring the opinion of a decision to "join" the opinion, to request changes in the draft opinion, often as a condition of joining the opinion, or to prepare a dissent or concurring opinion or to await the preparation of a dissent or concurrence by another Justice.

All of this information is very revealing of the Court's deliberative process, but no doubt the most remarkable are Justice Blackmun's notes taken during the conference on what each Justice said. The conference is the Court's most confidential proceeding. Only the Justices are in attendance. No other Court personnel, including the Justices' own law clerks, are allowed to attend. Justice Blackmun's notes, moreover, purport to be verbatim quotes of what each of the other Justices said in conference. (He did not, no doubt for logistical reasons, write down what he said at conference.) Justice Blackmun wrote his conference notes in his own distinct shorthand, which usually can be deciphered fairly accurately with experience. But, for that same reason, and because this Article relies heavily on Blackmun's conference notes, a caveat is required. Although Blackmun proffered these notes as verbatim quotes of what the other Justices said,<sup>15</sup> they remain his notes of what they said, rather than an actual verbatim transcript by a disinterested professional reporter or a mechanical device. There is, accordingly, an unavoidable risk that Blackmun consciously or unconsciously filtered the statements made by other members of the Court in a manner that distorts their meaning.<sup>16</sup>

Finally, a note regarding the reading of Justice Blackmun's Papers is in order. Many of the papers are typed, including the vast majority of law clerk memoranda to the Justice, correspondence between chambers, and draft opinions. For these documents, there is rarely any ambiguity concerning what the documents provide. But other papers, including some of the most interesting ones, are handwritten by the Justice himself. These include his notes in preparation for oral argument, notes taken during oral argument, notes taken during the Court's private conference,

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15. Former clerks of Justice Blackmun, including Beth Brinkman, Chai Feldblum, and Charles Rothfeld, have each confirmed in conversations with me that the Justice presented these notes as a verbatim account of what each of the other Justices said at conference.

16. Justice Blackmun would, according to former clerks, report back to his clerks what happened at conference by using his notes to recount what each of the other Justices said, using different voices for each of the Justices. Former Blackmun clerks further report that clerks from other chambers would sometimes come speak with them to find out what their own Justice had said at conference, to assist their own work.



and notes taken on draft opinions and law clerk memoranda. Almost all of these notes are taken in the Justice's own unique shorthand, which abbreviates many words and truncates sentences. Some translation of his shorthand is therefore necessary. But such translation is generally not difficult as one gets familiar with his patterns of abbreviation.

For instance, in describing what Justice Brennan said at conference during the Court's deliberations in *Penn Central Transportation Co. v. City of New York*,<sup>17</sup> Justice Blackmun wrote "Inquire on + partic fax," which means simply "Inquiry into the particular facts," no doubt referring to the need for a court evaluating a takings claim to inquire into the particular facts of a case.<sup>18</sup> Other examples are Blackmun's notations regarding what then-Justice Rehnquist stated at that same *Penn Central* conference. On the left is what Blackmun wrote and on the right is my translation:<sup>19</sup>

ED 5 Am & 14 Am	Eminent Domain 5th Amendment & 14th Amendment
Separate police pwr - City can take, all right. ? Is whe ty can take sans paying for it	Separate police power - City can take, all right. Question is whether they can take without paying for it
Holmes & Brandeis opposite in Pa Coal	Holmes and Brandeis took opposite positions in Pennsylvania Coal
In zonng, tr is a benefit ta accompanies t burden. No PP depriv in t long run.	In zoning, there is a benefit that accompanies the burden. No private property deprivation in the long run
Do n hv wi Landmark This enuf t push me over	Do not have with Landmark This is enough to push me over
TDRs n claimed t b = what is taken	Transferable Development Rights are not claimed to be equal to what is taken

This Article relies on my translation of Justice Blackmun's handwriting, including his shorthand, and does not just repeat verbatim the shorthand itself. There is, of course, as a result some risk of mistranslation. I have tried to minimize that possibility by not purporting to translate the Justice's handwriting whenever I am not confident of its

17. 438 U.S. 104 (1978).

18. Harry A. Blackmun, Conference Notes, *Penn Cent.*, No. 77-444 (Apr. 19, 1978) (The Blackmun Papers, *supra* note 2).

19. *Id.*

meaning or, at the very least, indicating in an accompanying footnote when there is possible ambiguity. The translations allow for an exceedingly rich portrayal of the Court's internal deliberations and, as a result, a meaningful basis for evaluating the effectiveness of individual Justices in deliberating with colleagues on the Court.

The conference notes, combined with the other documents within the Blackmun Papers, provide a virtually unprecedented basis for both learning and evaluating the efforts of individual Justices to influence the Court's opinions beyond their own formal votes. One can perceive how both the opinions and the votes of the individual Justices shift over time as part of the Court's deliberative process, culminating in the release of the Court's final opinion along with any separate concurring and dissenting opinions. During that process, opinions are written and rewritten in response to requests of individual Justices, and the final result is even sometimes reversed between the time of the initial conference vote and the final opinion. The ability of a Justice to keep a majority in support of meaningful precedent or, conversely, to deprive others on the Court of their majority to establish precedent that a Justice opposes is generally unknown to those outside the Court. The Blackmun Papers, however, make such knowledge possible.<sup>20</sup>

## II. JUSTICE ANTONIN SCALIA, THE BLACKMUN PAPERS, AND THE PROPERTY RIGHTS MOVEMENT IN THE SUPREME COURT

Justice Blackmun's tenure on the Court for just shy of twenty-five years offers a wealth of possibilities for evaluating individual Justices and substantive areas of law. This Article focuses on the property rights movement in the Supreme Court because the issue is of both historic and contemporary significance up to and including the Court's October 2004 Term. During Justice Blackmun's tenure, the Court ruled on nineteen significant property rights cases involving regulatory takings claims.<sup>21</sup>

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20. This Article puts aside the legitimate issues that can be raised concerning the propriety of Justice Blackmun's decision in his will to disclose this information so soon after his own retirement and death. During an informal meeting in 2005 at which I was in attendance, a member of the Court suggested that none of its then-current members were likely to emulate Blackmun in this respect and they were instead more likely to provide for public disclosure only after the deaths of the Justices serving on the Court at the time the notes were taken.

21. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hodel v. Indiana*, 452 U.S. 314 (1981); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74

Since Justice Blackmun's resignation, the Court has decided six more cases,<sup>22</sup> many of which build upon the earlier nineteen. This Article further focuses on Justice Scalia because property rights is an area of law in which Justice Scalia early on defined for himself a central role. Almost immediately upon his arrival in fall 1986, the Court began regularly to grant property owners petitions that raised the question whether government land use regulation violated federal constitutional protections for private property rights. For the same reason, this area of law and the Blackmun Papers provide a fair basis for evaluating Justice Scalia's effectiveness at influencing the direction of the Court's decisionmaking in an area of law important to him.

#### A. THE PRE-SCALIA COURT

Just a few years prior to Justice Scalia's joining the Court in September 1986, the Court decided several cases that raised issues concerning the extent to which government could, consistently with the Fifth Amendment, restrict private property rights. Most of these cases raised legal issues related to the "regulatory taking issue," based on Justice Holmes' opinion in 1922 for the Court in *Pennsylvania Coal Co. v. Mahon*,<sup>23</sup> ruling that land use regulations that go "too far" in their restrictions on private property violate the Fifth Amendment's prohibition on takings of private property in the absence of payment of just compensation.<sup>24</sup> Several cases raised the question whether such an unconstitutional taking had in fact occurred. Others raised the related remedial question whether the Constitution itself required the payment of just compensation for such regulatory takings or whether the government regulator could satisfy the constitutional command simply by invalidating the regulation prospectively. All of these cases serve as the backdrop for assessing the Court's subsequent precedent, including the impact of Justice Scalia.

##### 1. *Penn Central Transportation Co. v. City of New York* (1978)<sup>25</sup>

The *Penn Central* case concerned a regulatory takings challenge to

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(1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn Cent. Trans. Co. v. New York City*, 438 U.S. 104 (1978).

22. *San Remo Hotel v. City and County of San Francisco*, 125 S.Ct. 2491 (2005); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, LTD.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). Two other regulatory takings cases, not discussed in this Article, arose out of claims brought against state laws that require lawyers to place all client funds in interest-bearing trust accounts and require funds not capable of earning net interest to be deposited in accounts that pool such funds so as to allow the payment of the resulting interest to charities. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1996).

23. 260 U.S. 393 (1922).

24. *Id.* at 415.

25. 438 U.S. 104 (1978).

land use regulations imposed on historic landmarks. In 1967, New York City's Landmarks Preservation Commission designated Grand Central Station a "landmark" under the authority of New York City's Landmark Preservation Law. Because of that designation, all future alterations to the station required prior approval by the Commission. In return, the City granted Penn Central, the owner of the station, "transferable development rights" that could be used at other properties in the immediate area owned by Penn Central to develop those other properties more intensely than otherwise allowed.<sup>26</sup>

In 1968, Penn Central submitted two separate applications to build fifty-five-story and fifty-three-story office buildings on top of Grand Central Station, for which Penn Central would make several million dollars a year in rent.<sup>27</sup> The commission denied both applications.<sup>28</sup> Penn Central filed suit claiming that the city's application of the law had "taken" its property without just compensation, violating the Fifth and Fourteenth Amendments, and arbitrarily deprived them of their property without due process.<sup>29</sup> The New York Court of Appeals rejected the constitutional claim,<sup>30</sup> and the U.S. Supreme Court affirmed in an opinion for the Court written by Justice Brennan, joined by Justices Stewart, White, Marshall, Powell, and Blackmun, and a dissent written by then-Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens.<sup>31</sup>

Justice Brennan's majority opinion for the Court held that the historic landmark restriction on development did not amount to a taking of property requiring the payment of just compensation. The Court reasoned that the restriction on development was constitutional because it did not interfere with Penn Central's "primary expectation" concerning the use of the property,<sup>32</sup> which was use as a railroad terminal, and it permitted Penn Central to "obtain a 'reasonable return' on its investment."<sup>33</sup> The Court emphasized that the restriction did not amount to a flat prohibition against occupation of the air space, but was rather merely a prohibition of Penn Central's preferred use.<sup>34</sup>

Ironically, in light of *Penn Central's* prominence in regulatory takings jurisprudence today, Justice Brennan apparently sought in the opinion to purport to be making no significant law at all. While a

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26. *Id.* at 129.

27. *Id.* at 116-17.

28. *Id.* at 117.

29. *Id.* at 115-19.

30. *Penn Cent. Transp. Co. v. New York City*, 366 N.E.2d 1271 (N.Y. 1977).

31. *Penn Cent.*, 438 U.S. 104.

32. *Id.* at 136.

33. *Id.*

34. *Id.* at 136-37.

majority favored rejection of the takings claim, other chambers in the Court (in particular, Justice Stewart's) reportedly made clear at least to the Brennan clerk responsible for the initial draft of the opinion that the opinion should be essentially factbound and avoid any sweeping new rulings of law. That is likely why the majority opinion commences by candidly acknowledging that there is no "set formula" for regulatory takings analysis and that resolution of such cases turns on the particular facts of a case in light of basic principles of "justice and fairness."<sup>35</sup> What the *Penn Central* opinion does announce, in lieu of any takings formula, is an "ad hoc" approach focusing on three "factors" that are especially relevant to resolution of a takings claim.<sup>36</sup> The three factors include the "economic impact" of the challenged land use restriction, the restriction's "interference with distinct investment-backed expectations," and the "character of the governmental action."<sup>37</sup> Finally, the Court ruled that in evaluating a regulatory takings claim under the three-factor test, courts should consider the impact on the "parcel as a whole" and not just focus on any part of the property that might be the most burdened by the challenged regulation.<sup>38</sup>

The Blackmun Papers offer new insights into the Court's decision in *Penn Central*, supporting the earlier reports that the opinion's purpose was not to break new ground, and answer some curiosities about the case that commentators (including this author) have long debated. According to Blackmun's notes to himself prior to the oral argument and his conference notes, he voted at conference to affirm the lower court's rejection of the takings claim, but it was "not an easy [case for him]" because "it has emotion."<sup>39</sup> At conference, Justice Stewart stated that he was voting to affirm, emphasizing that the lower courts had "found [Penn Central] did not show not a reasonable return."<sup>40</sup> But Justice Stewart also described his resolution of the case as "[v]isceral rather [than] cerebral" and cautioned that one "cannot make a bright line."<sup>41</sup> Justice White, also in the majority, stated that "[r]estriction on use in and of itself [is] not a taking" and that an "ad hoc" approach is probably the result.<sup>42</sup> Brennan himself added that the case depended on an inquiry into "the [particular facts]" and how here, "[Penn Central] made no effort to prove [it could

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35. *Id.* at 124.

36. *Id.*

37. *Id.*

38. *Id.* at 130-31.

39. Harry A. Blackmun, Pre-Argument Notes, *Penn Cent.*, No. 77-444 (Apr. 16, 1978) (The Blackmun Papers, *supra* note 2).

40. Harry A. Blackmun, Conference Notes, *Penn Cent.*, No. 77-444 (Apr. 19, 1978) (The Blackmun Papers, *supra* note 2).

41. *Id.*

42. *Id.*

not] make a [reasonable] return.”<sup>43</sup> After first passing during conference, Justice Marshall voted in favor of affirming, cryptically adding that the case is “[a] messy mess.”<sup>44</sup>

The two curiosities in the voting of the individual Justices in *Penn Central* were supplied by Justice Powell and Justice Stevens. Justice Powell, a former corporate lawyer, was known for being sympathetic to business concerns, naturally skeptical of government economic regulation, and, for this reason, generally supportive of property rights claims.<sup>45</sup> Powell, however, joined Justice Brennan’s majority opinion. By contrast, Justice Stevens, who has been the Justice most skeptical of property rights claims and most sympathetic to government land use regulation over time,<sup>46</sup> joined Justice Rehnquist’s dissent. I have myself speculated that the primary motivation for Justice Powell’s vote likely lies in his affinity for historic preservation, marked by his deep personal involvement with Colonial Williamsburg in his native Virginia.<sup>47</sup> My prior speculation concerning Justice Stevens centered on the fact that a historic landmark designation, unlike most general zoning restrictions, is not generally applicable and therefore does not provide a “reciprocity of advantage” in the form of shared benefits to all similarly situated

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43. *Id.*

44. *Id.*

45. Just a few months before being nominated to the Court, Justice Powell authored a confidential memorandum to the U.S. Chamber of Commerce describing what he characterized as an “Attack on American Free Enterprise System,” in which economic regulations featured prominently. See Confidential Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, U.S. Chamber of Commerce Edu. Comm. (Aug. 23, 1971), available at <http://www.mediatransparency.org/story.php?StoryID=22> [hereinafter Powell Memorandum]; Richard J. Lazarus, *Restoring What’s Environmental about Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 729–33 (2000) [hereinafter Lazarus, *Restoring What’s Environmental*]; Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court’s Takings Cases*, 38 WM. & MARY L. REV. 1099, 1120 (1997) [hereinafter Lazarus, *Counting Votes*].

46. In the years since the Court decided *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), Justice Stevens wrote the majority opinions in favor of government regulators in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), and *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), and routinely dissented in cases in which property rights claims prevailed, including in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

47. Lazarus, *Restoring What’s Environmental*, *supra* note 45, at 729–33; Lazarus, *Counting Votes*, *supra* note 45, at 1120.

Consider, for example, Justice Powell’s sympathy for the historic preservation regulation challenged in *Penn Central* and his hostility toward restrictions on coal mining challenged in *Keystone Bituminous*. Justice Powell’s contrasting votes might reflect nothing more than his appreciation for historic preservation and coal. Each is well established in his home state of Virginia, where one finds both Colonial Williamsburg and a heavy economic dependence on coal mining.

*Id.*

landowners.<sup>48</sup>

Both suspicions proved correct. Justice Powell, during the conference, admitted that he had “2 Biases,” which he described as being “Williamsburgh” and “historic preservation values.”<sup>49</sup> He then added that he would “try to affirm” the lower court,<sup>50</sup> although he (along with dissenters Chief Justice Burger and Justices Rehnquist and Stevens) had voted to hear the case at the jurisdictional stage.<sup>51</sup> Justice Stevens, at conference, made two basic points. His first was that the “Federal Government in this business [*i.e.*, historic landmarks] has always done it at public expense.”<sup>52</sup> Stevens further described as “fundamental” the “[d]istinction between the general and the particular. Zoning is general. Landmarking is not.”<sup>53</sup>

Finally, Brennan’s opinion for the Court in *Penn Central* would seem to highlight his special ability to fashion and keep majorities while making law that he favored. In *Penn Central*, Brennan plainly lacked a strong majority in favor of government regulation of private property interests. Yet his opinion for the Court effectively held on to that majority by purporting to announce a mere ad hoc approach, while actually establishing a legal analytic framework that has proved generally favorable to government regulation and that remains even now, twenty-

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48. Lazarus, *Counting Votes*, *supra* note 45, at 1129 (“A likely distinction is that *Penn Central* is the only takings case that involved a regulation targeting particular properties and landowners rather than applying to all properties equally. The general applicability of the regulation was a factor that Justice Stevens subsequently emphasized in *Lucas* while defending South Carolina’s law.”).

49. Harry A. Blackmun, Conference Notes, *Penn Cent.*, No. 77-444 (Apr. 19, 1978) (The Blackmun Papers, *supra* note 2). The latter reference to “historic preservation values” is not completely clear from Blackmun’s Conference Notes. Blackmun appears to have written “HP values” after a reference to Williamsburg. But the same abbreviation that he used for what I read as “HP” is also one that appears elsewhere in papers related to *Penn Central* (e.g., *Blackmun Pre-Argument Notes* and *Conference Notes* on comments on other Justices, including Rehnquist), which undercuts the certainty of this particular reading. It is even possible, based on those other references, that the reference was either to “private property” or “real property” values. Even if so, such an alternative reading simply underscores the conflict that Justice Powell felt between his two competing interests in historic preservation, represented by Colonial Williamsburg, and private property.

50. *Id.*

51. Docket Sheet, *Penn Cent.*, No. 77-444 (The Blackmun Papers, *supra* note 2). Justice White, who also voted in the majority, similarly voted to note probable jurisdiction in the case. *Id.*

52. Harry A. Blackmun, Conference Notes, *Penn Cent.*, No. 77-444 (Apr. 19, 1978) (The Blackmun Papers, *supra* note 2).

53. *Id.* Justice Stevens’ joining then-Justice Rehnquist’s majority opinion for the Court in *Kaiser Aetna v. United States*, 444 U.S. 164 (1980), rather than Justice Blackmun’s dissent (joined by Justices Brennan and Marshall), may be similarly understood. At issue in that case was whether it amounted to a taking of private property for the United States to insist that an owner of a private pond in Hawaii had, by connecting their pond to a navigable water of the United States, lost the right to exclude the public from their private water body. The Court ruled in favor of the property owner. Here again, the focused nature of the burden placed on the property owner creates an equity issue not present in general zoning, especially because the federal agency had initially advised the landowner of the lack of federal jurisdiction over their plan to connect to the bay without ever suggesting that such a physical connection would create a right of public access under federal law. *Id.*

eight years later, the Court's leading precedent in regulatory takings.<sup>54</sup>

2. *Andrus v. Allard* (1979)<sup>55</sup>

This case concerned a takings challenge to regulations promulgated by the Secretary of the Interior pursuant to two federal laws, the Eagle Protection Act and the Migratory Bird Treaty Act, which barred commercial transactions in parts of birds (*e.g.*, feathers) killed before the two statutes prohibited their killing. The opinion of the Court, once again written by Justice Brennan, provides further support for his ability as a Justice to maintain his majority while crafting an opinion that declares substantive law that he favors.<sup>56</sup> In this case, the parties disputed both whether the federal law barred the sale of parts of birds killed before their killing was unlawful and, if so, whether such a restriction on commercial transactions amounted to an unconstitutional taking of property. Justice Brennan wrote the opinion for a unanimous Court (with Chief Justice Burger alone joining only in the judgment) in favor of the Secretary of the Interior on both issues.<sup>57</sup>

As revealed by the Blackmun Papers, however, the unanimity of the final result evinces Justice Brennan's effectiveness as an influential member of the Court. The original vote at conference was seven to two in favor of upholding the regulations, with Chief Justice Burger and Justice Stevens in dissent.<sup>58</sup> Justice Powell also expressed substantial concerns with Justice Brennan's draft opinion for the Court and informed Brennan that if he could not accommodate those concerns, Powell would write separately.<sup>59</sup> At the end of the day, however, neither the Chief Justice nor Justice Stevens dissented, and Justice Powell did not write separately, even though Brennan in fact declined to accommodate Powell's concerns in any significant way.

The Chief changed his mind after concluding that the "wildlife" aspect places this case in a somewhat different category from *Penn*

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54. See *infra* text accompanying notes 392–93.

55. 444 U.S. 51 (1979).

56. Justice Brennan was well known for using his personal charm and his related ability to forge majorities on the Court. See Thurgood Marshall, Tribute, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 1, 5 (1990); Abner J. Mikva, Tribute, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 9, 10 (1990); Richard A. Posner, Tribute, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990); Nina Totenberg, Tribute, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 37–38 (1990).

57. *Andrus*, 444 U.S. at 68.

58. Harry A. Blackmun, Conference Notes, *Andrus v. Allard*, No. 78-740 (The Blackmun Papers, *supra* note 2). At the jurisdictional stage, Justices White, Rehnquist, and Stevens voted to note probable jurisdiction and Justice Marshall stated that he would "join 3," which means he was willing to provide the necessary fourth vote if there were three other Justices favoring plenary review. The notes regarding the Chief Justice's vote on jurisdiction are harder to decipher. He appears to have favored review. See Docket Sheet, *Andrus*, No. 78-740 (The Blackmun Papers, *supra* note 2).

59. Letter from Justice Lewis F. Powell, Jr. to Justice Harry A. Blackmun, *Andrus*, No. 78-740 (Oct. 31, 1979) (The Blackmun Papers, *supra* note 2).



*Central*” (from which he dissented).<sup>60</sup> Justice Stevens changed his mind on the statutory construction issue when “[f]urther study” persuaded him that Brennan was “correct in stating that a flat proscription on the sale of wildlife, without regard to the legality of its taking, is and for a long time has been a traditional legislative tool for enforcing conservation policy.”<sup>61</sup> Justice Powell’s ultimate acquiescence, however, is the most telling. He objected strenuously to the statement in Brennan’s draft opinion that “loss of future profits . . . provides a slender reed upon which to rest a takings claim.”<sup>62</sup> Powell likewise objected to the draft opinion’s failure to make clear that the only reason that a prohibition on sale was not a taking in this case was based on a “nuisance theory” that allows such an “extraordinary intrusion on property rights . . . only when lesser measures cannot accomplish an important government purpose.”<sup>63</sup> Justice Brennan’s final opinion for the Court, however, neither abandoned either aspect of his original opinion in any significant way, nor lost Justice Powell’s vote.<sup>64</sup> Brennan plainly managed to assuage Powell’s concerns without losing the opinion’s force. History, moreover, has proved Justice Powell’s concerns well-placed given the prominence that government regulators have effectively given, when defending against takings challenges, to the parts of the *Andrus v. Allard* opinion about which Powell complained, especially the opinion’s characterization of profits as being a “slender reed.”<sup>65</sup>

### 3. *Agins v. City of Tiburon* (1980)<sup>66</sup>

*Agins* involved a classic regulatory takings challenge to a local land use regulation that limited the amount of permissible residential development. The plaintiffs owned five acres of undeveloped land in Tiburon, California. When the City enacted an ordinance restricting development in order to promote preservation of open space values, plaintiffs brought a lawsuit claiming that restricting their land to single-family dwellings, with density restrictions allowing up to five such residences on a five acre plot, amounted to an unconstitutional taking of private property for which they were entitled to a payment of “just

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60. Letter from Chief Justice Warren E. Burger to Justice Harry A. Blackmun, *Andrus*, No. 78-740 (Nov. 19, 1979) (The Blackmun Papers, *supra* note 2).

61. Letter from Justice John Paul Stevens to Justice Harry A. Blackmun, *Andrus*, No. 78-740 (Oct. 31, 1979) (The Blackmun Papers, *supra* note 2).

62. Letter from Justice Lewis F. Powell, Jr. to Justice Harry A. Blackmun, *Andrus*, No. 78-740 (Oct. 31, 1979). (The Blackmun Papers, *supra* note 2).

63. *Id.*

64. Compare *Andrus v. Allard*, 444 U.S. 51 (1979), with *Andrus*, No. 78-740, slip op. 12-15.

65. See, e.g., Amici Curiae Brief of State of California et al. at 23, *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (No. 85-1092), 1986 WL 728344; Amici Curiae Brief of State of California et al. at 7 n.7, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (No. 84-2015), 1985 WL 669430.

66. 447 U.S. 255 (1980).

compensation” by the Fifth Amendment. The landowners specifically sought a damage remedy rather than mere invalidation of the offending ordinance. The U.S. Supreme Court granted review after the California Supreme Court ruled that no such money damage remedy was available under the Constitution. The Court, however, ended up affirming the state court judgment without reaching the remedy issue after concluding that the development restrictions in no event constituted a taking of property in the first instance.<sup>67</sup>

Justice Powell wrote the opinion for a unanimous Court disposing of the case.<sup>68</sup> Although dubbed by Justice Blackmun’s clerk working on the case as “one of the dullest [cases] to have come down the pike this year,”<sup>69</sup> Powell’s opinion proved the potential for a Justice to make considerable law in writing a unanimous end of the Term decision that none of the other chambers may have been likely to read closely. Indeed, Blackmun’s conference notes show that at least five of the Justices were open to disposing of the case without any opinion, by just dismissing the appeal for want of substantial federal question.<sup>70</sup>

The Chief Justice assigned the case to Justice Powell for the drafting of the Court’s opinion, and he produced an opinion that, until very recently,<sup>71</sup> played a significant role in the Court’s takings law. The *Agins* opinion announced a new regulatory takings test, under which a land use regulation is a taking if it “does not substantially advance legitimate state interests” or it “denies an owner economically viable use of his land.”<sup>72</sup> Although the Court easily concluded that the City of Tiburon’s ordinance satisfied both tests, the upshot was nonetheless a new direction in takings law.

The crafting of the Court’s opinion strongly suggests that Justice Powell was carefully, and subtly, moving the Court toward a more aggressive view of the Takings Clause, perhaps partly in response to his failure to get Justice Brennan to modify his opinion for the Court earlier that same Term in *Andrus*.<sup>73</sup> Powell’s creation of the “economically viable use” test, for instance, was far from obvious. It required his resurrection of what had previously been seen as an incidental statement about economic viability in a final footnote of the *Penn Central* majority

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67. *Id.*

68. At the jurisdictional stage, the Chief Justice, and Justices White, Powell, and Rehnquist voted in favor of Supreme Court review, and Justice Marshall indicated his willingness to supply the fourth vote for review if there were three other Justices supporting review. *See* Docket Sheet, *Agins*, No. 79-602 (The Blackmun Papers, *supra* note 2).

69. Clerk Bench Memo at 18, *Agins*, No. 79-602 (The Blackmun Papers, *supra* note 2).

70. Harry A. Blackmun, Conference Notes, *Agins*, No. 79-602 (Apr. 18, 1980) (The Blackmun Papers, *supra* note 2).

71. *See infra* text accompanying notes 375–76.

72. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

73. *See supra* text accompanying notes 63–64; Powell Memorandum, *supra* note 45.

opinion.<sup>74</sup> Close examination of the oral argument in *Penn Central*, however, provides strong support for the notion that Powell may well have been responsible for Justice Brennan's inclusion of the language that Powell later effectively exploited in *Agins*.<sup>75</sup> The conference notes for *Penn Central* provide some additional support for that thesis. According to those notes, Powell raised at conference the very question that the final *Penn Central* footnote sought to answer about whether *Penn Central* might have a valid takings claim in the future under different and less favorable economic conditions.<sup>76</sup> But, whatever its origins, the "economically viable" test that Justice Powell wrote into the Court's opinion in *Agins* subsequently proved fertile breeding ground for what is widely considered the high water mark for the property rights movement in Justice Scalia's announcement of a per se takings test twelve years later in *Lucas v. South Carolina Coastal Council*.<sup>77</sup>

The other prong of the *Agins* test—whether the regulation "substantially advance[s] legitimate state interests"<sup>78</sup>—likewise strongly expanded constitutional protection of property rights, even while the *Agins* Court was seemingly just quickly dismissing a takings claim that lacked all merit. As now revealed by the Blackmun Papers, then-Justice Rehnquist is the one member of the Court who took explicit notice of the potential shift implicated by the test and specifically questioned Powell about it in formal written correspondence between their chambers. Rehnquist expressed some disquiet—"somewhat uneasy"—about the lack of latitude that the substantially advance test appeared to give local government and proposed to Powell substitute language that would "allow[] the states somewhat more latitude."<sup>79</sup> Rehnquist indicated that if Powell declined, he would "simply write a short separate concurrence."<sup>80</sup> Powell did in fact decline,<sup>81</sup> but Rehnquist nevertheless joined Powell's majority opinion for the Court without any separate writing.

With the benefit of hindsight, Justice Rehnquist's concerns were

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74. See *Agins*, 447 U.S. at 260 (citing *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978)).

75. Transcript of Oral Argument at 41-44, *Penn Cent.*, 438 U.S. 104 (No. 77-444); see Lazarus, *Restoring What's Environmental About Environmental Law in the U.S. Supreme Court*, *supra* note 45, at 733 & n.171.

76. Harry A. Blackmun, Conference Notes, *Penn Cent.*, No. 77-444 (Apr. 19, 1978) (The Blackmun Papers, *supra* note 2) ("If ICC [Interstate Commerce Commission] ordered closure [of Grand Central], the court could reopen [the takings claim.]").

77. 505 U.S. 1003, 1015 (1992); see *infra* text accompanying notes 256-57.

78. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

79. Letter from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr., *Agins*, No. 79-602 (May 29, 1980) (The Blackmun Papers, *supra* note 2).

80. *Id.*

81. Letter from Justice Lewis F. Powell, Jr. to Justice William H. Rehnquist, *Agins*, No. 79-602 (May 29, 1980) (The Blackmun Papers, *supra* note 2).

remarkably prescient. As discussed below,<sup>82</sup> six years later, Justice Scalia relied on the “substantially advance” language of *Agins* in *Nollan v. California Coastal Commission*<sup>83</sup> to construct a more exacting constitutional standard applicable to land use regulatory exactions that lift otherwise applicable restrictions on development. And, even more remarkably, also as discussed below,<sup>84</sup> the entire Court twenty-five years later in *Lingle v. Chevron U.S.A. Inc.* unanimously overruled the *Agins* “substantially advance” test on the ground that “it has no proper place in our takings jurisprudence.”<sup>85</sup> Coming full circle, Chief Justice Rehnquist agreed. In *Lingle*, he joined the Court’s opinion repudiating the very language in the *Agins* opinion that he had originally found troubling.<sup>86</sup>

4. *San Diego Gas & Electric Co. v. City of San Diego* (1981)<sup>87</sup>

*San Diego Gas & Electric Co. v. City of San Diego* was the last of the significant regulatory takings cases decided by the Court prior to Justice Scalia’s joining the Court. The case raised the remedy issue that had motivated the Court’s grant of review in *Agins v. City of Tiburon*, but which the Court nonetheless did not reach upon concluding that there was no taking of property and therefore no occasion to discuss remedy. Because the Justices granted review in *San Diego Gas & Electric* almost

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82. See *infra* text accompanying note 231.

83. 483 U.S. 825 (1987).

84. See *infra* text accompanying notes 375–76.

85. 125 S. Ct. 2074, 2083 (2005).

86. Rehnquist’s foresight was similarly evident in comments he made to Justice Blackmun concerning Blackmun’s draft majority opinion in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984). The case concerned a regulatory takings challenge to a federal statute that provided for public disclosure of trade secret information included in a pesticide company’s application for a federally mandated pesticide registration. Rehnquist expressed concern with the draft opinion’s notion that a taking could not occur so long as the pesticide company had notice of the possible disclosure prior to submitting the registration application. In correspondence to Blackmun, Rehnquist asked whether this portion of the opinion either decided or intimated “that it would be consistent with the ‘takings’ clause for a board of supervisors to provide that all submissions of subdivision of more than 40 acres made after a particular date would have to include a deed of at least 25% of the gross acreage owned to the county as a park?” See Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun, *Ruckelshaus v. Monsanto*, No. 83-196 (June 12, 1984) (The Blackmun Papers, *supra* note 2). Although Blackmun apparently declined any change and Rehnquist here too did not dissent or otherwise write separately, Rehnquist’s concern was well placed. In fact, government attorneys relied on that portion of the majority opinion in *Ruckelshaus v. Monsanto* to make the very argument Rehnquist found potentially troubling. In particular, in two subsequent regulatory takings cases—*Nollan v. California Coastal Commission* in 1992 and *Palazzolo v. Rhode Island* in 2001—relying on *Ruckelshaus v. Monsanto*, they contended that so long as a landowner had notice of a development restriction prior to purchasing the property, they could not later complain of an unconstitutional taking, even if that restriction required dedication to the government of a portion of their property. See, e.g., Brief for Respondent Rhode Island at 46, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047), 2001 WL 22908; Brief for Council of State Governments *et al.* as Amici Curiae in Support of Appellee at 23, *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (No. 86-133), 1987 WL 864767. However, notwithstanding Rehnquist’s correctness in identifying the possibility of such an application of *Ruckelshaus*, the Court had little trouble subsequently rejecting the arguments in both *Nollan* and *Palazzolo*.

87. 450 U.S. 621 (1981).

immediately after deciding *Agins*, it has long been assumed<sup>88</sup> that the Justices linked the two cases and granted the second to reach the *Agins* remedy issue. The Blackmun Papers now confirm the correctness of that assumption. In a “Memorandum to the Conference” dated one day after the Court issued its opinion in *Agins*, Justice Powell wrote the other members of the Court about the *San Diego* opinion, describing it as “present[ing] the remedies issue that was not reached in *Agins*,” and recommending plenary review.<sup>89</sup> In his handwritten notes on the case, Justice Blackmun succinctly declared: “*Agins v. Tiburon* revisited.”<sup>90</sup>

In an opinion written by Justice Blackmun, the Court ultimately frustrated the landowners (and several members of the Court) by failing again to reach the remedy issue. This time, however, the obstacle was the absence of a final state court judgment. Chief Justice Burger, Justices White, Stevens, and Rehnquist, all joined Justice Blackmun’s majority opinion for the Court. The gravamen of the majority opinion was that the state court’s failure to decide whether a taking had occurred prevented the Court from having jurisdiction to review the state court’s inherently non-final discussion of what remedy would exist were there a taking.<sup>91</sup>

The most significant part of the case, however, was the dissenting opinion authored by Justice Brennan, because of its portent for the remedy issue once it did reach the Court in a future case. The dissent concluded that the Fifth Amendment, by its own terms, compelled a money damages remedy for “just compensation” for regulatory takings of private property.<sup>92</sup> According to the dissent, although government could avoid a forced purchase of the property by rescinding the offending regulation prospectively, the government still had to pay the property owner “just compensation” for the temporary taking that had necessarily occurred prior to that rescission.<sup>93</sup>

The fact, moreover, that Justice Brennan authored the dissent (joined by three other Justices) left little doubt that a majority of the Justices would be willing to embrace the dissent’s view of the remedy issue once a case properly presented that issue to the Court. As one of the more liberal members of the Court and a Justice whom

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88. See, e.g., *Anti Trust Cost Case is Accepted*, N.Y. TIMES, June 17, 1980, at D1 (“The Justices, apparently eager to settle questions unresolved in last week’s opinion on the rights of property owners whose land is rezoned for conservation, agreed to hear an appeal by a California utility from a decision denying it the right to sue for damages for the rezoning of its property.”).

89. Lewis F. Powell, Jr., Memorandum to the Conference, *Agins*, No. 79-602 (June 11, 1980) (The Blackmun Papers, *supra* note 2).

90. Harry A. Blackmun, Pre-Argument Notes, *San Diego Gas & Elec.*, No. 79-678 (Nov. 30, 1980) (The Blackmun Papers, *supra* note 2).

91. *San Diego Gas & Elec.*, 450 U.S. at 631–32.

92. *Id.* at 646–61 (Brennan, J., dissenting).

93. *Id.* at 653–61.

environmentalists and government regulators had presumed to be sympathetic to land use regulation, Brennan's position made immediately apparent that the Court was prepared to rule in favor of property owners on the remedy issue. While Justice Marshall's decision to join Justice Brennan's dissent made that likelihood a virtual certainty, Justice Rehnquist filed a separate concurring opinion to remove any possible doubt. While agreeing with (and joining) the Court's holding concerning the absence of a final state court judgment, Justice Rehnquist's concurrence added that, in the absence of that jurisdictional bar, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan."<sup>94</sup> In fact, as discussed below,<sup>95</sup> six years later, then-Chief Justice Rehnquist authored an opinion for the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*<sup>96</sup> that effectively converted the Brennan dissent into a majority ruling.

The Blackmun Papers add a further gloss to the case and the internal decisionmaking dynamics within the Court. Although the Chief Justice assigned Justice Blackmun the responsibility for drafting the opinion of the Court based on the conference vote of a five Justice majority,<sup>97</sup> Justice Blackmun lost one of his votes and potentially the Court opinion when Justice Marshall subsequently switched sides in favor of Justice Brennan's dissent.<sup>98</sup> The switch meant that the Brennan dissent could become the opinion of the Court, relegating Blackmun to the dissent. Indeed, Justice Blackmun was apparently so unhappy about the possible loss of a Court majority that he wrote a letter to Chief Justice Rehnquist, seeming to blame him for this development. In particular, he chided the Chief Justice for not heeding Justice Blackmun's advice given "now four weeks ago, that you vote fairly promptly so that, it was to be hoped, your vote would have some influence upon Thurgood. . . . Thurgood has now slipped away, as perhaps was not to be unanticipated whenever Bill Brennan is on the other side and writing the dissent."<sup>99</sup>

Justice Blackmun succeeded in keeping the majority only because Rehnquist decided to switch sides after originally voting with Brennan on the jurisdictional issue.<sup>100</sup> Rehnquist did so only after obtaining

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94. *Id.* at 633-34 (Rehnquist, J., concurring).

95. See *infra* text accompanying notes 194-97.

96. 482 U.S. 304 (1987).

97. Harry A. Blackmun, Conference Notes, *San Diego Gas & Elec.*, No. 79-678 (Dec. 3, 1980) (The Blackmun Papers, *supra* note 2).

98. *Id.*; Docket Sheet, *San Diego Gas & Elec.*, No. 79-678 (Dec. 3, 1980) (The Blackmun Papers, *supra* note 2).

99. Letter from Justice Harry A. Blackmun to Chief Justice Warren E. Burger, *San Diego Gas & Elec.*, No. 79-678 (Mar. 11, 1981) (The Blackmun Papers, *supra* note 2).

100. Harry A. Blackmun, Conference Notes, *San Diego Gas & Elec.*, No. 79-678 (Dec. 3, 1980)

assurances from Blackmun that Blackmun's opinion would not rely on or otherwise cite to *Cox Broadcasting Corp. v. Cohn*,<sup>101</sup> an earlier Supreme Court case from which Rehnquist dissented. The Blackmun Papers include a handwritten note from Rehnquist to Blackmun asking him about the impact of his draft opinion on *Cox*, but also adding: "If this is an unfair question, you will not offend me by throwing this in the waste basket."<sup>102</sup> Blackmun replied the next day with a memo explaining why *Cox* was not implicated.<sup>103</sup>

Finally, the Blackmun Papers further reveal that although Justice Brennan voted at conference to reverse on the remedy issue, he expressed a fair amount of ambivalence at the time. He apparently began his remarks at conference by stating that he was "confused."<sup>104</sup> After explaining, moreover, his reasons for believing that invalidation of the regulation deemed a taking was not, by itself, a sufficient constitutional remedy, he added that he was "not fully at rest."<sup>105</sup>

5. *Loretto v. Teleprompter Manhattan CATV Corp. (1982)*<sup>106</sup>

In *Loretto*, the Court faced a different kind of takings claim against local government, which produced a different lineup of the Justices and introduced a new per se test for certain kinds of government actions. In *Penn Central*,<sup>107</sup> the Court had described the "character of the governmental action" as one of the three factors especially relevant to takings analysis,<sup>108</sup> and elaborated by adding that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government."<sup>109</sup> In *Loretto*, the Court announced that a permanent physical occupation of another's real property authorized by government amounted to a per se taking, without the need for any formal balancing under *Penn Central*.<sup>110</sup> The Court reasoned that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is

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(The Blackmun Papers, *supra* note 2).

101. 420 U.S. 469 (1975).

102. Handwritten Note from Justice William H. Rehnquist to Justice Harry A. Blackmun, *San Diego Gas & Elec.*, No. 79-678 (Jan. 21, 1981) (The Blackmun Papers, *supra* note 2).

103. Letter from Justice Harry A. Blackmun to Justice William H. Rehnquist, *San Diego Gas & Elec.*, No. 79-678 (Jan. 22, 1981) (The Blackmun Papers, *supra* note 2).

104. Harry A. Blackmun, Conference Notes, *San Diego Gas & Elec.*, No. 79-678 (Dec. 3, 1980) (The Blackmun Papers, *supra* note 2).

105. *Id.*

106. 458 U.S. 419 (1982).

107. 438 U.S. 104 (1978).

108. *Id.* at 124.

109. *Id.*

110. *Loretto*, 458 U.S. at 426.

determinative.”<sup>111</sup>

At issue in *Loretto* was a New York City law that required landlords to allow cable television operators to place cables in buildings owned by the landlord as necessary to provide cable television service to tenants in the building and to “crossover” to reach tenants in nearby buildings. The municipal law required that the cable company pay a “reasonable fee” to the landlords. The city had concluded that fee should amount to one dollar. Prior to New York’s enactment of this law, cable operators had to negotiate with individual landowners for access and for terms of payment, which typically amounted to five percent of the gross cable television revenues from that property.<sup>112</sup>

The voting lineup on the Court was significant because Justices Marshall and Brennan were on opposite sides. It was also the first takings case after Justice O’Connor joined the Court. Justice Marshall wrote the majority opinion for the Court in favor of the property owners, which Chief Justice Burger and Justices Rehnquist, Powell, Stevens, and O’Connor joined. Justice Blackmun dissented and was joined by Justices White and Brennan. The former Solicitor General and Harvard Law School Dean, Erwin Griswold, represented the respondents cable television companies and City of New York at oral argument in the case.<sup>113</sup>

Blackmun’s conference notes show that the Chief Justice originally passed prior to voting in favor of the landlords.<sup>114</sup> He acknowledged that he had “trouble with this case”<sup>115</sup> because of the possible analogy to municipal requirements for the location of sprinklers and smoke alarms, but he ultimately concluded that the “educational value” of cable television “does not bring this to a level with sprinklers.”<sup>116</sup> The conference notes also show that even those Justices (like Brennan and White) who ended up dissenting in favor of the City and cable television operators distinguished between cables used for providing service to tenants in the landowner’s own building and “crossover” cables providing service in other buildings. Justice Brennan favored the landlords’ position on the “crossover” issue, and Justice White at conference was unsure of his vote on that issue, tentatively voting in favor of the respondents. Justice Powell at conference voted like Brennan, although he ended up subsequently joining the majority in its

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111. *Id.*

112. *Id.* at 423.

113. *Id.* at 420.

114. Harry A. Blackmun, Conference Notes, *Loretto*, No. 81-244 (Apr. 2, 1982) (The Blackmun Papers, *supra* note 2).

115. *Id.* (“I hv trouble wi this case.”).

116. *Id.* (“St hs t pwr t compell sprinkler smoke warnings etc. But this? \* \* \* Educ value ds n brng this to a level wi sprinklers”).



entirety.<sup>117</sup>

Justice Marshall saw the issue very simply. He exclaimed at conference, “[I] cannot buy this”; he saw no difference between the crossover and non-crossover issue for the simple reason that in either case it was “my roof.”<sup>118</sup> Justice Stevens likewise stated that he felt “very strongly” that the landowners should win. As in *Penn Central*, Stevens here too indicated that the absence of general reciprocity was key. The conference notes suggest he said that it would be “OK” if every building had to do this, “[b]ut here a special company and the City takes the five percent whenever they want.” Stevens also noted that Griswold “did a fine snow job” in arguing the case for respondents.<sup>119</sup> Finally, Blackmun’s conference notes on O’Connor are striking because, as in future occasions,<sup>120</sup> Blackmun emphasizes what he perceives as the emotional character of her views. He describes O’Connor as voting in favor of respondents and saying the case is “shocking!” and “unbelievable!”<sup>121</sup>

What, in retrospect, *Loretto* contributed to the Court’s taking jurisprudence was a potential analytic line of departure from the *Penn Central* balancing framework embraced by Justice Brennan in his opinion for the Court in that case. The Court opinion in *Loretto* endorsed the potential for extracting from *Penn Central* a series of per se takings tests, defining circumstances when *Penn Central* balancing would not be required. Justice Scalia subsequently seized upon this precedent to try to do just that a decade later.<sup>122</sup>

#### 6. *Williamson County v. Hamilton Bank* (1985)<sup>123</sup>

Three years later, the Court returned for yet a third time to the regulatory takings damage remedy issue, but once again without success.<sup>124</sup> In *Williamson County v. Hamilton Bank*, the Sixth Circuit had, relying on the four Justices joining Justice Brennan’s *San Diego* dissent

117. *Id.*

118. *Id.* (“Cann buy this \* \* \* no dif btw t 2—my roof”).

119. *Id.* (“Very strongly \* \* \* PP OK wn every dldg is t do this & so. But here a special co & t city takes t 5% wnever ty want \* \* \* Griswold did a fine sno job”).

120. *See infra* note 209. Blackmun’s characterization of the views of Justice O’Connor on this occasion and on others arguably reflect an apparent antipathy toward O’Connor or at least suspicion of her that Blackmun harbored almost as soon as she joined the Court. A recent biography of O’Connor documents that hostility and suggests that it may have resulted from possible jealousy about the tremendous amount of attention being received by O’Connor upon joining the Court, or alternatively, might have derived from concern that the new Justice might vote to overrule *Roe v. Wade*, 410 U.S. 113 (1973). *See* JOAN BISKUPIC, SANDRA DAY O’CONNOR—HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 114, 140, 160–61 (2005).

121. Harry A. Blackmun, Conference Notes, *Loretto*, No. 81-244 (Apr. 2, 1982) (The Blackmun Papers, *supra* note 2).

122. *See infra* text accompanying notes 256–57.

123. 473 U.S. 172 (1985).

124. The Court also tried to reach the remedy issue but again failed because of the absence of ripeness in *MacDonald, Somer & Frates v. Yolo County*, 477 U.S. 340 (1986).

and Justice Rehnquist's concurring statement in that same case, ruled that the Constitution compelled a damage remedy for a temporary regulatory taking. The Supreme Court again granted review but reversed for lack of ripeness, thereby frustrating property rights advocates one more time.<sup>125</sup>

Justice Blackmun wrote the opinion for the Court, which Chief Justice Burger and Justices Brennan, Marshall, Rehnquist, and O'Connor joined. The majority held that the regulatory takings claim was not ripe on two separate grounds. The first deficiency was that there had been no "final decision" because the landowner had failed to submit a final development application with the relevant governmental body, including one for available variances.<sup>126</sup> Absent such a final governmental ruling, it was not possible to assess an as-applied takings claim. The second, independent ground for lack of ripeness was that the landowner had never pursued available state administrative or judicial avenues for obtaining "just compensation" for any taking resulting from the application of a state regulation. Consequently, no viable claim could be made in federal court that there had been a taking without "just compensation" in violation of the Fifth Amendment. An owner of property claiming, therefore, that a state regulation violates the Fifth Amendment must first establish that the state denied her "just compensation."<sup>127</sup> Justice White dissented on the ground that the takings claim was ripe for review.<sup>128</sup> Justices Brennan and Marshall joined the majority, but also wrote separately to make clear that they were adhering to the views expressed on the remedy issue in the *San Diego* dissent.<sup>129</sup> Justice Stevens concurred in the judgment on the ground that it was clear that the landowner was not entitled to any damage remedy because there had been no temporary taking.<sup>130</sup> Justice Powell took no part in the consideration or decision in the case.<sup>131</sup>

The Blackmun Papers show that at conference the vote was similar to the final outcome except that Justice Rehnquist gave a "tentative" vote in favor of the landowner and affirmance, but also acknowledged that he was "[i]n equipoise."<sup>132</sup> He also wrote Chief Justice Burger a few days after conference to explain that he thought that his "vote to affirm in this case may be misleading."<sup>133</sup> Somewhat surprisingly in light of his

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125. 473 U.S. at 190-94.

126. *Id.* at 190-91.

127. *Id.* at 194-97.

128. *Id.* at 200.

129. *Id.* at 201.

130. *Id.* at 202-06.

131. *Id.* at 174.

132. Harry A. Blackmun, Conference Notes, *Williamson County*, No. 84-4 (Feb. 22, 1985) (The Blackmun Papers, *supra* note 2).

133. Letter from Justice William H. Rehnquist to Chief Justice Warren E. Burger, *Williamson*

other precedent, Rehnquist stated that he “d[id]n’t think a ‘taking’ clause analysis [was] proper when there has been no physical invasion and no effort to acquire by condemnation.”<sup>134</sup> And, in a subsequent letter to Justice Blackmun, asking for a change in the draft majority opinion,<sup>135</sup> Rehnquist further acknowledged that “[t]his was a tough case to be assigned the opinion to write, because as I recall we were split up all over the lot at Conference.”<sup>136</sup>

## B. SCALIA ON THE COURT

Soon after Justice Scalia joined the Supreme Court in 1986, he quickly became the property rights movement’s strongest ally on the bench. During his very first Term, he voted in favor of greater protection of property owners in all four of the significant property rights cases before the Court that Term.<sup>137</sup> In the last of the four, *Nollan v. California Coastal Commission*,<sup>138</sup> in which Scalia himself authored the opinion for the Court, the Court held that a land use regulation amounted to an unconstitutional taking—the first time the Court had done so since *Pennsylvania Coal v. Mahon* in 1922.<sup>139</sup> The opinion’s rhetoric, moreover, was entirely sympathetic to the claims of the property rights movement,

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*County*, No. 84-4 (Feb. 25, 1985) (The Blackmun Papers, *supra* note 2).

<sup>134</sup> *Id.*

<sup>135</sup> Rehnquist asked Blackmun to include in his opinion an analogy to *Parratt v. Taylor*, 451 U.S. 527 (1981), to which Blackmun agreed. See Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun, Re: *Williamson Planning Commission* [sic], No. 84-4 (June 10, 1985) (The Blackmun Papers, *supra* note 2); Letter from Justice Harry A. Blackmun to Justice William H. Rehnquist, Re: *Williamson County*, No. 84-4 (June 11, 1985) (The Blackmun Papers, *supra* note 2). Apparently, at Justice Brennan’s insistence, Blackmun also included a footnote limiting the significance of the citation to *Parratt*, to which Rehnquist then objected. Blackmun ultimately redrafted the opinion in a manner that satisfied both Rehnquist and Brennan, while decrying to the former the challenges presented to the opinion writer “encounter[ing] the usual cross-fire between” conflicting positions of individual Justices all in the majority. Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun, Re: *Williamson County*, No. 84-4 (June 12, 1985) (The Blackmun Papers, *supra* note 2); Letter from Justice Harry A. Blackmun to Justice William H. Rehnquist, Re: *Williamson Planning Commission*, No. 84-4 (June 13, 1985) (The Blackmun Papers, *supra* note 2); Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun, Re: *Williamson County*, No. 84-4 (June 13, 1985) (The Blackmun Papers, *supra* note 2).

<sup>136</sup> Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun, *Williamson Planning Comm’n*, No. 84-4 (June 10, 1985) (The Blackmun Papers, *supra* note 2).

<sup>137</sup> See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987). I am treating as less significant here a fifth takings case before the Court that same Term, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). The Court in that case unanimously ruled that the federal government could exercise its navigation servitude power to regulate navigational uses of waters and that any resulting harm to riparian interests or owners of the navigable riverbed does not amount to a taking of private property because all owners of such property hold their property subject to that dominant governmental power.

<sup>138</sup> 483 U.S. 825.

<sup>139</sup> 260 U.S. 393 (1922).

expressing marked disdain for the efficacy, if not good faith motivation, of environmental land use regulators. When, six years later, Justice Scalia followed up on *Nollan* with his seemingly sweeping opinion for the Court favorable to the landowner in *Lucas v. South Carolina Coastal Council*,<sup>140</sup> the property rights movement had every reason to believe that it had found a champion on the High Court.

The Blackmun Papers, however, suggest a different story and outcome. They show not only that Justice Scalia did not immediately embrace the agenda of the property rights movement in all respects, but that once he did, he stumbled. Ironically, the reason for his stumble may have been his willingness to embrace the movement's sharp rhetoric rather than his ability to craft the kinds of opinions more likely to further the movement's interests over the longer term.

I. *Hodel v. Irving* (1987)<sup>141</sup>

The first case argued on Justice Scalia's first day on the bench (and also Rehnquist's first as Chief Justice), *Hodel v. Irving*, raised a regulatory takings issue, albeit in an unusual context. In response to the increasing fragmentation of ownership of Indian Lands, Congress enacted the Indian Land Consolidation Act of 1983, providing that no undivided fractional interest in Indian lands shall descend by intestacy or devise, but, instead, shall escheat to the tribe "if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than \$100 in the preceding year before it is due to escheat."<sup>142</sup>

The federal statute did not provide for any payment of compensation to the owners of the interests escheated to the tribe pursuant to this provision. The Court unanimously struck down the federal statute as unconstitutional. Justice O'Connor authored the majority opinion for seven members of the Court, which applied the *Penn Central* three-factor analysis in ruling that the federal escheat provision amounted to an unconstitutional taking.<sup>143</sup> Justices Brennan, Marshall, and Blackmun joined the majority opinion, but also joined Brennan's short separate concurring opinion stating the view that the Court ruling did not disturb the Court's decision in *Andrus v. Allard*.<sup>144</sup> The Chief Justice and Justices Scalia and Powell likewise joined the majority opinion, but also filed a competing concurring opinion, authored by Justice Scalia, which contended that *Andrus v. Allard* was

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140. 505 U.S. 1003 (1992).

141. 481 U.S. 704 (1987).

142. Pub. L. 97-459, tit. II, 96 Stat. 2519 (1983).

143. *Hodel*, 481 U.S. at 713-18.

144. *Id.* at 718.

now limited to the facts of that case.<sup>145</sup> Finally, Justice Stevens filed a separate concurring opinion, joined by Justice White, finding the federal law unconstitutional, but for lack of notice as required by due process rather than on takings grounds.<sup>146</sup>

The Blackmun Papers reveal the reason why it took the Court more than seven months (until May 18, 1987) to decide a case argued the first Monday of October. Certainly, there was little about this case that would have prompted outside observers to anticipate that its resolution would have produced such a struggle within the Court. The nature of that struggle, however, especially the role that Justice Scalia played in its promotion and persistence, is emblematic of his tenure on the Court ever since.

As described by Blackmun's Oral Argument Notes, during the argument itself, Justice Scalia was "hung up on" the question whether the plaintiffs even had standing to bring this claim.<sup>147</sup> What was most remarkable about Scalia's questioning, however, was how hard he pressed the federal government for not taking a sufficiently aggressive position in arguing that plaintiffs lacked standing.<sup>148</sup> Although the Court's final opinion ultimately appeared to have little trouble concluding that standing was in fact easily met, much of the oral argument was dominated by Scalia's aggressive questioning of the attorney from the Solicitor General's Office. Indeed, legal commentary of the day focused on Scalia's questioning at oral argument in *Hodel v. Irving*, remarking upon his effectiveness in calling the executive branch to task.<sup>149</sup>

Blackmun's conference notes further reveal that the initial vote concerning the federal law's possible unconstitutionality was not as lopsided as that when the Court announced its opinion seven months later.<sup>150</sup> The Chief Justice and Justice Brennan both stated that there was no taking and that the due process notice issue was not before the Court.<sup>151</sup> Justice Powell agreed that there was no constitutional infirmity.<sup>152</sup> Justice Stevens agreed that there was no taking, but indicated that he would reach the due process issue and find the law unconstitutional on that distinct ground based on lack of notice as

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145. *Id.* at 719.

146. *Id.* at 719-34.

147. Harry A Blackmun, Oral Argument Notes, *Hodel*, No. 85-637 (Oct. 6, 1986) (The Blackmun Papers, *supra* note 2).

148. See Official Report of Oral Argument, *Hodel v. Irving*, No. 85-637 (Oct. 6, 1986).

149. Stephen J Adler, *Scalia's Court: How the Newest Justice Has Effected a Quiet Revolution in the Rehnquist Court*, THE AMERICAN LAWYER, Mar. 1987.

150. Harry A. Blackmun, Conference Notes, *Hodel*, No. 85-637 (Oct. 8, 1986) (The Blackmun Papers, *supra* note 2).

151. *Id.*

152. *Id.*

applied to those who died early.<sup>153</sup>

There was, moreover, significant tentativeness in the votes of the five members of the Court who stated that the federal statute amounted to an unconstitutional taking. Justice White stated that although he was voting with the majority, he was “not now so sure” and he had thought “that easy for US at first.”<sup>154</sup> Justice Marshall said he shared White’s views.<sup>155</sup> Justice O’Connor described her view of the merits as “tentative,” and Justice Scalia did not think the federal statute was unconstitutional in all applications.<sup>156</sup> He contended the escheat provision did not constitute a taking or due process deprivation as applied to those who died intestate, but did when applied to those who sought to pass on their property by devise.<sup>157</sup> Because Justice Blackmun’s conference notes never elaborate upon the reasons he may have expressed for his vote, all we know is that he voted to affirm the lower court’s judgment that the federal law was an unconstitutional taking.

After Justice White (as the senior Justice in the majority) assigned the opinion for the Court to Justice Stevens, the Court quickly broke down. Justice Stevens, consistent with his discussion at conference, circulated within a few weeks to the other chambers a draft opinion that rested exclusively on the absence of due process and otherwise sought to limit the ruling to the Indian trust relationship. Justice O’Connor immediately responded with a letter to Justice Stevens, declining to join the opinion, restating her preference to affirm the lower court judgment in part on the basis of the Takings Clause, and declaring her intent to “await further writing.”<sup>158</sup> The next day Justice Scalia wrote a letter to Stevens saying that he “share[d] Sandra’s concerns,” thought that the “elimination of the right to pass property by will violates the takings clause, although its change in what happens to property absent a will does not.”<sup>159</sup> Scalia added that he intended “to try [his] hand at an opinion along these lines in the hope of persuading you and the rest of my colleagues.”<sup>160</sup> One day later, Justice Powell stated in a letter to Stevens that he was “not at rest” and would await “further writing.”<sup>161</sup> Justice Blackmun five days later informed Stevens by letter that he was

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Letter from Justice Sandra Day O’Connor to Justice John Paul Stevens, *Hodel*, No. 85-687 (Nov. 3, 1986) (The Blackmun Papers, *supra* note 2).

159. Letter from Justice Antonin Scalia to Justice John Paul Stevens, *Hodel*, No. 85-687 (Nov. 4, 1986) (The Blackmun Papers, *supra* note 2).

160. *Id.*

161. Letter from Justice Lewis F. Powell, Jr. to Justice John Paul Stevens, *Hodel*, No. 85-687 (Nov. 5, 1986) (The Blackmun Papers, *supra* note 2).

“in somewhat the same position as that taken by Sandra and Nino” and would “await further writing or shall pen a few words myself.”<sup>162</sup>

It was not, however, until late February that Justice Scalia finally circulated his draft opinion in the case and let it be known, at least through his law clerks, that he hoped to secure a majority for his views and therefore convert his concurrence into an opinion of the Court.<sup>163</sup> Unlike his statements at conference and in his earlier correspondence with Stevens, Scalia’s draft concluded that the federal statute was a taking whether or not the property was transmitted by descent or by devise.<sup>164</sup> In addition, as described by one of Blackmun’s law clerks, the draft opinion took “a restrictive view of standing” and made “broad statements” that “seem to be a reflection of Justice Scalia’s personal philosophy and not at all necessary to a decision in the case.”<sup>165</sup>

Although Justice Blackmun had voted at conference that the federal law was a taking,<sup>166</sup> which was the same result advocated by Scalia’s draft, Blackmun declined to join the opinion. According to Blackmun’s law clerk, the “fundamental problem” with the Scalia opinion was that it “eschews the traditional takings balancing analysis entirely” in favor of “a hard and fast rule with implications far beyond ‘Indian’ cases.”<sup>167</sup> Perhaps for this same reason, however, Justice Powell and the Chief Justice, both of whom had voted on the other side at conference, were the first to join Scalia’s opinion, each stating in separate letters that they found the opinion “persuasive.”<sup>168</sup> In short, it appears that once Justice Scalia decided in February to use the *Hodel v. Irving* case to further a broader property rights agenda, two members of the Court more sympathetic to that agenda were quickly willing to change their earlier views about this particular case and sign on.

According to the memorandum prepared by Justice Blackmun’s law clerk summarizing the reactions within the other chambers to the Scalia opinion, however, the rest of the Court did not follow suit.<sup>169</sup> Brennan still believed that there was no taking and the case should be remanded

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162. Letter from Justice Harry A. Blackmun to Justice John Paul Stevens, *Hodel*, No. 85-687 (Nov. 10, 1986) (The Blackmun Papers, *supra* note 2).

163. Clerk Memorandum to Justice Harry A. Blackmun, *Hodel*, No. 85-687 (Feb. 20, 1986) (The Blackmun Papers, *supra* note 2).

164. *Id.*

165. *Id.*

166. Harry A. Blackmun, Conference Notes, *Hodel*, No. 85-687 (Oct. 8, 1986) (The Blackmun Papers, *supra* note 2).

167. Clerk Memorandum to Justice Harry A. Blackmun, *Hodel*, No. 85-687 (Mar. 9, 1986) (The Blackmun Papers, *supra* note 2).

168. Letter from Chief Justice William H. Rehnquist to Justice Antonin Scalia, *Hodel*, No. 85-687 (Mar. 3, 1987) (The Blackmun Papers, *supra* note 2); Letter from Justice Lewis F. Powell, Jr. to Justice Antonin Scalia, *Hodel*, No. 85-687 (Feb. 26, 1987) (The Blackmun Papers, *supra* note 2).

169. Clerk Memorandum to Justice Harry A. Blackmun, *Hodel*, No. 85-687 (Mar. 9, 1987) (The Blackmun Papers, *supra* note 2).

for consideration of the due process issue raised by Stevens.<sup>170</sup> White had assigned the case to Stevens, but still had not even himself signed on to the Stevens draft opinion for the Court.<sup>171</sup> Marshall's clerks reported that Marshall "wants the Indians to win and doesn't think he will join Justice Scalia's opinion."<sup>172</sup> The Blackmun clerk also wrote to the Justice that "Justice O'Connor's clerk is very uncomfortable with Justice Scalia's opinion, but [O'Connor's clerk] doesn't think that she wants to write."<sup>173</sup>

The logjam was finally broken in mid-March when Justice O'Connor circulated her own draft concurring opinion that found a taking relying on a *Penn Central* balancing analysis.<sup>174</sup> By the end of April, O'Connor was circulating the draft as an opinion for the Court, which she described in correspondence with the other chambers as "the result of efforts to seek a compromise between Nino's approach and the approach in my dissent."<sup>175</sup> After O'Connor acquiesced in Scalia's request that she eliminate from her draft language distinguishing *Andrus v. Allard*<sup>176</sup> and Brennan decided, notwithstanding that revision,<sup>177</sup> to join the majority opinion, the disassembling of Justice Stevens' opinion for the Court was complete. Justice Stevens was left to file his opinion relying on due process as a separate concurring opinion, which only Justice White joined,<sup>178</sup> perhaps just out of courtesy given that White had plainly erred in originally assigning Stevens the opinion for the Court.

In all events, Justice Scalia stalled in his first effort, literally out of the box, to begin to move the Court to promote property rights more aggressively. Notwithstanding the plaudits he received from commentators for his opening day performance at oral argument, he had little to show for it the day the Court actually announced its opinion. The

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170. *Id.* at 3.

171. *Id.*

172. *Id.*

173. *Id.*

174. Clerk Memorandum to Justice Harry A. Blackmun, *Hodel*, No. 85-687 (Mar. 12, 1987) (The Blackmun Papers, *supra* note 2) ("This is it! I was hoping that if we waited long enough there would be an opinion that I could recommend that you join—Justice O'Connor has found a taking by applying the traditional balancing test.").

175. Sandra Day O'Connor, Memorandum to the Conference, *Hodel*, No. 85-687 (Apr. 21, 1987) (The Blackmun Papers, *supra* note 2).

176. Sandra Day O'Connor, Memorandum to the Conference, *Hodel*, No. 85-687 (May 5, 1987) (The Blackmun Papers, *supra* note 2).

177. Letter from Justice William H. Brennan to Justice Sandra Day O'Connor, *Hodel*, No. 85-687 (May 8, 1987) (The Blackmun Papers, *supra* note 2) ("I regret having to prolong the agony in the above, but I am uncomfortable with the case as it now stands. Your decision to delete any discussion of *Allard*, standing by itself, was not troublesome for me. Viewed in tandem with Nino's concurrence, however, the practical result is to limit *Allard* to its facts."). Justice Brennan ultimately joined Blackmun's majority opinion and wrote his own short concurring opinion taking issue with Scalia's reading of the impact of *Hodel* on *Allard*. See *Hodel v. Irving*, 481 U.S. 704, 718 (1987) (Brennan, J., concurring).

178. 481 U.S. at 719.



standing issue he trumpeted with great fanfare at oral argument proved to have no legs, as no one, including even Scalia, subsequently embraced the concerns he had expressed in October in any of the actual written opinions.<sup>179</sup> And, Scalia failed in his efforts to use *Hodel v. Irving* as an effective vehicle to declare a bright line takings test more favorable to property owners than he considered the *Penn Central* multi-factor balancing framework. When the dust settled, Justice O'Connor, not Justice Scalia, proved the more effective in crafting an opinion for the Court.<sup>180</sup>

2. *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987)<sup>181</sup>

The Court heard oral argument in *Keystone Bituminous* in November, little more than a month after oral argument in *Hodel v. Irving*, and just after it was becoming clear that Justice Stevens lacked a majority for his draft opinion relying on due process in that case. The case was strikingly reminiscent of *Pennsylvania Coal v. Mahon*,<sup>182</sup> the fountainhead of the Court's regulatory takings jurisprudence. Both *Keystone Bituminous* and *Pennsylvania Coal* involved regulatory takings challenges to restrictions on coal mining in Pennsylvania that were designed to limit the adverse public safety consequences of such mining due to surface subsidence. Both restrictions had the necessary consequence of limiting the mineral estate's ability to mine coal and benefiting the competing owner of the surface estate whose rights were otherwise by private contract subservient to the mineral estate. In *Pennsylvania Coal*, a closely divided Court struck down the mining restriction as an unconstitutional taking. But, in *Keystone Bituminous*, a closely divided Court upheld the state law in the context of a facial takings challenge. Justice Stevens wrote the majority opinion, joined by Justices Brennan, White, Marshall, and Blackmun.<sup>183</sup> Chief Justice Rehnquist dissented, joined by Justices Powell, O'Connor, and Scalia.<sup>184</sup> Justice Stevens' opinion for the Court relied on an extremely narrow reading of the *Pennsylvania Coal* precedent, treating as mere dicta much of Justice Holmes' opinion for the Court in that case.

Unlike *Hodel v. Irving*, the final opinions in *Keystone Bituminous* were not the result of shifting votes. The final votes in the case were identical to the initial votes in conference for each of the Justices.<sup>185</sup>

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179. See *id.* at 704-34.

180. In the aftermath of the Court's decision in *Hodel v. Irving*, Congress amended section 207 of the Indian Land Consolidation Act, but the Court subsequently invalidated the amended law as well on takings grounds. See *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997).

181. 480 U.S. 470 (1987).

182. 260 U.S. 393 (1922).

183. *Id.*

184. *Id.* at 506.

185. Harry A. Blackmun, Conference Notes, *Keystone Bituminous Coal*, No. 85-1092 (Nov. 14,

According to Blackmun's conference notes, the Chief acknowledged that one's approach to the case "depends on the point of view" because one could characterize the case either as merely a "9%" deprivation or a deprivation of the right to mine 27 million tons of coal.<sup>186</sup> For Rehnquist, however, *Pennsylvania Coal* was controlling. Justice White was clearly the swing Justice on the Court for the case and while he voted at conference in favor of upholding the law, he also indicated that his view was tentative and he was "not fully at rest."<sup>187</sup> He seemed to distinguish *Pennsylvania Coal* on the ground that in the days of "John W. Davis" (the counsel for the coal company in 1922), one "could not mine" but in light of new technology one "can mine."<sup>188</sup> White apparently closed his comments by saying that he would now vote to affirm the lower court's rejection of the takings claim, but that he would also wait and read the dissent in the case before finally voting.<sup>189</sup> Justice Scalia, as the junior Justice, spoke last and bluntly explained the reasons for voting to strike down the state law. He characterized *Pennsylvania Coal* as an "anchor" and the state law challenged in this case as "less a regulation than a rip-off. [It] gives economic wealth to the surface owner."<sup>190</sup>

As the senior Justice in the majority, Justice Brennan in mid-November assigned Justice Stevens the responsibility of drafting the opinion for the Court.<sup>191</sup> Stevens circulated in mid-February what Blackmun's clerk described as a "lengthy" draft that reflected a "lack of editing,"<sup>192</sup> and Rehnquist circulated his dissent soon thereafter. Because the final versions of both were published less than a month later, on March 9, 1987, the kind of internal struggle then occurring over *Hodel v. Irving* was apparently not repeated in *Keystone Bituminous*. Justice Blackmun's clerk did express, in a memorandum, some misgivings about the "length and lack of editing" of Stevens' draft majority opinion and "more serious[ly]" the possibility that "Justice White [who] was on the fence in this case . . . may react adversely to such a lengthy opinion."<sup>193</sup> But those fears were not realized. Whatever opening the *Keystone Bituminous* dissenters had to bring Justice White over to their side was not successfully exploited.

The upshot was, in retrospect, the Court's publication in *Keystone Bituminous* of a most unlikely repudiation of *Pennsylvania Coal* given

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1986) (The Blackmun Papers, *supra* note 2).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Docket Sheet, *Keystone Bituminous Coal*, No. 85-1092 (The Blackmun Papers, *supra* note 2).

192. Clerk Memorandum to Justice Harry A. Blackmun, *Keystone Bituminous Coal*, No. 85-1092 (Feb. 11, 1987) (The Blackmun Papers, *supra* note 2).

193. *Id.*

the makeup of the Court at the time. Hence, while Justice Scalia and others were fighting over *Hodel v. Irving*, Justice Stevens had succeeded in persuading Justice White to join a potentially far more significant opinion in *Keystone Bituminous*, which preempted the *Hodel v. Irving* decision by two months. The only saving grace for the property rights movement was that it was hard to believe that there was in fact a stable majority on the Court for everything within Stevens' opinion for *Keystone Bituminous*. But, for Justice Stevens, who had lost his Court in *Hodel v. Irving*, *Keystone Bituminous* was a major accomplishment.

3. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987)<sup>194</sup>

In *First English*, the Court finally had the opportunity a majority of the Court had long sought to address—the regulatory takings remedy issue first raised, but not reached, in *Agins* and then again in *San Diego Gas & Electric*. No doubt for this reason, all nine Justices voted at conference to note probable jurisdiction and to hear the case on the merits.<sup>195</sup> Chief Justice Rehnquist wrote the majority opinion for the Court in *First English*, essentially embracing Justice Brennan's dissenting opinion in favor of the property owners in *San Diego Gas & Electric*, elevating that opinion to the status of an opinion of the Court.<sup>196</sup> The *First English* Court ruled that because the Constitution by its own terms mandated the payment of "just compensation" for governmental takings of private property, when a government regulation was deemed a taking, the government had a choice: the government could either purchase the property by paying "just compensation," or the government could lift the offending regulation and pay "just compensation" for the temporary taking that occurred prior to the regulation's invalidation.<sup>197</sup>

The Court's opinion did, however, contain one surprise. Justice O'Connor did not join the Chief's opinion, which was instead joined by Justices Brennan, White, Marshall, Powell, and (not surprisingly) Scalia. Justice O'Connor, like Justice Blackmun, joined parts of Justice Stevens' dissent.<sup>198</sup> The parts joined by O'Connor (and Blackmun) dissented on two grounds. The first was that there was clearly no regulatory taking in the case, and therefore, the case should have been dismissed on summary judgment, obviating any need to address the remedy issue.<sup>199</sup> The second ground was that the judgment should have been affirmed because the majority was agreeing with the state (California) courts that government

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194. 482 U.S. 304 (1987).

195. Docket Sheet, *First English*, No. 85-1199 (The Blackmun Papers, *supra* note 2).

196. Compare *First English*, 482 U.S. at 314-22, with *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 646-61 (1981) (Brennan, J., dissenting).

197. 482 U.S. at 314-22.

198. *Id.* at 322.

199. *Id.* at 323-28.

could invalidate the regulation without having to purchase the property and the state courts had not yet reached the question of possible damages for a temporary taking.<sup>200</sup> Neither O'Connor nor Blackmun joined the portions of Stevens' dissent that contended that due process rather than takings should govern the kind of claims at issue in *First English*, alleging "improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking."<sup>201</sup>

The Blackmun Papers are revealing both because they cast further light on the views of several of the Justices, including the Chief, O'Connor, and Scalia. The conference notes, for instance, show that Chief Justice Rehnquist did not believe that the interim land use ordinance at issue in the case, which restricted reconstruction of a church retreat center and camp for handicapped children in a flood plain following its prior destruction by flood, amounted to a taking.<sup>202</sup> The Chief Justice began the discussion of the case by stating that he "fe[lt] no taking here," but went on to explain why he also believed the Court could, as a matter of procedure, address the remedy issue while sidestepping the merits.<sup>203</sup> Blackmun, alone, favored dismissing the case, with everyone else agreeing with the Chief that the remedy issue was properly before the Court, while not necessarily agreeing that reversal was warranted.<sup>204</sup>

Justice O'Connor argued in favor of affirmance, consistent with her subsequent vote to join Justice Stevens' dissent in part.<sup>205</sup> The tenor of her comments was apparently quite emotional. She described the consequences of the case as "grave" while also stating that "this particular restriction is not a taking."<sup>206</sup> She also stated that she "share[d] Stevens' concerns about the interim" just after Stevens had informed the conference that there "need not be compensation for temporary taking" and any damages appropriate for such a temporary deprivation should be governed by a "higher standard" best left for the lower courts to consider in the first instance.<sup>207</sup> But in one of the more remarkable points in all of the Blackmun Paper conference notes that I reviewed, Blackmun then reports that O'Connor said, "This is scary and I rise in alarm!"<sup>208</sup> In apparently characterizing the tenor of her comments, Blackmun writes

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200. *Id.* at 335-39.

201. *Id.* at 339-41.

202. Harry A. Blackmun, Conference Notes, *First English*, No. 85-1199 (Jan. 16, 1987) (The Blackmun Papers, *supra* note 2).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

“very ♀” and “screams.”<sup>209</sup>

While far less dramatic, even more surprising is that Justice Scalia at conference voted with O'Connor and Stevens to affirm and therefore was not in the majority.<sup>210</sup> According to Blackmun's conference notes, Scalia contended that the interim period did not amount to a taking, while also saying that he would not “go so far as the Solicitor General” (who argued broadly against a constitutionally compelled just compensation remedy) because that argument was “a disaster!”<sup>211</sup> Scalia said, like Stevens, that while “not a taking,” such a temporary impairment “could be a deprivation of due process.”<sup>212</sup>

What the conference notes therefore reveal is that Justice Scalia was far from fully on board the property rights movement in all respects during his first term. Whether the Just Compensation Clause mandated a remedy of “just compensation” in damages for regulatory takings was a central element of the movement's constitutional claims. Yet, when first considering it, Scalia's reaction was to reject it. Scalia's reluctance was not, moreover, confined to the conference. The Chief Justice circulated his draft opinion in mid-February,<sup>213</sup> one month after the January 1987 conference, and he quickly obtained his Court. Justices Powell, Brennan, White, and Marshall all had joined his opinion for the Court within a few days.<sup>214</sup> By contrast, Justice Scalia did not join the Chief Justice's opinion until more than three months later, on May 28, 1987, a few weeks after Justice Stevens circulated his dissent, which Blackmun and O'Connor joined in part.<sup>215</sup>

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209. *Id.* As previously described, a recent biography of Justice O'Connor suggests that Justice Blackmun was especially hostile to O'Connor, prone to denigrating her abilities, which may explain his tendency to describe her on this occasion and on others as merely emotional rather than analytical. See *supra* note 120. In other words, Blackmun's description may be more revealing about Blackmun than about O'Connor.

210. Harry A. Blackmun, Conference Notes, *First English*, No. 85-1199 (Jan. 16, 1987) (The Blackmun Papers, *supra* note 2).

211. *Id.*

212. *Id.*

213. See Letter from Justice Sandra Day O'Connor to Chief Justice William H. Rehnquist, *First English*, No. 85-1199 (Feb. 19, 1987) (The Blackmun Papers, *supra* note 2).

214. See Letter from Justice Lewis F. Powell, Jr. to Chief Justice William H. Rehnquist, *First English*, No. 85-1199 (Feb. 19, 1987) (The Blackmun Papers, *supra* note 2); Letter from Justice William J. Brennan Jr. to Chief Justice William H. Rehnquist, *First English*, No. 85-1199 (Feb. 20, 1987) (The Blackmun Papers, *supra* note 2); Letter from Byron R. White to Chief Justice William H. Rehnquist, *First English*, No. 85-1199 (Feb. 23, 1987) (The Blackmun Papers, *supra* note 2); Letter from Thurgood Marshall to Chief Justice William H. Rehnquist, *First English*, No. 85-1199 (Feb. 24, 1987) (The Blackmun Papers, *supra* note 2).

215. Letter from Justice Antonin Scalia to Chief Justice William H. Rehnquist, *First English*, No. 85-1199 (May 28, 1987) (The Blackmun Papers, *supra* note 2); see Justice Stevens, 1st Draft Dissent, *First English*, No. 85-1199 (May 6, 1987) (The Blackmun Papers, *supra* note 2); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (Stevens, J., dissenting).

The Blackmun Papers do not offer any hints as to the cause of Justice Scalia's change of heart. What seems most likely, however, is that by May of that Term, the ideological dividing lines were beginning to form around the regulatory taking issue and Justice Scalia chose a side, not content to straddle the issue like either Justice White or Justice O'Connor. If that is so, the likely trigger for Scalia's decision to embrace the property rights issue may well have been the final regulatory takings case of the Term, *Nollan v. California Coastal Commission*,<sup>216</sup> which was the first property rights case opinion for the Court authored by Scalia, discussed next.

4. *Nollan v. California Coastal Commission* (1987)<sup>217</sup>

*Nollan v. California Coastal Commission* was the Court's final regulatory takings case of October Term 1986, argued on March 30, 1987.<sup>218</sup> Justice Scalia wrote the opinion for the Court, which was not handed down until the last opinion day of the Term, June 26, 1987.<sup>219</sup> The ruling was a significant win for property rights advocates, and especially welcome after their disappointing loss a few weeks before in *Keystone Bituminous*. Indeed, it was hard to square the reasoning of *Keystone Bituminous* with *Nollan*. Justice White, alone, was in the majority in the two cases and he wrote in neither one.<sup>220</sup>

Justice Scalia's opinion for the Court in *Nollan* upheld a takings claim brought against the California Coastal Commission.<sup>221</sup> The Commission policy challenged by homeowners in the case allowed for the lifting of height restrictions on development along the Pacific coast in exchange for the landowner agreeing to provide the public with lateral access along the beach between the home and the ocean that was otherwise private property.<sup>222</sup> The Court ruled that although the outright taking of a permanent public access requirement would be a per se taking, a permit condition requiring such access could pass constitutional muster if the condition substantially furthered the same governmental purposes as would have justified denial of the permit.<sup>223</sup>

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216. 483 U.S. 825 (1987).

217. *Id.*

218. U.S. Supreme Court Center, *Nollan v. Cal. Coastal Comm'n*, <http://www.justia.us/us/483/825/index.html> (last visited Jan. 29, 2006).

219. *Id.*

220. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 472 (1987); *Nollan*, 483 U.S. at 826. The Court decided to hear *Nollan* apparently only after Justice Scalia requested that the case be relisted after initial conference. See Docket Sheet, *Nollan*, No. 86-133 (The Blackmun Papers, *supra* note 2). Ultimately, Justices Scalia, O'Connor, and Powell voted to hear the case, which fell shy of the requisite four votes for review, except that both the Chief Justice and Justice White stated their willingness to "join 3" to supply the necessary vote for plenary review. See *id.*

221. 483 U.S. at 841-42.

222. *Id.* at 828.

223. *Id.* at 836-37.

According to the majority, the constitutional flaw in *Nollan* was the absence of a sufficient nexus between the government interests being served by the height restriction and those being served by the exaction of public access to the beach.<sup>224</sup> The Court found unpersuasive the Commission's claim that both the restriction and the exaction furthered the public interest in beach access, with the height restriction focusing on the public's *visual* access and the exaction providing instead for the public's *physical* access.<sup>225</sup> In addition to Justice White, the Chief Justice, Justice Powell and Justice O'Connor provided Justice Scalia's opinion with the necessary majority.<sup>226</sup> Justice Brennan filed a dissenting opinion, which Justice Marshall joined.<sup>227</sup> Justice Blackmun filed his own dissenting opinion<sup>228</sup> as did Justice Stevens, though the latter's primary purpose was to chide Justice Brennan yet one more time for joining the majority's opinion in *First English*.<sup>229</sup>

Justice Scalia's opinion for the Court contained several elaborations especially promising to property rights advocates. First, the opinion rejected the government's argument that the fact that the landowners purchased the property after the Coastal Commission announced its policy defeated their takings claim, because they had notice and therefore no reasonable investment backed expectations to the contrary. The majority ruled that the government, simply by giving prior notice, could not so easily defeat an otherwise meritorious takings claim.<sup>230</sup> The Court also rejected the argument that mere rational basis means-end review was all that was required in takings analysis, akin to due process and equal protection analysis. Relying on the Court's prior language in *Agins* to conclude that the regulation must "substantially advance" the 'legitimate state interest' to be achieved," the Court held that the exaction's substantive nexus to the purposes being served by the underlying development restriction must accordingly be more substantial.<sup>231</sup>

The Blackmun Papers for the *Nollan* case provide insight into the

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224. *Id.* at 837.

225. *Id.* at 838.

226. *Id.* at 826.

227. *Id.* at 842 (Brennan, J., dissenting).

228. *Id.* at 865 (Blackmun, J., dissenting).

229. *See id.* at 866-67 (Stevens, J., dissenting).

I like the hat that Justice Brennan has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a shortsighted one. Like Justice Brennan, I hope that "a broader vision ultimately prevails."

*Id.* at 867.

230. *Id.* at 833 n.2.

231. *Id.* at 834 n.3 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260-62 (1980)).

Court's deliberations. At conference, for instance, Justice Brennan described the case as "tough" and appears to have indicated that he might be voting for reversal (in favor of the landowner) before finally settling on affirmance in favor of the Coastal Commission.<sup>232</sup> Blackmun describes Brennan as having talked for a "long" time.<sup>233</sup> Justice Marshall at conference formally voted in favor of the landowner, saying matter of factly that the "State has a right to take but must pay. Simple."<sup>234</sup> Later, however, when the draft opinions were circulating, Marshall ended up switching positions and voting with Brennan in dissent.<sup>235</sup>

The most surprising part of Blackmun's conference notes is the suggestion that Scalia originally thought the challenged Coastal Commission exaction policy was "not a regulatory taking."<sup>236</sup> To be sure, the conference notes show Scalia voting for reversal in favor of the landowner, but not on takings grounds.<sup>237</sup> Justice Scalia reportedly described the state beach access exaction policy as "a gimmick."<sup>238</sup> He also contended that there "has to be a reasonable relationship" and that there should be "no balancing test."<sup>239</sup> His antipathy for a balancing test in *Nollan* is consistent with his view then being expressed during the Court's simultaneous deliberations in *Hodel v. Irving*, in which he proffered a bright line takings test rather than a *Penn Central* multi-factor analytical framework.<sup>240</sup>

As is evident from the final opinion for the Court authored by Scalia, the Justice at some point between the date of the conference (April 1, 1987) and the final opinion he drafted for the Court decided to embrace the takings approach to the case. What is interesting is that in neither *First English*, described above, nor in *Nollan*, did Scalia initially believe it made sense to characterize the relevant constitutional problem as a "taking." He instead appears to have thought that the issue sounded more in due process than in takings. In both *Nollan* and *First English*, however, Scalia decided to embrace the takings approach fairly enthusiastically. He might have done so because he in fact changed his own mind in both cases, which would also explain why he finally decided in late May to join the Chief Justice's opinion for the Court in *First English*. Or, perhaps, Justice Scalia decided that as the author of the

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232. See Harry A. Blackmun, Conference Notes, *Nollan*, No. 86-133 (Apr. 1, 1987) (The Blackmun Papers, *supra* note 2).

233. *Id.*

234. *Id.*

235. *Nollan*, 483 U.S. at 842.

236. Harry A. Blackmun, Conference Notes, *Nollan*, No. 86-133 (Apr. 1, 1987) (The Blackmun Papers, *supra* note 2).

237. *Id.*

238. See *id.*

239. *Id.*

240. See *infra* text accompanying notes 163-64.



opinion for the Court in *Nollan*, it was his responsibility to reflect the views of the majority of the Justices, which relied on a takings label, rather than on whatever constitutional label he might have thought more apt were this a constitutional question of first impression.<sup>241</sup>

5. *Lucas v. South Carolina Coastal Council (1992)*<sup>242</sup>

When Justice Clarence Thomas joined the Court in 1992, the property rights movement had good reason to believe that the Court finally had a firm majority favorable to their interests. Justice Thomas had given speeches in the past that endorsed more aggressive protection of property rights under the federal Constitution. Indeed, for that reason, the Chair of the Senate Judiciary Committee, Senator Joseph Biden, commenced Justice Thomas' confirmation hearings by questioning then-Judge Thomas about his views on property rights and the possible impact of those views on the ability of government to regulate private property.<sup>243</sup>

Soon after his confirmation, moreover, the Court seemed ready to do just what property rights advocates had hoped and government regulators had feared. Within the first few weeks of October Term 1991, the Court granted review in three different property rights cases raising the regulatory taking issue: *PFZ Properties, Inc. v. Rodriguez*,<sup>244</sup> *Yee v.*

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241. Justice Scalia's opinion for the Court in *Nollan* does not, in any event, represent his finest work of opinion craftsmanship. This was the end of Scalia's first Term on the Court, and during the final few weeks it was quite clear that he was behind in his opinion assignments and having difficulty completing all of his work by the close of the Term. He filed four opinions for the Court during the final two days of the Term. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (filed on June 26, 1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (filed on June 26, 1987); *Anderson v. Creighton*, 483 U.S. 635 (1987) (filed on June 25, 1987); *U.S. v. Stanley*, 483 U.S. 669 (1987) (filed on June 25, 1987).

He also filed two additional opinions for the Court earlier in June. See *Hewitt v. Helms*, 482 U.S. 755 (1987) (filed on June 19, 1987); *Interstate Commerce Comm'n v. Bd. of Locomotive Eng'rs*, 482 U.S. 270 (1987) (filed on June 8, 1987). And, during the last two weeks of the Term, he also filed five dissenting opinions. See *Rankin v. McPherson*, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting) (filed on June 24, 1987); *Am. Trucking Ass'n v. Scheiner*, 483 U.S. 266, 303 (1987) (Scalia, J., dissenting) (filed on June 23, 1987); *Tyler Pipe Indus., Inc. v. Wash. State Dept. of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., dissenting in part and concurring in part) (filed June 23, 1987); *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting) (filed on June 19, 1987); *Booth v. Maryland*, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting) (filed on June 15, 1987).

The *Nollan* opinion, in particular, was oddly drafted. Unlike most majority opinions, which seem clearly to have been written before the circulation of any dissenting opinions, Scalia's opinion for the Court in *Nollan* makes almost all of its substantive points in lengthy response to Justice Brennan's dissent. Its peculiar nature may be why, in a memorandum to the Justice about the case, one of Blackmun's clerks wrote that "Justice Scalia's opinion for the majority might as well carry a disclaimer that the Court does its sloppiest work at the end of the year." Letter from Law Clerk to Harry A. Blackmun, *Nollan*, No. 86-133 (June 9, 1987) (The Blackmun Papers, *supra* note 2).

242. 505 U.S. 1003 (1992).

243. See *Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 110-27 (1991).

244. 502 U.S. 956 (1991).

*City of Escondido*,<sup>245</sup> and *Lucas v. South Carolina Coastal Council*.<sup>246</sup> The first two cases, however, largely fizzled when the Court, upon closer examination, realized that the constitutional issues were not well presented. The Court formally dismissed the writ as improvidently granted in *PFZ Properties*,<sup>247</sup> and, while reaching the merits by rejecting other constitutional claims in *Yee*, concluded that the regulatory taking issue was not fairly presented by the case and accordingly declined to address it.<sup>248</sup>

*Lucas* was therefore the only one of the three regulatory takings cases to survive the Term intact. The facts of the case, as presented to the Court, seemed very sympathetic to the landowner, David Lucas, and for this reason, it is not surprising to learn that the members of the Court who voted to hear the case (the Chief Justice and Justices White, O'Connor, Scalia, and Thomas) were those most interested in establishing precedent favorable to property rights.<sup>249</sup> The state law *Lucas* challenged prevented him from building a house (or any other permanent structure) on either of his two beachfront lots, even though houses had previously been built up and down the coastline on similarly situated property before the new development restrictions became effective.<sup>250</sup> The trial court had found that the new development restrictions had rendered the property without any economic value and therefore constituted a taking, but the South Carolina Supreme Court had reversed, seemingly on little more than the fact that the restriction was a valid police power measure that furthered legitimate governmental interests.<sup>251</sup>

When Justice Scalia announced the opinion for the Court in *Lucas* on the very last day of the Term in June, the ruling seemed to many to be the blockbuster for which the property rights movement had long hoped. Justice Scalia wrote, as he tends to do, with a fair amount of gusto, on this occasion stressing the important "historical compact recorded in the Takings Clause that has become part of our constitutional culture."<sup>252</sup> The Court opinion immediately made clear that, notwithstanding the Stevens' opinion for the Court five years earlier in *Keystone Bituminous, Pennsylvania Coal* remained good law.<sup>253</sup> The opinion also, notably, at

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245. 502 U.S. 905 (1991).

246. 502 U.S. 966 (1991).

247. *PFZ Properties, Inc. v. Rodriguez*, 503 U.S. 257 (1992).

248. *Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992).

249. Docket Sheet, *Lucas*, No. 91-453 (The Blackmun Papers, *supra* note 2). Justice Blackmun, however, also stated at conference his willingness to supply the fourth vote for jurisdiction, if necessary to grant review. *Id.*

250. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008-09 (1992).

251. *Id.* at 1009-10.

252. *Id.* at 1028.

253. *Id.* at 1014-15. The opinion noted, cryptically, that *Keystone Bituminous Coal Ass'n v.*

the outset of its analysis cited to a law review article written by University of Chicago law professor Richard Epstein, widely considered the intellectual fountainhead of the property rights movement.<sup>254</sup>

Somewhat reminiscent of his unsuccessful draft opinion for the Court five years earlier in *Hodel v. Irving*, Justice Scalia's opinion for the Court in *Lucas* sought to eschew a *Penn Central* balancing approach in favor of a bright line test.<sup>255</sup> In particular, the *Lucas* opinion carved out of the Court's prior precedent a series of per se takings tests. For example, relying on *Agins v. City of Tiburon*, the Court held that a police power regulation that deprived a landowner of all "economically viable use" of the property constituted a taking.<sup>256</sup> Scalia's *Lucas* opinion also offered a not-so-subtle rebuke of *Andrus v. Allard*, the case he sought to limit to its fact in *Hodel v. Irving*, in particular its reference to "profits" as being a "slender reed" upon which to base a takings claim. The *Lucas* opinion, by contrast proclaimed "[F]or what is the land but the profits thereof[?]"<sup>257</sup>

Notwithstanding Justice Scalia's attempt in *Lucas* to move the Court to a bright line test, his opinion for the Court included a series of caveats that deprived the holding of some of its force. One footnote expressly admitted just that. It acknowledged that "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."<sup>258</sup> In that footnote, the opinion sought to cast some doubt on the ongoing validity of the Court's prior ruling in *Penn Central* that, in evaluating a takings claim, one looked to the "property as a whole" rather than the part most restricted by regulation.<sup>259</sup> The Court's holding was also further muddled by the fact that the apparent critical trigger for the per se test—loss of all economically viable use—was alternatively phrased throughout the opinion, making even less clear what the trigger was in terms of the extent of remaining economic value, if any.<sup>260</sup>

The most significant limitation within the opinion, however, was the majority's concession that there was an exception from the per se test for

*DeBenedictis*, 480 U.S. 470, 472 (1987), had rejected a takings challenge to a state law "nearly identical" to the one struck down in *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978). *Lucas*, 505 U.S. at 1016 n.7 (citations omitted).

254. *Lucas*, 505 U.S. at 1015.

255. *Id.*

256. *Id.* at 1016.

257. *Id.* at 1017 (quoting I E. COKE, INSTITUTES ch. I, § I (1st Am. ed. 1812)).

258. *Id.* at 1016 n.7.

259. *See id.*

260. The *Lucas* opinion alternatively referred to the per se trigger as the absence of economically "beneficial," "productive," "feasible" use, leaving the property "economically idle," or without "economic value." *See id.* at 1015–20, 1034.

regulations that did no more than apply “background principles” of law, including nuisance law:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.<sup>261</sup>

The majority elaborated that there would, under this formulation be no liability “for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.”<sup>262</sup> Nor would the owner of a lake bed

be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.<sup>263</sup>

The *Lucas* Court explained that while “[s]uch regulatory action may well have the effect of eliminating the land’s only economically productive use, . . . it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.”<sup>264</sup> The majority opinion went on to cite to the Second Restatement of Torts provisions governing nuisance law.<sup>265</sup> Because the Restatement is very open-ended in its potential reach and ultimately relies on a balancing test, this final acknowledgment dramatically undermined the significance of the supposedly per se approach that the *Lucas* majority opinion had announced a few paragraphs earlier.

Because of the background principles and nuisance exception, the *Lucas* Court stopped short of formally ruling that the restriction on land use development in that case was a taking.<sup>266</sup> The Court instead remanded back to the state courts to determine in the first instances what the applicable principles of state law were, including state nuisance law.<sup>267</sup> While thereby deferring to the state courts on a question of state law, the majority opinion left little doubt whether it believed those principles

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261. *Id.* at 1029.

262. *Id.* at 1029 n.16.

263. *Id.* at 1029.

264. *Id.* at 1029–30.

265. *Id.* at 1031.

266. *Id.*

267. *Id.* at 1031–32.

could validly bar the landowner in *Lucas* from building his houses on his two lots. The Court added “[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the ‘essential use’ of land.”<sup>268</sup> The Court also warned that states were not unfettered in their ability to announce “background principles” of state law capable of defeating a per se takings claim.<sup>269</sup> “[O]nly if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found” would a per se taking not be found.<sup>270</sup>

The Chief Justice and Justices White, O’Connor, and Thomas joined Justice Scalia’s opinion for the Court.<sup>271</sup> Justice Kennedy concurred in the judgment only, adopting a very different analytical framework than that proffered by Scalia for the Court.<sup>272</sup> Kennedy advanced a “reasonable expectations” analysis and, seemingly in direct contradiction of the majority opinion, further contended that “[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”<sup>273</sup> Explicitly recognizing the basis of much modern environmental law, Kennedy added that “[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.”<sup>274</sup> Justice Souter neither concurred nor dissented. He filed a separate “statement” in which he contended that the Court should have dismissed the writ as improvidently granted in part because of the improbable nature of the district court’s finding that the property that was the subject of the takings claim truly had no remaining economic value.<sup>275</sup>

Much speculation surrounded the Court’s opinion immediately afterwards. The way it was written, for instance, suggested the possibility that Scalia was working hard to hold on to his majority.<sup>276</sup> That would explain why the opinion would announce a per se test in sweeping terms, but then just as quickly abandon it with caveats such as nuisance law that seemed to reintroduce into the takings analysis the very kind of balancing test and harm/benefit analysis that the opinion purported to be rejecting. There was also reason to wonder why and how two relatively

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

269. *Id.*

270. *Id.* at 1032 n.18.

271. *Id.* at 1005.

272. *Id.* at 1032.

273. *Id.* at 1034–35.

274. *Id.* at 1035.

275. *Id.* at 1076 (Souter, J.).

276. See, e.g., Lazarus, *Counting Votes*, *supra* note 45, at 1118–19; Richard J. Lazarus, *Putting the Correct “Spin” on Lucas*, 45 *STAN. L. REV.* 1411, 1426–27 (1993).

new Justices, Kennedy and Souter, had nonetheless failed to join the majority. Justice White was, as in October Term 1986, the decisive fifth vote.

The Blackmun Papers here too tell a much fuller and richer story. At conference, the vote in favor of the landowner was not nearly as close or as divided as suggested by the final Court opinion. The conference vote had seven Justices in the majority and only two (Blackmun and Stevens) in dissent.<sup>277</sup> In addition to the four members of the Court who ended up joining Scalia's final opinion for the Court, Justices Kennedy and Souter also voted for the landowner, without much qualification.<sup>278</sup> Justice Kennedy asserted that he was "[with the Chief Justice]."<sup>279</sup> The Chief had previously commented during conference deliberations that "this type of [regulation] is not [sufficient] to bring [in the] nuisance line of cases" and that a claim was "[available] in terms of [the] just [compensation] cases, i.e., *Penn Central*."<sup>280</sup> Kennedy added that one "cannot write narrowly" and that the "*Agins* [language] is not correct and has [to be] explained."<sup>281</sup> In similarly voting for reversal, Justice Souter stated that "the [State] [Supreme Court] rule is wrong" and the case provided an opportunity "to begin to explain what we mean by a nuisance."<sup>282</sup> Finally, Justice O'Connor stated at conference that this is a "very [important] case" and, while voting for the landowner, also added that "there is a public nuisance exception."<sup>283</sup> According to O'Connor, the "[State] has to do [more]" to justify its development restriction.<sup>284</sup>

Although the case was argued on March 2, Justice Scalia did not circulate his draft opinion until early June,<sup>285</sup> three months later, leaving

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277. Harry A. Blackmun, Conference Notes, *Lucas*, No. 91-453 (Mar. 4, 1992) (The Blackmun Papers, *supra* note 2).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. Docket Sheet, *Lucas*, No. 91-453 (The Blackmun Papers, *supra* note 2); Antonin Scalia, First Draft Majority Opinion, *Lucas*, No. 91-453 (June [ ], 1992) (The Blackmun Papers, *supra* note 2). Justice O'Connor quickly joined the majority opinion in what she dubbed "this difficult case," while expressing some concern that his draft shifts the "burden of persuasion . . . to the state." Letter from Justice Sandra Day O'Connor to Justice Antonin Scalia, *Lucas*, No. 91-453 (June 2, 1992) (The Blackmun Papers, *supra* note 2). The Chief Justice joined the next day, while also asking Justice Scalia to "accommodate two relatively minor suggestions," including a more expanded discussion of the "'noxious use' line of cases" and an explicit reservation "with respect to the authority of government to destroy or damage property during the course of battle, or in some other comparable emergency, without having to pay compensation." Letter from Chief Justice William H. Rehnquist to Justice Antonin Scalia, *Lucas*, No. 91-453 (June 3, 1992) (The Blackmun Papers, *supra* note 2).

The final Court opinion reflects both these suggestions. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022-23 (1992) ("It is correct that many of our prior opinions have suggested that 'harmful

relatively little time for further internal deliberations before the Court adjourned at the end of that same month. The Blackmun Papers contain little formal correspondence between chambers but the correspondence that does exist, along with the conference notes, suggest why and how Justice Scalia may have lost his seven-Justice majority. Justice Scalia's per se approach pushed Justice Kennedy away, as it did Justice Souter, both of whom would have likely joined an opinion that pursued something more akin to the *Penn Central* balancing approach mentioned by the Chief Justice during conference. Scalia's inclusion, on the other hand, of the extended discussion of background principles and nuisance law seems likely to have been in response to Justice O'Connor, who mentioned the need for a nuisance exception at conference.<sup>286</sup> The majority opinion's explicit acknowledgment that restricting development in a flood hazard area would not be a taking also seems to have been directed to O'Connor's reported "alarm," emotionally expressed several years back during the *First English* conference, that it was not a taking to bar the reconstruction of a camp for handicapped children in a floodplain.<sup>287</sup> As late as three days before the final opinion was announced, Justice O'Connor was still writing Scalia about possible concerns with parts of the opinion.<sup>288</sup>

In sum, there was a cost to Justice Scalia's decision to craft the majority opinion in a more aggressive way. He lost the votes of two of the newer (and more junior) Justices on the Court, both of whom had expressed a willingness to join a majority opinion in favor of the

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or noxious uses' of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case."); *id.* at 1029 n.16 ("absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others").

286. Harry A. Blackmun, Conference Notes, *Lucas*, No. 91-453 (Mar. 4, 1992) (The Blackmun Papers, *supra* note 2).

287. See *supra* text accompanying notes 205-09. During oral argument in *First English*, Justice O'Connor expressed her concern about allowing construction in a flood hazard area. See Official Transcript Proceedings Before the Supreme Court of the United States at 26, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (No. 85-1199) (questions posed by Justice O'Connor) ("[D]o you think that local governments don't have authority to engage in flood control regulation? . . . And does the church plan to rebuild on a flood plain where people have been killed?").

288. Letter from Justice Sandra Day O'Connor to Justice Antonin Scalia, *Lucas*, No. 91-453 (June 26, 1992) (The Blackmun Papers, *supra* note 2) ("I notice that the second draft of *Lucas* now says, at page 11, note 6, that *Penn Central* was 'unsupportable.' I hope you will consider taking this out, as I am not prepared to disapprove of *Penn Central* as part of the resolution of this case. If you do not decide to remove it, please show me as joining all but note 6."); Letter from Justice Sandra Day O'Connor to Justice Antonin Scalia, *Lucas*, No. 91-453 (June 26, 1992) (The Blackmun Papers, *supra* note 2) ("At your suggestion, I have reread note 6 and I now accept your explanation that the criticism is addressed only to a portion of the state court's holding in *Penn Central*. With that understanding I withdraw my request.").

landowner. The opinion instead relied on the vote, never fully explained by any of the papers, of Justice White, the oldest member of the Court by far and, accordingly, the most likely to leave the Court soon thereafter. In fact, Justice White resigned from the Court one year later, which immediately raised legitimate questions concerning the continuing vitality of *Lucas*.

Even more importantly, whatever short term advantages might have been realized by the per se approach, Justice O'Connor's apparent insistence on a lengthy discussion of nuisance law, including the nuisance balancing test, seems to have rendered any such advantages no more than a Pyrrhic victory. The *Lucas* per se test was so narrowly drawn that, as established by subsequent case law, it almost never applies. The practical effect of its inapplicability is, ironically, to make lower courts less rather than more likely to find that a challenged regulation amounts to a regulatory taking.<sup>289</sup> The natural tendency of courts is to ask, first, whether a regulation constitutes a per se taking under *Lucas* and, after concluding that it does not, to conclude quickly that the regulation is constitutional. In the *Lucas* per se world, the *Penn Central* analysis became a mere afterthought, akin to a rational basis review that lower courts equated with a finding of constitutionality.

Had, by contrast, Justice Scalia been willing to embrace the kind of reasonable expectations analysis favored by Kennedy that Scalia abhors, the resulting precedent might well have proved more powerful and longstanding. Lower courts might well have taken note of the Court's willingness to use a balancing test to find a regulation to be an unconstitutional taking. And, following that lead, those same courts would likely have been more willing to do the same rather than to treat balancing approaches as necessarily toothless. Certainly, in other areas of law, ranging from abortion rights to the Fifth Amendment privilege against self-incrimination, conservative jurists have substantially furthered their agenda through incremental decisionmaking that, while less sweeping than overruling *Roe v. Wade*<sup>290</sup> or *Miranda v. Arizona*,<sup>291</sup> use balancing tests in support of their preferred substantive outcome. In this manner, both a woman's right to obtain an abortion and a criminal defendant's ability to rely on her Fifth Amendment right against self-

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289. See Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005). Soon after *Lucas* was decided, I suggested the possibility of just this unintended result. See Lazarus, *Putting the Correct "Spin" on Lucas*, *supra* note 276, at 1427 ("But, because environmental protection laws almost never result in total economic deprivations, that categorical presumption will rarely apply. Instead, the negative implication of the category's nonapplicability will dominate the lower courts' takings analyses. These courts will likely apply the opposite presumption that no taking has occurred.").

290. 410 U.S. 113 (1973).

291. 384 U.S. 436 (1966).



incrimination have been significantly curtailed since *Roe* and *Miranda*,<sup>292</sup> although the cases themselves remain formally the law of the land.

6. *Dolan v. City of Tigard* (1994)<sup>293</sup>

*Dolan v. City of Tigard* was the last regulatory takings case decided by the Court during Justice Blackmun's tenure. He left the Court at the close of October Term 1993, soon after *Dolan* was decided. The *Dolan* case was a sequel in many ways to the *Nollan* case because, like *Nollan*, the regulatory takings issue arose in the context of a challenge to a permit condition rather than, as in a case like *Lucas* or *Agins*, a challenge to the underlying land use restriction itself. In *Dolan*, the City of Tigard was conditioning a permit to allow the owner of a plumbing and hardware store to double the size of the existing store and to expand and pave the store parking lot. The proposed permit conditions were designed to address the increased traffic and risk of flooding that would be caused by such a commercial expansion. The city contended that the proposed expansion would result in additional traffic from more customers and increased risk of floods because the related construction would increase the amount of impermeable surface area and therefore of runoff. The conditions, accordingly, required dedication of land for (1) a public greenway along a creek to minimize flooding, and (2) a bicycle/pedestrian pathway in order to relieve traffic congestion in the area.<sup>294</sup> The Oregon Supreme Court had rejected the takings claims.<sup>295</sup>

In an opinion written by the Chief Justice, the U.S. Supreme Court reversed and remanded for further proceedings. The Court first held that the permit conditions did not suffer from the same constitutional flaw present in *Nollan* because they sought to serve the same legitimate ends—flood prevention and traffic congestion—furthered by the underlying development restriction. The *Nollan* nexus requirement was therefore met.<sup>296</sup> The constitutional infirmity, in the Court's opinion, related instead to whether the degree of exactions being demanded by the city was "rough[ly] proportional[]" to the projected impact of the proposed development.<sup>297</sup> The Court ruled that the city had not met its burden of proof with regard to either of the permit exactions. In particular, the city had failed to demonstrate why a private as opposed to a public greenway would not equally satisfy the risk of flood,<sup>298</sup> nor had the city demonstrated adequately that the proposed bicycle/pedestrian

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292. See, e.g., *United States v. Patane*, 542 U.S. 630 (2004); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

293. 512 U.S. 374 (1994).

294. *Id.* at 379–83.

295. *Id.* at 383.

296. *Id.* at 386–88.

297. *Id.* at 390–91.

298. *Id.* at 392–95.

pathway *would* rather than merely *could* address the traffic hazard problem.<sup>299</sup> Justices O'Connor, Scalia, Kennedy, and Thomas joined the Chief Justice's opinion. Justice Stevens filed a dissenting opinion, which Justices Blackmun and Ginsburg joined. Justice Souter also filed a dissenting opinion.

The oral argument in *Dolan* was one of Blackmun's last. The argument was on March 23, 1994, and Blackmun appeared two weeks later on April 6, 1994, with President Clinton to announce his retirement at the end of that Term.<sup>300</sup> Based, however, on Blackmun's oral argument notes in *Dolan*, the argument was not one of the more scintillating. During argument for counsel for the City of Tigard, Blackmun wrote "I am fighting drowsiness again."<sup>301</sup>

Even though the Chief Justice, and not Scalia, wrote the opinion for the Court, Blackmun's conference notes show that Scalia here too pushed the writing in a manner that diminished the majority. At conference, those voting in favor of the property owner included all those who ended up in the majority in the final opinion, but the conference majority also included Justice Souter.<sup>302</sup> Just like he had in *Lucas*, Justice Souter here too initially voted with the property owner. And, again, just as in *Lucas*, Souter left the majority and in *Dolan* dissented only after Justice Scalia in effect pushed him away. The only difference was that it was Scalia's own opinion for the Court in *Lucas*, and in *Dolan* it was the result of Scalia's persuading the Chief Justice to take a more aggressive stance that lost Souter's vote.

At conference, the Chief Justice first announced his vote to reverse in favor of the landowner, explaining simply that the City "has to do [more] than [it did] here" to justify the exactions being imposed, although a "precise fit is not [necessary]."<sup>303</sup> Justice O'Connor indicated that she "strongly" favored reversal and expressed concern with "what is going on in the communities!" and asserted that the "[state has the burden of proof]."<sup>304</sup> Justice Scalia stated that he was "[with the Chief Justice]," the "sky [would not] fall" if local government had to justify these kinds of exactions, and appeared to characterize what the City was doing here as "a shake-down."<sup>305</sup> In explaining his vote for reversal, Justice Thomas discussed how with "Society you have to share [company

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299. *Id.* at 395-96.

300. ARTEMUS WARD, DECIDING TO LEAVE—THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 207-09 (2003).

301. Harry A. Blackmun, Oral Argument Notes, *Dolan*, No. 93-518 (Mar. 23, 1994) (The Blackmun Papers, *supra* note 2).

302. Harry A. Blackmun, Conference Notes, *Dolan*, No. 93-518 (Mar. 25, 1994) (The Blackmun Papers, *supra* note 2).

303. *Id.*

304. *Id.*

305. *Id.*

to be] left alone and have peace.”<sup>306</sup> Finally, Blackmun’s notes are unfortunately limited about what Justice Souter said at conference. Other than describing the fact that Souter spoke “at length,” the conference notes state only that Souter “wish[ed he] had confidence to [affirm].”<sup>307</sup>

The subsequent correspondence between the chambers, however, makes clear why Justice Souter subsequently shifted positions. On May 12, 1994, the Chief Justice circulated the first draft of his opinion for the Court.<sup>308</sup> In that draft, Rehnquist decided to embrace a constitutional standard for exactions under the Takings Clause that was less rather than more demanding. While the state courts were divided concerning whether the condition must satisfy a “reasonable relationship” or a more demanding “substantial relationship” test to pass constitutional scrutiny, Rehnquist decided to adopt the “reasonable relationship” approach while concluding that the City had not met its burden under that standard under the facts of this case.<sup>309</sup> The draft opinion expressly stated: “We hold that a ‘reasonable relationship’ between the required dedication and the impact of the proposed development is sufficient for purposes of the federal Constitution.”<sup>310</sup>

Justice Scalia responded the next day with a letter to the Chief, with copies to all chambers, stating that while he “would like to join your opinion,” he also had “several problems.”<sup>311</sup> He expressed concern that the “reasonabl[e] relat[ionship]” test risked “watering . . . down” the “substantially advance” language of *Agins*.<sup>312</sup> He accordingly proposed that the Chief Justice use a “‘rough proportionality’ or ‘substantial proportionality’” standard instead because they would have the “advantage of emphasizing that it is indeed the *extent*, Draft at 10, or *degree*, Draft at 12, and not just the *nature* of the exactions that must pass muster.”<sup>313</sup> Scalia had several other suggestions related to the proposed proportionality standard. Finally, in addition to requesting that the Chief Justice eliminate a favorable reference to specific language from a state court ruling “that I cannot accept,” Scalia also asked for either more discussion or elimination of the draft opinion language that provided that the “benefit conferred” by the regulatory scheme is relevant to the

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306. *Id.*

307. *Id.*

308. William H. Rehnquist, 1st Draft Majority Opinion, *Dolan*, No. 93-518 (May 12, 1994) (The Blackmun Papers, *supra* note 2).

309. *Id.* at 15–16.

310. *Id.* at 16.

311. Letter from Justice Antonin Scalia to Chief Justice William H. Rehnquist, *Dolan*, No. 93-518 (May 13, 1994) (The Blackmun Papers, *supra* note 2).

312. *Id.*

313. *Id.*

proportionality analysis.<sup>314</sup> Justice Kennedy, in a follow-up letter to Rehnquist, generally endorsed Scalia's proposal, while acknowledging that the case was "difficult," and the need to "speak in somewhat general terms to allow the law to develop in the series of decisions that no doubt will arise in the wake of our holding here."<sup>315</sup>

Justice Souter, however, wrote a letter expressing his disagreement with Justices Scalia and Kennedy.<sup>316</sup> While agreeing with Scalia that "the opinion should make clear that the nexus required involves a question both as to nature and as to degree," Souter stated that his own "view is much closer to the one reflected in your current draft" than to Scalia's proposal. He continued that he agreed with Chief Justice Rehnquist (and Justice Stevens) "that the benefit conferred is an important part of [the] takings analysis" and that he would favor "plac[ing] the burden on the government entity to show that the burden is not grossly disproportionate to the burden being added by the proposed action by the private party as well as to the benefit being conferred on the private party." Finally, Souter made clear that he could "probably join an opinion using the 'reasonable relationship' test, but [was] wary of going any further," and that, as applied to this case, he agreed the public greenway easement may fail the test, and was willing to remand to require the City to make a better showing in support of the bicycle/pedestrian pathway.<sup>317</sup>

Notwithstanding Justice Souter's concerns, the Chief did agree to modify his opinion in most of the ways preferred by Scalia. Rehnquist even agreed to eliminate the "benefit" language although he advised that "[t]his is an area I know something about from my own private practice."<sup>318</sup> Apparently, in response to the Chief Justice's acquiescence to Scalia's request, which prompted the latter to join the opinion,<sup>319</sup> Souter declined to join the majority and went so far as to write in dissent instead.<sup>320</sup>

### C. SCALIA'S DELIBERATIVE ROLE

The pattern in all of the regulatory takings cases covered by the Blackmun Papers is generally the same. Once Justice Scalia erased some initial doubts he appears to have harbored about the proper role of the

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<sup>314</sup> *Id.*

<sup>315</sup> Letter from Justice Anthony Kennedy to Chief Justice William H. Rehnquist, *Dolan*, No. 93-518 (May 16, 1994) (The Blackmun Papers, *supra* note 2).

<sup>316</sup> Letter from Justice David H. Souter to Chief Justice William H. Rehnquist, *Dolan*, No. 93-518 (May 17, 1994) (The Blackmun Papers, *supra* note 2).

<sup>317</sup> *Id.*

<sup>318</sup> Letter from Chief Justice William H. Rehnquist to Justice Antonin Scalia, *Dolan*, No. 93-518 (May 18, 1994) (The Blackmun Papers, *supra* note 2).

<sup>319</sup> *Id.*

<sup>320</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 411-14 (1994) (Souter, J., dissenting).

Takings Clause, he pushed his colleagues to establish stronger precedent more protective of property rights and, to that end, he trumpeted bright line tests rather than balancing and more contextual analysis, as he has generally done in other areas of constitutional law. Indeed, Scalia pushed so hard that he frequently pushed away several Justices who might otherwise have been inclined to join a majority opinion in support of the takings claim. However, except on one occasion (*Keystone Bituminous*) when the upshot may have been a lost opportunity to convert a dissent into a majority opinion, none of Scalia's pushing appears to have resulted in a property owner losing in the Court. The result instead was narrow majorities and sometimes, as in *Lucas*, opinions that promised far more than they in fact delivered.

One can, of course, disagree about whether these results make a Justice more or less effective. Some might, for instance, argue that a Justice who seeks to promote a specific ideological agenda of any kind should try to get as much as possible out of every case before the Court. That may mean pushing as far as possible while keeping the minimum five vote majority. Under that view, a unanimous or lopsided vote in a case is, in effect, a wasted opportunity. The author of the opinion should have taken the opinion even further—as far as possible without losing the majority—in order to spend strategically the voting capital presented by the case.

My own view is quite different. First, as an institutional matter, the Justice who promotes division within the Court to further short term ideological ends often does the Court and the nation a disservice. To be sure, dissent can be extremely important, and not all cases need or should be unanimous. But neither should sharp dissent or narrow division be an aspiration. There is an incremental cost to the Court, in terms of the respect in which its rulings are held and the ability of the Justices to deliberate together in the kind of constructive way necessary to produce outstanding opinions. The Blackmun Papers make plain the value of such deliberations because of the enormous intelligence of the individual Justices and the breadth of experience and perspective they bring to their work. All nine Justices deliberating respectfully together produce far better opinions than small camps of chambers within the Court. Such a deliberative capacity is not inconsistent with respectful and even sharp dissent. But it can be broken down by efforts from within to maximize the differences to achieve immediate results or by affirmative appeals by individual Justices to those outside the Court to condemn the majority or certain members of the Court in exaggerated terms for their opposing views. In a letter to Chancellor Kent in 1837, Justice Joseph Story candidly explored the need for a Justice to strike a balance between the needs to express one's views and the needs of the Court as an institution:

While I continue on the Bench I shall on important occasions come out with my own opinions, for which I alone shall consider myself responsible. But I shall naturally be silent on many occasions from an anxious desire not to appear contentious, or dissatisfied, or desirous of weakening the influence of the Court.<sup>321</sup>

There is also often a strategic disadvantage to the precedent produced by thin margins or splintered opinions. Even when those rulings establish binding precedent upon the lower courts, they frequently represent the kind of ruling that is of limited long term precedential significance. As in *Lucas*, compromises necessary to satisfy a single Justice with enormous leverage on a closely divided Court ultimately deprive the opinion of any true coherence. Or, also as epitomized by *Lucas*, the Justice doing the pushing misses an opportunity to bring into his fold for the longer term someone who might prove a long-term ally, but instead becomes a long-term protagonist who feels no attachment to the ruling announced.

The Blackmun Papers create a strong impression that Justice Scalia has chosen the more divisive strategy. Whether in writing his own opinions for the Court or lobbying another Justice charged with that responsibility, Scalia appears to push hard from within. Nor is he at all reticent to take another Justice to task for failing to embrace Scalia's view of legal doctrine. He is a sharp and often barbed critic,<sup>322</sup> well known for producing the kinds of turns of phrases that capture the attention of the news media and sympathetic commentators outside the Court. The words he uses seem not so much intended to persuade future Justices in future cases as to hold up for condemnation, sometimes even ridicule, his colleagues, by the general public.<sup>323</sup> Ironically, those he seems

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321. WARD, *supra* note 300, at 62 (quoting Correspondence from Joseph Story to Chancellor Kent, June 26, 1837 (brackets omitted)).

322. See generally MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 61–66 (2005).

323. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting).

The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

*Id.*; *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) (“Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”); *Wabaunsee County v. Umbehr*, 518 U.S. 668, 688–89 (1996) (Scalia, J., dissenting) (“What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional?”); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that “animosity” toward homosexuality, *ante*, at 634, is evil. I vigorously dissent.”); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

to denounce most strongly are those whose votes he needs the most—members of the Court, such as Justice O'Connor, whose abandonment of conservative jurisprudence he believes to be the most indefensible.<sup>324</sup>

At least in the area of regulatory takings, however, there is reason to believe that Justice Scalia's approach has slowed rather than promoted the success of the property rights movement since he joined the Court. As described below, the Court's precedent since Justice Blackmun left the Court suggests that the state of the law is increasingly less rather than more favorable to the constitutional claims of property rights advocates. Justice Scalia's decision not to promote a strategy within the Court of reaching out to others to create stronger, broader coalitions, has led to a marked weakening of the precedent that he has trumpeted or created. It has produced *per se* rules that reflect his preferred approach but rules that because of their narrow applicability unwittingly make it harder, not easier, for property rights advocates to prevail.

### III. PROPERTY RIGHTS IN THE SUPREME COURT AFTER BLACKMUN: THE SCALIA BACKLASH

Since Justice Blackmun left the Court in 1994, the Court has ruled in several regulatory takings case. But rather than demonstrate a steady expansion or even entrenchment of the Court's rulings favorable to property rights in *Nollan*, *Lucas*, or *Dolan*, the overall trend has been just the opposite. The Court's opinions have been generally more favorable to government regulators, and they have made it more difficult for property rights advocates to prevail on their constitutional claims. On those occasions where property rights claims won, moreover, the precedent that was established was far less expansive than they had

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That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.

*Id.*; *Conroy v. Aniskoff*, 507 U.S. 511, 518–19 (1993) (Scalia, J., concurring) (“That is not merely a waste of research time and ink; it is a false and disruptive lesson in the law.”); *Schad v. Arizona*, 501 U.S. 624, 651 (1991) (Scalia, J., concurring) (“Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is ‘due.’”); *Cruzan v. Mo. Dep't. of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (“that the point at which life becomes ‘worthless,’ and the point at which the means necessary to preserve it become ‘extraordinary’ or ‘inappropriate,’ are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory”).

324. BISKUPIC, *supra* note 120, at 278–97.

hoped. By the close of the Court's most recent Term in June 2005, the Court had either substantially cut back or entirely eliminated both of the two-prongs of the takings test that Justice Powell established in *Agins* in 1980 and that Justice Scalia had sought to promote and expand into per se tests in *Nollan* in 1987 and *Lucas* in 1992.

A. *SUITUM V. TAHOE REGIONAL PLANNING AGENCY* (1997)<sup>325</sup>

The Court's ruling in *Suitum v. Tahoe Regional Planning Agency* in 1997 would seem a clear example of a property rights victory that was a disappointment. The case, even more than *Lucas*, presented a factual backdrop that underscored well the plight of owners of private property subject to very stringent environmental restrictions on development. The landowner in the case, Bernadine Suitum, owned property on land surrounding Lake Tahoe that she and her husband had purchased to build their "dream home." Land in the Lake Tahoe Basin had been subject to a series of increasingly stringent land use plans over time as the Tahoe Regional Planning Agency (TRPA) sought to regulate development to limit the amount of sediment runoff into the Lake. Those who built before the development restrictions became more stringent were able to build homes on parcels of land that would have been barred under the TRPA plan as finally adopted.<sup>326</sup>

The Suitums were not able to build before the tougher restrictions became effective, and under the new land use plan, their parcel was deemed too susceptible to increased sediment runoff to allow for residential development. The comprehensive land use plan, however, provided for so-called "transferable development rights" (TDRs) to parcels such as the Suitum's, which could be applied to allow for greater residential development than otherwise permitted on other less environmentally sensitive parcels in the Tahoe Basin. Under that plan, the Suitums received some TDRs as a matter of right, based on the restrictions imposed on their own parcels and others for which they were eligible to apply. With the TRPA's approval, the Suitums could either apply the TDRs themselves to other property they owned in the area or sell them to other property owners seeking to develop eligible property. Reportedly just before he died, however, Mrs. Suitum's husband insisted that she not simply sell the property, but instead build the home there that they had always wanted.

Unable to build, Mrs. Suitum brought a section 1983 regulatory takings claim in federal court.<sup>327</sup> The lower courts, however, dismissed

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325. 520 U.S. 725 (1997).

326. *Id.* at 728-31; Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court*, 12 J. LAND USE & ENVTL. L. 179, 184-86 (1997) [hereinafter Lazarus, *Litigating Suitum*].

327. *Suitum*, 520 U.S. at 728-31.



her claim for lack of ripeness. The trial court ruled that it could not assess the extent to which the land use restrictions had interfered with Mrs. Suitum's property rights until she had applied for and sought to sell her TDRs. Only then could the value of the TDRs be known and, therefore, the economic impact of the development restrictions be assessed. The Ninth Circuit affirmed on the ground that until Suitum had applied to transfer her TDRs, there had been no "final decision" in the application of the regulations to her property, as required for a ripe takings claim.<sup>328</sup>

The Supreme Court unanimously reversed, ruling that Suitum's takings claim was clearly ripe.<sup>329</sup> She did not have to apply for or otherwise seek to obtain or sell TDRs to bring her takings claim. But the opinion for the Court, written by Justice Souter, provided a far less significant win for property rights advocates than they had hoped. First, the Court reaffirmed the validity of the "final decision" ripeness requirement that several amici supporting Suitum had sought to use the case to narrow.<sup>330</sup> Second, while ruling that Suitum's suit was not barred by ripeness, the Court did so on narrow, case specific grounds. The Court held nothing more than that the TDR application was not a necessary part of a final decision when, as in *Suitum*, it was undisputed that the TRPA had finally determined that Suitum's parcel was in a zone in which development would not be permitted. She need not do anything more to establish a record of decision establishing the value of any TDRs to which she might be entitled under the plan.<sup>331</sup>

Even more significantly, the Court declined to reach the potentially much more important second question presented in the case, which was the relevancy of the value of the TDRs to Suitum's takings claim.<sup>332</sup> Relying on language in *Penn Central*, the TRPA argued that the value was relevant to the threshold question whether the land use restriction amounted to a taking. For that reason, the TRPA further argued that the value of the TDRs took the case out of the *Lucas* per se rule, because they showed that she had not been deprived of all "economically viable use" of her property.<sup>333</sup> Suitum's response was that because the TDRs did not amount to a "use" of her property, *Lucas* clearly applied, and that the value of the TDRs was relevant only to the question whether she had received "just compensation" for the taking of her property.<sup>334</sup>

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328. *Id.* at 731-33; Lazarus, *Litigating Suitum*, *supra* note 326, at 182-84; *see also* *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d 359 (9th Cir. 1996).

329. 520 U.S. at 744.

330. *Id.* at 735-41.

331. *Id.* at 742-45.

332. *Id.* at 728.

333. Lazarus, *Litigating Suitum*, *supra* note 326, at 199-201.

334. *Id.* at 195-99.

This second issue was far more significant than the ripeness “finality” issue because of its portent for the reach of *Lucas* and the use of techniques such as TDRs.<sup>335</sup> Souter’s opinion for the Court declined to reach the issue at all, which environmentalists and government regulators considered very good news. Justice Scalia, in a separate concurring opinion, joined by Justices O’Connor and Thomas, faulted the majority for failing to reach the TDR issue by assuming that their value was relevant to the threshold taking issue.<sup>336</sup> His separate concurrence also took explicit account of the potential relevance of the TDR valuation issue to property rights claims: “taking [TDRs] into account in determining whether a taking has occurred will render much of our regulatory takings jurisprudence a nullity.”<sup>337</sup>

For that same reason, however, it is all the more striking that Souter, and not Scalia, had the opinion assignment in the case. The most likely scenario is that the Chief Justice, as the senior Justice in the majority, assigned the opinion to Souter in the first instance.<sup>338</sup> To be sure, many factors go into opinion assignments, especially ensuring rough equity in numbers of Court opinions between Chambers, but the difference between a Souter assignment and a Scalia assignment was potentially quite huge. Souter, after all, had strongly disagreed with Scalia in both *Lucas* and *Dolan*, so much so that he ended up not joining the majority opinions in either case. The clear implication of the opinion assignment was that Souter would write the kind of narrow opinion that Scalia would disfavor, which is exactly what Souter did.

If given the opinion assignment, Scalia might well have been able to draft an opinion favorable to property rights advocates on the second TDR issue, but it would undoubtedly have been a sharply divided Court. Because Scalia’s concurring opinion in *Suitum* garnered three votes (including his own) and Rehnquist’s dissent in *Penn Central* strongly suggests his agreement with Scalia on the irrelevancy of TDR value to the threshold taking issue,<sup>339</sup> Scalia would presumably have needed to sway only one more Justice, most likely Kennedy. The Chief Justice decided against giving Scalia that opportunity. Rehnquist might have done so for many reasons, including the possibility that there was in fact

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335. *Id.* at 200–01.

336. *Suitum*, 520 U.S. at 745–50.

337. *Id.* at 750.

338. Of course, it is alternatively possible, in theory, that Scalia had the initial opinion assignment, but lost his Court for the broader ruling, and was relegated to a concurring opinion. Such an alternative scenario seems extremely unlikely. Neither the structure of the majority and concurring opinions nor the amount of time between argument and decision suggests that there was a change in authorship.

339. *Penn Cent. Trans. Co. v. New York City*, 438 U.S. 104, 150–52 (1978) (Rehnquist, J., dissenting).

another case about which Scalia strongly preferred to write.<sup>340</sup> Whatever the reason, the result was a case that ultimately did very little to promote the property rights agenda.

B. PALAZZOLO V. RHODE ISLAND (2001)<sup>341</sup>

*Palazzolo v. Rhode Island*, decided by the Court in 2001, was another regulatory takings case won by the landowner, but the Court's opinion portended a possible unraveling of the precedent that Scalia had established in favor of property rights in *Lucas*. At issue in *Palazzolo* was whether a landowner who purchased property after development restrictions were effective could subsequently bring a meritorious regulatory takings challenge against those same regulations.<sup>342</sup> The Rhode Island Supreme Court had ruled that the takings claim must fail.<sup>343</sup> The court ruled, first, the takings suit was not ripe because the landowner had not received a "final decision" regarding how the property could be used.<sup>344</sup> In light of its threshold ruling on ripeness, the state court could have ended its opinion there, but the court went on to explain that the landowner had no right to challenge as takings the application of regulations that became effective prior to his legal ownership of the property in question.<sup>345</sup> According to the court, that fact alone would defeat even a *Lucas* claim based on total economic deprivation because the land use restrictions being applied would constitute "background principles" of law under the *Lucas* exception to its own per se rule.<sup>346</sup> The court also added that the factual premise of Palazzolo's *Lucas* per se taking claim, in all events, lacked merit because its use was contradicted by undisputed evidence that he had \$200,000 in development value remaining on an upland parcel of the property.<sup>347</sup> Finally, the state supreme court elaborated that Palazzolo was further precluded from making a meritorious claim under *Penn Central*, for reasons analogous to why a *Lucas* claim would lack merit under the "background principles"

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340. Scalia's opinion assignment that month was instead to author the opinion for the Court in a case raising the question whether Congress had authorized the Secretary of Transportation to appoint civilian members of the Coast Guard Court of Criminal Appeals, and if so, whether this authorization is constitutional under the Appointments Clause of Article II. *Edmonds v. United States*, 520 U.S. 651 (1987). The Court was unanimous, except that Souter declined to join part of the Court opinion, and filed a separate concurrence. *Id.* at 666. Faculty colleagues commenting upon an earlier draft of this Article, and more familiar with the Appointments Clause issue at stake in *Edmonds*, believe that Scalia may well have harbored significant interest in writing the *Edmonds* opinion because it provided him with an opportunity to limit the Court's prior opinion in *Morrison v. Olson*, 487 U.S. 654 (1988), from which he dissented (*id.* at 697). See *Edmonds*, 520 U.S. at 661-65.

341. 533 U.S. 606 (2001).

342. *Id.* at 611.

343. *Palazzolo v. State*, 746 A.2d 707 (R.I. 2000).

344. *Id.* at 712-15.

345. *Id.* at 716.

346. *Id.*

347. *Id.* at 715.

exception to the per se rule—because he became the lawful owner of the land after the land use restrictions became effective, he could have had no “reasonable investment-backed expectations” that were adversely affected by this regulation.<sup>348</sup>

The U.S. Supreme Court reversed, in an opinion by Justice Kennedy that, like *Suitum*, rejected once again the government’s threshold ripeness argument.<sup>349</sup> But the landowner’s victory included in it a lot of longer term bad news for the property rights movement. First, the Court held that the landowner’s *Lucas* challenge in all events lacked merit because there was clearly some economic value to at least one part of his property.<sup>350</sup> The Court declined the opportunity, urged by the landowner and numerous supporting amici briefs, to conclude that the *Lucas* per se test was triggered to the extent that any part of the property was subject to a complete prohibition on development.<sup>351</sup> Second, Kennedy’s opinion for the majority stopped short of embracing the landowner’s argument that the existence of development restrictions at the time of purchase was wholly irrelevant to the takings inquiry. The majority concluded only that the state supreme court was wrong in saying that their existence automatically precluded a takings claim.<sup>352</sup>

Even more portentously, Justice O’Connor both joined the majority opinion and wrote separately to make clear her view that the existence of development restrictions at the time of purchase most certainly *would be* relevant to takings analysis under *Penn Central*. “[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.”<sup>353</sup> Because it was already fairly clear that Justice Kennedy thought the same based on his concurring opinion in *Lucas*, O’Connor’s opinion left no doubt that a solid majority of at least six Justices were ready to jettison *Lucas* as a leading case for takings analysis.<sup>354</sup> Instead, Justice Brennan’s opinion for

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348. *Id.* at 717.

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

350. The Court nonetheless did remand the case back to the lower courts for further proceedings to allow the landowner to argue that the development restrictions amounted to a taking under the *Penn Central* balancing test. *Id.* at 632. The state trial court recently ruled that the landowner’s claim lacked any merit under *Penn Central*, relying primarily on the absence of landowner reasonable investment backed expectations to develop the property in light of its physical characteristics (approximately one-half was below mean high water) and public nuisance law. *See Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*1 (R.I. Super. July 5, 2005).

351. Petitioner’s Brief on the Merits at 38–41, *Palazzolo*, 533 U.S. 606 (No. 99-2047); Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 26–29, *Palazzolo*, 533 U.S. 606 (No. 99-2047); Brief Amicus Curiae of the American Farm Bureau Federation and Rhode Island Farm Bureau in Support of Petitioner at 13–15, *Palazzolo*, 533 U.S. 606 (No. 99-2047).

352. *Palazzolo*, 533 U.S. at 626–30.

353. *Id.* at 633.

354. The dissenting (and partially concurring) opinions filed and/or joined by Stevens, Souter, Ginsburg, and Breyer, make clear their view that pre-existing laws are relevant to, and tend to defeat,

the Court in *Penn Central*, long resisted by Scalia, seemed destined to become, as Justice O'Connor now proclaimed, the "polestar" for the Court in takings cases.<sup>355</sup>

Justice Scalia also wrote separately in *Palazzolo*, but now for the purpose of taking deliberate and harsh aim at O'Connor, who ten years earlier had supplied him with one of his five votes in *Lucas*. Scalia minced no words in his challenge: "I write separately to make clear that my understanding of how the issues discussed in Part II-B of the Court's opinion must be considered on remand is *not* Justice O'Connor's."<sup>356</sup> But, what was becoming clear in light of *Palazzolo* was that Scalia had not just parted ways with O'Connor, he had lost the Court that he had once had in *Nollan*, *Lucas*, and to a certain extent in *Dolan*.

C. TAHOE-SIERRA PRESERVATION COUNCIL V. TAHOE REGIONAL PLANNING AGENCY (2002)<sup>357</sup>

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, Justice Stevens took full advantage of the table laid for him by Justice Scalia and turned it over. Stevens, who had been essentially relegated to a series of dissents, including in *Lucas*, took back the Court, and Scalia found himself in dissent with little left of his opinion for the Court in *Lucas*.

The sole issue in *Tahoe-Sierra* was whether a complete ban on development during a thirty-two month moratorium for the purpose of developing a comprehensive land use plan amounted to a per se *Lucas* taking of property in the absence of "just compensation." The taking claimed would, akin to the kind of taking described by the Court in *First English*, be a temporary taking limited to the time that the development moratorium was in effect. The landowners' legal arguments essentially sought to marry the best parts from their perspective of *First English*, in terms of temporary takings, with *Lucas*, in terms of a per se analysis.

The Supreme Court, however, rejected the argument in a sweeping opinion written by Justice Stevens for the Court, joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Neither Kennedy nor O'Connor wrote separately. No doubt to achieve just that end, the Stevens Court opinion borrows generously from the prior writings of both O'Connor and Kennedy, with numerous verbatim quotations. The upshot is an opinion that dramatically limits the reach of *Lucas* and, akin to Kennedy's "reasonable expectations" analysis in *Lucas* and

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takings claims by undermining the possible reasonableness of a landowner's development expectations. See *id.* at 637-45 (Stevens, J., dissenting in part and concurring in part); *id.* at 645-55 (Ginsburg, J., joined by Souter and Breyer, J.J., dissenting); *id.* at 654-55 (Breyer, J., dissenting).

355. *Id.* at 633.

356. *Id.* at 636.

357. 535 U.S. 302 (2002).

O'Connor's balancing analysis in *Palazzolo*, completely rebuffs Scalia's basic per se approach to takings law:

Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries," . . . designed to allow "careful examination and weighing of all the relevant circumstances."<sup>358</sup>

The *Tahoe-Sierra* case also appeared to put to rest Scalia's attempt, commenced in *Lucas*,<sup>359</sup> to have the Court revisit the *Penn Central* ruling that takings analysis must consider the "parcel as a whole"<sup>360</sup> and not just focus on the part of a landowner's property that is most burdened by regulation. As the Court acknowledged in *Lucas*,<sup>361</sup> the significance of the *Lucas* per se test is ultimately entirely dependent on how one defines the subject property. If one focuses just on the part of the property that is most burdened or just on a time period when the property is most burdened, one is more likely to find that there is a complete economic deprivation. But, if one looks to the parcel as a whole physically and/or temporally, one will rarely ever find such an economic wipeout. Such blanket, permanent prohibitions almost never happen. In *Tahoe-Sierra*, the Court ruled that one must look to the parcel as a whole both spatially and temporally.<sup>362</sup> Under that approach, there will almost never be the permanent elimination of all economic value necessary to trigger *Lucas*.

Finally, the *Tahoe-Sierra* majority likewise rejected the efforts of property rights advocates to expand the reach of the *Lucas* per se takings test by not having its application strictly tied to complete wipeouts of all economic value. Stevens' opinion for the Court made plain that the *Lucas* "holding was limited to 'the extraordinary circumstance when no productive or economically beneficial use of land is permitted.'"<sup>363</sup> The categorical rule does "not apply if the diminution in value [is] 95% instead of 100%."<sup>364</sup> Hence, "[a]nything less than a 'complete elimination of value,' or a 'total loss,' the Court acknowledged, would require the kind of analysis applied in *Penn Central*."<sup>365</sup>

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358. 535 U.S. at 325 (citations omitted). Justice Stevens' opinion for the Court in *Tahoe-Sierra* quotes or cites specifically to opinions authored by Justices O'Connor and Kennedy six and three times, respectively.

359. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

360. *Penn Cent. Trans. Co. v. New York City*, 438 U.S. 104, 130 (1978).

361. *Lucas*, 505 U.S. at 1016 n.7.

362. 535 U.S. at 331-32 ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety.").

363. *Id.* at 333 (quoting *Lucas*, 505 U.S. at 1017).

364. *Id.* at 333 (quoting *Lucas*, 505 U.S. at 1019 n.8).

365. *Id.* at 333 (quoting *Lucas*, 505 U.S. at 1019-20 n.8).

In sum, *Tahoe-Sierra* represented a major repudiation of what had been widely perceived as Justice Scalia's single greatest achievement on behalf of the property rights movement: his opinion for the Court in *Lucas* converting Justice Powell's reference in *Agins* to "economic viability" and creating a *per se* takings test. But what proved *Lucas*'s undoing was the opinion's lack of internal coherence and careful craftsmanship and Scalia's failure in *Lucas* and in subsequent cases to build alliances with other members of the Court. After *Tahoe-Sierra*, *Lucas* was largely relegated to its peculiar facts: a complete economic wipeout with no remaining economic value.<sup>366</sup> Because, moreover, hardly anyone believed those presumed facts to be true even in *Lucas* itself—because of the value such beachfront property inevitably has to neighboring landowners seeking to increase the lot size for their own pre-existing homes—its precedential reach became almost a nullity.<sup>367</sup>

#### D. LINGLE V. CHEVRON U.S.A. INC. (2005)<sup>368</sup>

Just this past Term, the Court followed up on *Tahoe-Sierra* with yet another sweeping rule that cut back yet again on the property rights movement's prior gains before the Court. While Scalia had based *Lucas* on the second "economic viability" prong of the takings test announced by the Court in *Agins*,<sup>369</sup> he had used the first prong of *Agins* to justify the heightened means-ends analysis he had established for the Court in *Nollan* and had pushed the Chief Justice to adopt for the Court in *Dolan*.<sup>370</sup> The first *Agins* prong stated that a land use regulation amounts to an unconstitutional taking if it fails to "substantially advance a

366. The "background principles" caveat has, moreover, increasingly been transformed into a powerful categorical defense to takings claims. See Blumm & Ritchie, *supra* note 289, at 321.

367. *Lucas*, 505 U.S. at 1033–34 (Kennedy, J., concurring).

The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. App. to Pet. for Cert. 37. The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beachfront lot loses all value because of a development restriction.

*Id.* (citations omitted). One of the more interesting documents in the Blackmun Papers relates to the question whether the landowner David Lucas had really been deprived of all economic value in his property as a result of the restrictions on development imposed on his two parcels. In a memorandum to the Justice written by one of Justice Blackmun's clerks in anticipation of the oral argument in the case, the clerk noted: "There is something fishy about this case." Clerk Memorandum to Justice Harry A. Blackmun, *Lucas*, No. 91-453 (Feb. 28, 1992) (The Blackmun Papers, *supra* note 2). The clerk strongly intimated that the very high prices that David Lucas reportedly paid for the property, prior to the restrictions, reflected the property's actual market value. She suspected that the reported increases in appreciation prior to his purchase were "too much to be believed," but were more likely the result of "speculative churning to raise the price," and, because Lucas was intimately involved in the real estate development in the area, "[i]t also seems very odd that someone who was in on the island's development from the start would wait to buy the *last* lots at the *highest* prices." *Id.*

368. 544 U.S. 528 (2005).

369. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

370. See *supra* text accompanying notes 311–15.

legitimate governmental goal.”<sup>371</sup> Scalia had invoked the “substantially advance” test in his opinion for the Court in *Nollan* to justify the ruling that the nexus requirement application to permit condition exactions was more stringent than mere rational basis review typically invoked in due process or equal protection challenges to economic legislation.<sup>372</sup> He did so again in *Dolan* in his letter to Chief Justice Rehnquist, which successfully persuaded him to require more than a “reasonable relationship” between the degree of exactions being demanded by the City and the projected impact of the proposed development that justified governmental regulation in the first instance.<sup>373</sup> The Ninth Circuit had, following Justice Scalia’s lead, embraced the property rights movement’s even more far reaching argument that the Takings Clause demanded a heightened means-end analysis for all governmental restrictions on private property, wholly outside the context of permit exactions.<sup>374</sup>

In *Lingle*, however, the Court in an opinion written by Justice O’Connor unanimously rejected the “substantially advance” language that it had, also unanimously, endorsed in *Agins*. The Court was candid in acknowledging its prior error: “On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined.”<sup>375</sup> But the Court also made clear, in no uncertain terms that the “‘substantially advances’ . . . prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.”<sup>376</sup>

Even the care that the *Lingle* Court took to make clear that it was not disturbing either *Nollan* or *Dolan* will likely have just the opposite effect.<sup>377</sup> The Court’s assertion that its “decision should not be read to disturb these precedents” was on a narrow reading of both cases.<sup>378</sup> As described by the Court, “the rule [*Nollan* and *Dolan*] established is entirely distinct from the ‘substantially advance’ test we address today” because “*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings.”<sup>379</sup> The irony of the Court’s preservation of *Nollan* and

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371. *Agins*, 447 U.S. at 260.

372. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835 n.3 (1987).

373. Letter from Justice Antonin Scalia to Chief Justice William H. Rehnquist, *Dolan*, No. 93-518 (May 13, 1994) (The Blackmun Papers, *supra* note 2) (“Elsewhere, however, *Nollan* pointed out that even in the context of general regulation (never mind individuated exaction) land-use restriction must ‘substantially advance legitimate state interests,’ quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added) . . .”).

374. *Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000).

375. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 2077 (2005).

376. *Id.* at 2082–83.

377. *Id.* at 2086–87.

378. *Id.* at 2087.

379. *Id.* at 2086–87.



*Dolan* is that the property rights movement had hoped to take the *Nollan* and *Dolan* rationale for heightened means-end analysis and persuade courts to apply it far beyond the narrow confines of “dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings.” They sought to apply them not only to all permit exactions, but also to police power regulations of property with or without exactions, as in *Lingle*.

Coming full circle, Scalia, too, joined with all the other Justices to produce a unanimous Court for its repudiation of *Agins*. The Blackmun Papers suggest that Scalia had initially recognized that much of what was being dubbed a takings issue was really a question of due process.<sup>380</sup> But, after expressing those concerns at conference soon after joining the Court, he later abandoned them in favor of promoting an aggressive reading of the Takings Clause. In *Lingle*, he appears to have abandoned that particular battleground in the takings revolution. Or, as he himself put it at oral argument in *Lingle*, the entire Court, including Scalia, was going to “have to eat crow.”<sup>381</sup>

#### E. SAN REMO HOTEL V. CITY AND COUNTY OF SAN FRANCISCO (2005)<sup>382</sup>

The regulatory takings case decided by the Supreme Court after *Lingle* is far from the most important, but it strongly suggests that the property rights movement may, at long last, be ridding itself of a procedural obstacle to the maintenance of regulatory takings claims. Even then, the potential for a later win was embedded in a case that property rights advocates lost unanimously in the Court.

The precise legal issue raised in *San Remo Hotel v. City and County of San Francisco* was not exactly a barn burner: whether an exception to issue preclusion should exist under the Full Faith and Credit Clause for issues decided in regulatory takings cases that had to be brought first in state court because of the Supreme Court’s ripeness ruling in *Williamson County*.<sup>383</sup> In *Williamson County*, the Court held in an opinion for the Court written by Justice Blackmun that a plaintiff could not maintain a section 1983 claim in federal court for a regulatory taking without first pursuing any available state court avenues available for just compensation.<sup>384</sup> The Court’s logic in *Williamson County* was straightforward. Unless and until a property owner has been denied just compensation potentially available for a regulatory taking in any available state administrative or judicial proceeding, there has been no

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380. See *supra* text accompanying note 241.

381. Official Oral Argument Transcript at 21, *Lingle*, 544 U.S. 528, No. 04-163 (Feb. 22, 2005).

382. 125 S. Ct. 2491 (2005).

383. *Id.* at 2495.

384. 473 U.S. 172 (1985).

violation of the federal Constitution's Takings Clause.<sup>385</sup> That Clause, after all, does not prohibit takings per se; it prohibits takings absent the payment of "just compensation."

The practical effect of the Court's procedural ruling, however, has been harsh on property owners bringing takings challenges who would prefer to maintain their lawsuit to vindicate a federal constitutional right in federal court.<sup>386</sup> If they maintain their federal constitutional claim first in state court to satisfy *Williamson County* ripeness requirements, they are precluded from relitigating the same claim in federal court.<sup>387</sup> And, if they instead seek formally to reserve their federal claim, by bringing only a state constitutional takings claim in state court, federal courts subsequently hearing their federal constitutional claim may decide to reject their federal claim pursuant to issue preclusion and the Full Faith and Credit Clause. Issue preclusion can still apply so long as the federal and state constitutional takings claims are effectively commensurate. Under issue preclusion, when there is no grounds for believing that the state constitutional takings issue is any different than a federally based one, a state court's rejection of a state constitutional regulatory takings claim compels a federal court's similar rejection of a federal takings claim.<sup>388</sup>

In *San Remo*, the Court had little trouble unanimously concluding that, notwithstanding any possible unfairness caused by denying property owners a federal forum for their federal constitutional claim, the circumstances did not warrant the Court's making an exception for regulatory takings claim under the Full Faith and Credit Clause.<sup>389</sup> Property rights advocates, however, can find some solace in the concurring opinion filed in the case by the Chief Justice, joined by Justices O'Connor, Kennedy, and Thomas.<sup>390</sup> Rehnquist's concurring opinion stated that the Court should reconsider the correctness of the Court's holding in *Williamson County* that plaintiffs must first seek just compensation in available state administrative and judicial fora. Rehnquist stated that "further reflection and experience lead me to think

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385. *Id.* at 194-97.

386. *See San Remo*, 125 S. Ct. at 2507 (Rehnquist, C.J., concurring, joined by O'Connor, Kennedy, and Thomas, JJ.).

387. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

388. *Allen v. McCurry*, 449 U.S. 90, 104 (1980).

389. *San Remo* had the additional complication that the plaintiffs had initially brought the case in state court and formally reserved the federal takings claim pursuant to *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964). *See San Remo*, 125 S. Ct. at 2501-02. The Court, however, found the *England* reservation ineffective because the plaintiffs in state court had not confined their litigation to "antecedent state law issues" but instead broadened it by putting forward facial and as-applied takings claims that, in effect, asked the state court to resolve the same federal issue nominally reserved in federal court. *Id.* at 2503.

390. *San Remo*, 125 S. Ct. at 2507 (Rehnquist, C.J., concurring, joined by O'Connor, Kennedy, and Thomas, JJ.).

that the justifications for [the *Williamson County*] state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic.”<sup>391</sup> It was only because the question whether *Williamson County* should be overruled in any respect was not before the Court in *San Remo*—because the parties had not raised it—that the Court did not reach the issue. Given the identity of those signing onto the Chief Justice’s concurring opinion, the possibility seems high of the Court’s taking the next step to overrule the *Williamson County* state-litigation ripeness requirement in a future case where the issue is raised. For reasons unknown, Justice Scalia did not join the Chief Justice’s opinion, but it seems unlikely that he would not be sympathetic to the Chief Justice’s views. Now that Chief Justice Roberts has replaced Rehnquist, and Justice Alito has replaced Justice O’Connor, the precise status of *Williamson County* is necessarily more murky again.

#### CONCLUSION

Since Justice Scalia joined the Supreme Court in fall 1986, the Court’s docket has reflected a concerted effort to establish legal precedent favoring landowners bringing regulatory takings challenges. The Court has decided a large number of significant regulatory takings cases and in almost every case but *Lingle* at the request of the property owner who had lost in the court below.<sup>392</sup> Notwithstanding the opportunity thereby presented, the resulting precedent has plainly been a disappointment to property rights advocates. The Court’s analytic framework for regulatory takings analysis remains today, just as it was in 1978, Justice Brennan’s opinion for the Court in *Penn Central*. Justice Scalia’s effort has largely failed to persuade his colleagues on the Court to eschew balancing in favor of a per se approach or heightened means-end analysis. His first major opinion favoring property rights, *Nollan*, along with the Court’s related decision in *Dolan*, have largely been confined to the narrow world of permit exactions of dedications of permanent physical easements. So too has Justice Scalia’s once landmark property rights victory in *Lucas* largely been whittled away. Almost twenty years after Scalia joined the Court, it is now 85-year-old Justice Stevens in the majority, while Scalia is mostly relegated to the dissent.

To the extent, moreover, that takings law has perceptibly shifted since the Court’s 1978 *Penn Central* ruling, it has arguably become more and not less difficult for regulatory takings plaintiffs to prevail. Once courts conclude that *Lucas* does not apply—either because there is no total economic deprivation or, increasingly, because of the existence of

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391. *Id.* at 2509–10.

392. The only other case granted at the request of the government defendant was *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

background principles—they have proven unlikely to find a taking instead under the *Penn Central* framework. The inapplicability of *Lucas*, in effect, saps the force of most takings claims. What Scalia hoped to serve as a per se takings rule proves, in its practical operation, to work more often as a per se no takings rule. Even *Penn Central* today is potentially less friendly to plaintiffs than when first announced by Justice Brennan for the Court in 1978. In light of the Court's recent precedent, especially *Tahoe-Sierra* and *Lingle*, and opinions of individual Justices such as Justice O'Connor's concurring opinion in *Palazzolo* and Justice Kennedy's concurring opinion in *Lucas*, it seems to have become harder for takings plaintiffs to prevail under the reasonable expectations analysis carved out by the Court in *Penn Central*.<sup>393</sup>

What the Blackmun Papers add to the story is how Justice Scalia may have appeared an effective champion of pro-property rights rhetoric to those outside the Court, but how much less effective he has been so far within the Court in furthering that agenda. He not only repeatedly failed in his efforts to build a workable coalition on the Court, but he also pushed away potential allies. The upshot was, in the first instance, precedent heavy on strong rhetoric yet light on staying power. The ultimate result was a splintering of those Justices, which included more than a simple majority intuitively sympathetic to property rights claims and the reconstruction of a new majority more often led by the once iconoclastic Justice Stevens.

To be sure, this Article's thesis is not that Justice Scalia, standing alone, caused the faltering of the property rights movement that has occurred within the Supreme Court during the past several decades. Of course, he did not. There were other forces that played significant, and likely even more significant, roles than Scalia himself. Circumstances far beyond the control of any individual Justice create the facts of the cases that are before the Court and therefore the merits of arguments for and against protection of private property rights. So too does the quality of the advocacy and the reasoning of the lower court opinions plainly make a big difference to the outcome in the Court.

Yet, the Justices themselves, especially their ability to work within the Court, clearly matter too. The general public as well as legal commentators typically limit their measure of a Justice on the Court to the formal votes he or she publicly declares when the Court announces its decision in specific cases. Some of the most important work of a Justice, however, is the work each does behind the scenes with other members of the Court. It is in private discussions—in individual chambers, between chambers, and at conference attended exclusively by

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393. See, e.g., *K&K Constr., Inc. v. Mich. Dept. of Env'tl. Quality*, 707 N.W.2d 365 (Mich. Ct. App. 2005) (rejecting takings claim challenging denial of permit to develop in a wetland).

the Justices themselves—when and where a Justice’s influence on the outcome is truly determined.

A Justice’s formal vote is, of course, significant, but it is not ultimately the measure of greatness of a Supreme Court Justice. All Justices, including the Chief Justice, have only one vote. To be a great Justice requires more than the ability to vote, no matter how intelligent those votes. It depends on a Justice’s ability to discuss and debate legal issues with the other Justices on the Court in a constructive fashion and to be persuasive in both oral presentation and written word within the Court. By this measure, Justice Scalia has been a disappointment for the property rights movement.

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