

# ANTONIN SCALIA’S FLAWED TAKINGS LEGACY

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## INTRODUCTION

This article examines the work of the late Justice Antonin Scalia in the field of takings. While I offer an unapologetically negative assessment, I acknowledge at the outset that Justice Scalia brought an unusual level of sophistication, energy, and determination to his work on the Supreme Court. He certainly influenced the Supreme Court’s jurisprudence in many fields of law.<sup>1</sup> All those who enjoy Supreme Court oral arguments will miss Justice Scalia’s incisive questions and his clever *bons mots*.

My basic conclusions are: (1) Justice Scalia’s contributions to takings law, though hardly insubstantial, turned out to be relatively modest; and (2) his takings work was deeply flawed, both as a matter of legal doctrine and because of its negative effects on society. Over his 30 years on the Court, Justice Scalia authored only two majority opinions in takings cases: *Nollan v. California Coastal Commission*,<sup>2</sup> and *Lucas v. South Carolina Coastal Council*.<sup>3</sup> *Nollan*, which established the “essential nexus” test for regulatory permit exactions,<sup>4</sup> is unquestionably a major decision. But the legal theory Scalia invoked to support this new test—that a regulation effects a taking if it fails to “substantially advance” a legitimate government interest<sup>5</sup>—was fundamentally flawed and ultimately rejected by the Court, including

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1. The Federalist Society 2016 National Lawyers Convention: The Jurisprudence and Legacy of Justice Scalia, held in Washington, D.C., on November 17–19, 2016, was devoted to examining Scalia’s contributions to the law. A boiled-down version of this article was presented at that convention. A draft of this article was also presented at the 19th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations, held at Tulane Law School in New Orleans, Louisiana, on November 4, 2016.

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

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

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

5. *Id.* at 834.

Justice Scalia himself.<sup>6</sup> To the extent Scalia saw *Nollan* and the “substantially advance” test as building blocks for constructing an expansive doctrine of regulatory takings—and there is substantial evidence that he did<sup>7</sup>—his project failed completely.

*Lucas* has proven more durable but is also both narrow and deeply problematic. *Lucas* established that a regulation that destroys the economic value of private real property is a “per se” taking.<sup>8</sup> Subsequent cases have read *Lucas* narrowly, and the case is subject to various qualifications, with the result that few claimants can successfully invoke the *Lucas* precedent. At the same time, *Lucas* does operate as an impediment to effective regulation of development in certain hazardous land areas, most notably coastal beaches of the kind at issue in the *Lucas* case itself. In this era of climate change, with the threat of a dramatic rise in sea level, the *Lucas* decision is a singularly maladaptive decision.

This article proceeds as follows: Part I provides an overview of Justice Scalia’s takings work on the Court; Part II describes how the Court’s 1980 decision in *Agins v. City of Tiburon*<sup>9</sup>—a brief unanimous decision *rejecting* a takings challenge to a zoning regulation—served, ironically enough, as Scalia’s Rosetta Stone for his attempts to reshape takings doctrine in a more conservative direction; Part III discusses the *Nollan* case and describes Justice Scalia’s effort to invigorate the “substantially advance” takings theory and the ultimate failure of that effort; and Part IV examines the *Lucas* decision and its jurisprudential and practical implications. The paper closes with a short conclusion.

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6. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005) (rejecting the “substantially advance” test as not appropriate to determine whether regulations amount to takings under the Fifth Amendment).

7. See *infra*, Part III (discussing Scalia’s authorship of *Nollan* and the “substantially advance” test).

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

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

## I. JUSTICE SCALIA'S TAKINGS WORK

By my count, Justice Scalia participated in 32 significant takings cases while he sat on the Court. These include 31 inverse condemnation cases<sup>10</sup> and one notable condemnation case, *Kelo v. City of New London*.<sup>11</sup> In these cases, he authored majority opinions for the Court,<sup>12</sup> plurality opinions,<sup>13</sup> dissents,<sup>14</sup> and concurrences,<sup>15</sup> and, of course, joined in opinions authored by other justices. It is a substantial body of work by any standard.

The two Court opinions Scalia authored in takings cases are both important. *Nollan* established that a permit “exaction” is a taking unless the government demonstrates an “essential nexus” between the government’s regulatory objectives and the challenged exaction.<sup>16</sup> The decision also launched a new branch of regulatory takings analysis later elaborated upon in *Dolan v. City of Tigard*,<sup>17</sup> and *Koontz v. St. Johns River Water Mgmt. Dist.*<sup>18</sup> While Justice Scalia only joined in majority opinions authored by other justices in these later cases, he was entitled to claim a pride of parenthood in those decisions. *Lucas* established a new per se takings rule for regulatory restrictions that deny an owner all economically viable use of his or her land.<sup>19</sup> While the *Lucas* precedent applies only in a narrow set of cases, the decision is significant not only as an important doctrinal innovation, but also for sending a signal that the Takings Clause imposes at least some (fairly) clear outer limits on government regulatory authority. Moreover, as revealed by Professor Richard Lazarus’s detailed exploration of the Blackmun papers, Justice Scalia sometimes played a significant behind-the-scenes role in shaping opinions that he had not been assigned to write.<sup>20</sup>

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10. See generally ROBERT MELTZ, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY, CONG. RESEARCH SERV. NO. 97-122 (2015), <https://fas.org/sgp/crs/misc/97-122.pdf> (providing a chronological history of U.S. Supreme Court takings cases and holdings).

11. *Kelo v. City of New London*, 545 U.S. 469, 494 (2005).

12. *Lucas*, 505 U.S. at 1006.

13. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 703 (2010) (Scalia, J., plurality).

14. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 241 (2003) (Scalia, J., dissenting).

15. *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (Scalia, J., concurring).

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

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

18. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

19. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

20. See Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 805–08 (2006) (describing Scalia’s behind-the-scenes efforts to press Chief Justice Rehnquist to adopt a more stringent standard for the review of exactions in the *Dolan* case).

But Scalia's output in the field of takings is not as substantial as I had initially supposed. Perhaps because Justice Scalia was a dominant figure in oral arguments before the Court in takings cases, I assumed that he had written more than two majority takings opinions. Part of the explanation for the paucity of Scalia majority opinions in takings cases is that he frequently voted in the majority with Chief Justice Rehnquist. As Chief Justice, Rehnquist held the authority to make opinion writing assignments in cases in which he was in the majority, and in many takings cases in which he was aligned with Scalia, he opted to write the majority opinions himself. During the period that Justice Scalia served on the Court, the Chief Justice authored six Court takings opinions—three times as many as Justice Scalia.<sup>21</sup> The authority of the senior justice in the majority (when the Chief Justice is not in the majority) to assign opinion writing responsibility explains why Justice Stevens authored six majority takings opinions during Scalia's tenure, again tripling Scalia's output.<sup>22</sup> But even other associate justices authored more Court opinions in takings cases than Justice Scalia during his tenure, including two who authored three opinions (Justices O'Connor<sup>23</sup> and Souter<sup>24</sup>), and two others who authored as many Court opinions in takings cases (two) as Scalia (Justices Ginsburg<sup>25</sup> and Kennedy<sup>26</sup>).

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21. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 159 (1998); *Bennis v. Michigan*, 516 U.S. 442, 443 (1996); *Dolan*, 512 U.S. at 377; *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301 (1989); *Pennell v. City of San Jose*, 485 U.S. 1, 4 (1988); *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304, 306 (1987).

22. *Kelo v. City of New London*, 545 U.S. 469, 470 (2005); *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323 (2005); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 218 (2003); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002); *Bowen v. Gilliard*, 483 U.S. 587, 589 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473 (1987).

23. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 530 (2005); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); *Hodel v. Irving*, 481 U.S. 704, 704 (1987).

24. *Verizon Comm'ns, Inc. v. F.C.C.*, 535 U.S. 467, 475 (2002); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728 (1997); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 604 (1993).

25. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012); *Babbitt v. Youpee*, 519 U.S. 234, 236 (1997).

26. *Palazzolo v. Rhode Island*, 533 U.S. 606, 610 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 693 (1999). These data actually overstate Justice Scalia's contribution to the Court's takings output relative to other justices, because these calculations only identify the Court opinions authored by other justices in takings cases while Scalia was serving on the Court. During Scalia's entire period of service on the Court, the breakdown of majority opinion writing responsibilities was as follows (in two cases during this period, no opinion commanded majority: *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 703 (2010); and *E. Enters. v. Apfel*, 524 U.S. 498, 502 (1998)): Chief Justice Rehnquist (6); Justice Stevens (6); Justice O'Connor (3); Justice Souter (3); Justice Ginsburg (2); Justice Kennedy (2); Justice Scalia (2); and one Court opinion each by Justices Marshall, White, Brennan, Alito, Thomas, and Chief Justice Roberts.

One of the reasons Scalia may have received few opportunities to write in takings cases was his tendency to vigorously contest certain issues with his fellow justices in a fashion that likely annoyed them and sometimes served to highlight an argument that he lost. Justice Scalia's concurring opinion in *Palazzolo v. Rhode Island*,<sup>27</sup> in which he vigorously contested a particular issue with Justice O'Connor, is a notable example. Justice Rehnquist may have preferred to write opinions for the Court in takings cases in which he was in the majority with Justice Scalia, not only because he found takings cases interesting, but because he preferred to avoid the discord a Scalia takings opinion might produce. Another explanation may be that Justice Scalia was not actually very interested in the takings issue. In contrast with some other fields of law in which Scalia had a carefully considered position, his work in the takings field does not appear to have proceeded from any deep conviction about how the law should develop. He never wrote academically at any length about takings, and his opinions reflect no grand theory.

These data show that Scalia was a very reliable supporter of private property rights advocates. He consistently sided with Court majorities supporting takings claimants.<sup>28</sup> He never authored an opinion of any sort in opposition to a takings claim or takings argument. He did not, of course, align with the property rights side in every case; in more than a handful of cases, he joined in unanimous decisions rejecting takings claims.<sup>29</sup> Justice Scalia's consistency on the takings issue is perhaps best captured by the fact that in no regulatory takings case while he was sitting on the Court did he stake out a position that was *less* supportive of the property rights argument than any other justice; put another way, during his tenure on the Court, there was no one on the Court more protective of property rights under the Takings Clause. By contrast, in *Kelo v. City of New London*, while both Scalia and Justice Thomas dissented from the Court's ruling upholding the use of the eminent domain power in that case, Justice Thomas argued for stronger limits on the use of eminent domain for economic development than Justice O'Connor, whose dissenting opinion Justice Scalia joined.<sup>30</sup>

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27. *Palazzolo*, 533 U.S. at 636 (Scalia, J., concurring).

28. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1005 (1992) (writing the opinion for the Court); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013) (joining the majority opinion).

29. *See, e.g.*, *Stop the Beach Renourishment, Inc.*, 560 U.S. at 702 (denying private owners compensation for an alleged taking caused by a beach renourishment project); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (denying a claim under the "substantially advance" test); *Concrete Pipe & Prods. of Cal., Inc.*, 508 U.S. at 602 (rejecting a takings claim based on liability imposed on a company for withdrawing from a multiemployer pension trust).

30. *Kelo v. City of New London*, 545 U.S. 469, 494, 505–06 (2005) (O'Connor, J., dissenting).

There is only one arguable exception to this unrelenting pro-property rights stance in regulatory takings cases. In the case of *San Remo Hotel v. City & County of San Francisco*,<sup>31</sup> the Supreme Court unanimously affirmed a ruling by the U.S. Court of Appeals for the Ninth Circuit that the issue preclusion doctrine barred a takings claimant from suing in federal court after previously litigating the same claim in state court. The Court held that the Full Faith and Credit Clause mandated this result, even though the plaintiff was compelled against its wishes to litigate the claim in state court under the so-called *Williamson County* doctrine.<sup>32</sup> While agreeing with the Court's conclusion on the issue preclusion question, Chief Justice Rehnquist, joined by three other justices, filed a concurring opinion expressing doubt about the validity of the *Williamson County* "state-litigation requirement," and stating that the Court "should reconsider" it.<sup>33</sup>

Conspicuously, Justice Scalia did not join in the Chief Justice's concurring opinion, notwithstanding the fact that overturning *Williamson County* is a high priority for property rights advocates, and Justice Scalia might have been expected to be sympathetic to the argument. Justice Scalia's position is an enigma, because, of course, the Justices need not, and generally do not, explain choices such as this. Perhaps Justice Scalia's well-established sympathy for federalism caused him to diverge from private property rights advocates on this forum-selection issue. Perhaps he thought that making a five-justice concurring opinion addressing an issue not squarely presented by the case was somehow unseemly. In any event, if this is an exception to Justice Scalia's unalloyed enthusiasm for the cause of private property rights, it is not much of one.

## II. *AGINS V. CITY OF TIBURON*: SCALIA'S TAKINGS ROSETTA STONE

A comprehensive review of Justice Scalia's takings work shows that the decision in *Agins v. City of Tiburon*<sup>34</sup> provided the foundation for his efforts to expand the scope of takings doctrine. The *Agins* Court articulated a two-part takings test: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."<sup>35</sup> *Agins* served as Justice Scalia's Rosetta Stone for

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31. *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 346–47 (2005).

32. *Id.* at 336–37. *See also* *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (ruling that a takings claim against a state or local government is not "ripe" in federal court until the entry of a final state judgment denying just compensation).

33. *San Remo Hotel, L.P.*, 545 U.S. at 348, 352.

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

35. *Id.* at 260 (citations omitted).

takings, in the sense that each of the opinions for the Court that he wrote explicitly built upon the two prongs of *Agins*. In *Nollan*, Scalia sought to invigorate the “substantially advance” test,<sup>36</sup> and in *Lucas*, he invoked the denial of all economically viable use language from *Agins* to articulate a new, per se test for regulatory takings.<sup>37</sup>

*Agins* was, on the surface, an improbable starting place for conservative innovation in takings law. The case involved a farfetched takings challenge to a zoning ordinance, which the Court unanimously rejected.<sup>38</sup> The Court apparently agreed to hear the case in the hope of resolving the long-simmering issue of the appropriate remedy for a regulatory taking—not for the purpose of resolving any issue related to the substantive standard for takings liability.<sup>39</sup> Concluding that the takings claim lacked merit, the Court resolved the case on that basis in a very short opinion, pretermittting the remedy issue.<sup>40</sup> The unimportance of the *Agins* case may help explain how Justice Powell, the relatively conservative author of the Court’s opinion, managed to seed the opinion with language that could bear pro-property fruit later.

At least with 20-20 hindsight, the two-part *Agins* test seems thoroughly jury-rigged. The first branch of the *Agins* test—that a regulation “effects a taking if the ordinance does not substantially advance legitimate state interests”<sup>41</sup>—transposes substantive due process means-ends analysis into takings law. The only precedent Justice Powell cited for this ostensible takings test was *Nectow v. Cambridge*,<sup>42</sup> in which the Court struck down a zoning regulation based on the Due Process Clause, not the Takings Clause. Moreover, the use of the adverb “substantially” suggested that this means-ends test, once transposed into takings, would be more demanding than the traditional rational basis test applied in due process cases since the New Deal.

Understood in historical context, the transposition of due process analysis into takings doctrine was not as misguided or remarkable as it may appear 35 years later. Takings doctrine was still in its infancy when *Agins* was decided. There was a lively debate on the Court about whether excessive regulation could ever support a compensation award under the

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36. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987).

37. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

38. *Agins*, 447 U.S. at 259.

39. *Id.*

40. *Id.* at 263.

41. *Id.* at 260.

42. *See Nectow v. City of Cambridge*, 277 U.S. 183, 188–89 (1928) (holding that, “. . . the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained”).

Takings Clause, or whether instead it should simply be viewed as invalid under the Due Process Clause.<sup>43</sup> Justice Stevens, in a concurring opinion in *Moore v. East Cleveland*, decided three years earlier, expressed the view that the Court had simply “fused” the restrictions of the Takings and Due Process Clauses “into a single standard.”<sup>44</sup> Against this backdrop, the *Agins* Court’s muddling of takings and due process doctrines had a perfectly respectable pedigree.

On the other hand, *Agins* broke new ground by stating that the takings test should be whether government action “substantially” advances a governmental interest,<sup>45</sup> a standard that is clearly more demanding than the traditional rational basis standard applied under the Due Process Clause. The Court derived this standard from the *Nectow* decision, which declared that a zoning restriction was unconstitutional “if it does not bear a substantial relation to the public health, safety, morals, or general welfare.”<sup>46</sup> By invoking this pre-New Deal precedent,<sup>47</sup> *Agins* implicitly revived the pre-New Deal level of constitutional scrutiny of economic regulation. Tellingly, as revealed by the Blackmun papers, then Justice Rehnquist sent a memorandum to Justice Powell after he circulated a draft of his *Agins* opinion, saying that he was “somewhat uneasy about the latitude” that would be conferred on the courts by the “substantially advance” language, and suggested the insertion of additional language that would “allow[] the states somewhat more latitude . . . .”<sup>48</sup> Justice Powell declined to modify his opinion,<sup>49</sup> and Justice Rehnquist ultimately said that his concern did not warrant the filing of a separate opinion.<sup>50</sup> But it did not pass Rehnquist’s notice that the first branch of the new *Agins* test could

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43. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197–99 (1985).

44. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring) (stating that *Nectow* “fused the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process nor for a public purpose without just compensation—into a single standard.”).

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

46. *Nectow*, 277 U.S. at 188.

47. The *Agins* Court also discussed *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), the Court’s seminal zoning decision holding that a municipal ordinance will survive a substantive due process challenge so long as it is not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”

48. Memorandum from Justice Rehnquist to Justice Powell (May 29, 1980) (on file in the Blackmun Papers with the Library of Congress).

49. Memorandum from Justice Powell to Justice Rehnquist (May 29, 1980) (on file in the Blackmun Papers with the Library of Congress).

50. Memorandum from Justice Rehnquist to Justice Powell (May 30, 1980) (on file in the Blackmun Papers with the Library of Congress).

have long-term ripple effects. If other justices shared Justice Rehnquist's reservations about the *Agins* opinion, there is no record of it.

While *Agins* is generally identified as the origin of the “substantially advance” takings test, Justice Powell's new test actually had roots in prior precedent. Three years earlier, in the important takings decision in *Penn Central Transportation Co. v. City of New York*, the Court stated that, “a use restriction on real property may constitute a ‘taking’ if [it is] not reasonably necessary to the effectuation of a substantial public purpose.”<sup>51</sup> The *Penn Central* formulation is similar to, though not identical to, the *Agins* “substantially advance” test, and, like the *Agins* test, also departs from the traditional rational basis standard. The *Penn Central* Court also cited *Nectow*<sup>52</sup> and Justice Stevens's concurring opinion in *Moore v. East Cleveland* approving the apparent conflation of takings and due process doctrines.<sup>53</sup> Thus, it is not farfetched to suggest that the *Penn Central* decision is the true origin of the “substantially advance” takings test. This conclusion is remarkable both because *Penn Central* is best known as the origin of a different, three-factor test,<sup>54</sup> and because the decision was likely intended to create no new law at all.<sup>55</sup>

The second branch of the *Agins* test—that a regulation effects a taking if it “denies an owner economically viable use of his land”<sup>56</sup>—had a similarly questionable origin: the final footnote (note 36) in the opinion for the Court in *Penn Central*. The footnote reads:

We emphasize that our holding today is on the present record, which in turn is based on *Penn Central*'s present ability to use the

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51. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 127 (1978). The *Penn Central* Court also stated that it was “implicit” in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), that this type of means-ends analysis could govern the takings question. *Id.* This description of *Goldblatt* is inverted because the case involved a due process claim, and the Court sought to resolve whether there was a due process violation by asking whether the regulation amounted to a taking or a due process violation. See Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle”*, 90 MINN. L. REV. 826, 832, 883–93 (2006) (tracing the deep historical roots of the confusion between due process and takings analysis).

52. *Penn Cent. Transp. Co.*, 438 U.S. at 127.

53. *Id.*

54. *Id.* at 124 (“[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.”) (citation omitted).

55. See *Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 301 (2004) (David Carpenter—law clerk to Justice Brennan—recalls that “one of Justice Stewart's clerks told me that you better not say anything and should make the opinion very, very narrow”).

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

Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be “economically viable,” appellants may obtain relief.<sup>57</sup>

This footnote was likely inserted to placate justices joining the majority who were concerned, given that Penn Central Company was operating under bankruptcy protection,<sup>58</sup> about the effect of the landmark designation on the terminal’s continued profitability. It is strange, on its face, for the Court in *Agins* to have relied on a strategic concession, offered by counsel in *Penn Central*, to support a general test for takings liability.

The test, based on economic viability, was both suggestive and quite vague. Other passages in *Penn Central* emphasized the importance of economic impact in regulatory takings analysis, and it stands to reason that a taking is more likely to occur when a regulation destroys an investment’s economic viability. But this test is also in considerable tension with the Court’s other statement in *Penn Central* “reject[ing] the proposition that diminution in property value, standing alone, can establish a ‘taking.’”<sup>59</sup> And, as a practical matter, how was one supposed to interpret and apply this test? Does a parcel of real property retain economic viability if it can be sold for a positive price in the market place? Or is an investment in property rendered nonviable when, considering the size of the owner’s equity stake, the venture will no longer yield a positive rate of return? Trying to put flesh on the bones of this second *Agins* test was the challenge that Justice Scalia took up in *Lucas* 12 years later.

Why did Justice Scalia conclude that *Agins* provided the appropriate framework for analysis as he approached the takings question shortly after he joined the Court? At the time, the *Agins* test stood alongside the better known three-factor analytic framework laid out in *Penn Central* three years earlier. The determination as to whether a regulatory restriction amounts to a taking, the *Penn Central* Court declared, requires consideration of its economic impact, the degree of interference with reasonable investment-backed expectations, and the character of the regulation.<sup>60</sup>

While the two tests obviously overlap, they also are quite different. *Agins* calls for a mean-ends analysis while the *Penn Central* test does not. *Agins* articulates a relatively narrow test for economic impact sufficient to

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57. *Penn Cent. Transp. Co.*, 438 U.S. at 138 n.36.

58. *Id.*

59. *Id.* at 131.

60. *Id.* at 124.

support a finding of a taking, while the *Penn Central* test appears broader. Part of the explanation for Justice Scalia's opting for *Agins* undoubtedly lies in his well-known preference for bright-line rules over balancing tests. *Penn Central* represents more of a multifactor approach than a true balancing test, but it is arguably more like a balancing test than the *Agins* test. Yet, if Scalia relied on *Agins* to refashion takings doctrine to be more rule-based, his commitment to that agenda was only half-hearted, at least as reflected in his *Lucas* opinion. In *Lucas*, he relied on *Agins* to support a per se takings when regulation eliminates all economically viable use; but he also stressed that the *Penn Central* framework would continue to apply in so-called partial takings cases in which the *Lucas* rule did not apply.<sup>61</sup> So much for bright-line rules.

The other alluring aspect of *Agins* from Justice Scalia's perspective may have been the "substantially advance" test and its utility for resolving the first case in which he wrote an opinion for the Court, *Nollan v. California Coastal Commission*. The *Nollan* case involved the question of what standard to apply when a coastal property owner's building permit required an easement across his beachfront property.<sup>62</sup> The Blackmun papers suggest that Justice Scalia had difficulty seeing the case as raising a regulatory takings issue, but favored reversal of the judgment below.<sup>63</sup> Sorting through the available takings precedents, Justice Scalia apparently identified the *Agins* "substantially advance" test as the solution to his dilemma.

### III. SCALIA'S ROMANCE WITH THE "SUBSTANTIALLY ADVANCE" TAKINGS TEST

One of Justice Scalia's most famous quips from the bench in a takings case was his observation during oral argument in *Lingle v. Chevron U.S.A. Inc.* that the Court would "have to eat crow."<sup>64</sup> The Court followed through on this prediction a few months later in a unanimous decision repudiating the "substantially advance" takings test, boldly announcing that "it has no proper place in our takings jurisprudence."<sup>65</sup> In this dramatic ruling, the Court repudiated a takings test that it had repeatedly articulated, and arguably applied to uphold several claims over a period of 25 years. As

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61. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1119 n.8 (1992).

62. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987).

63. See *Lazarus*, *supra* note 20, at 784 (interpreting Blackmun's notes of the *Nollan* conference to indicate that Scalia did not initially perceive *Nollan* as raising a regulatory takings question).

64. Transcript of Oral Argument at 21, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (No. 04-163).

65. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005).

Justice Scalia may have intended to acknowledge with his quip, the reversal was a particularly stinging rebuke of his own efforts to legitimize the “substantially advance” test. And the reversal was undoubtedly doubly embarrassing for Justice Scalia, a staunch opponent of a broad application of substantive due process doctrine, because the *Lingle* Court described the “substantially advance” takings claim as simply a garden-variety substantive due process claim masquerading as a takings claim.<sup>66</sup>

Justice Scalia first invoked the “substantially advance” test in his opinion for the Court in *Nollan v. California Coastal Commission*—striking down as a taking a permit condition requiring landowners to grant public access across the ocean beach in front of their private property.<sup>67</sup> The *Nollan* case is well known as the source of the so-called “essential nexus” test for evaluating the constitutionality of development exactions under the Takings Clause. But, in formulating this new test, Justice Scalia relied almost exclusively upon the *Agins* “substantially advance” formula. He began by observing that, if the Commission had simply appropriated a right of way across the Nollans’ property, then there would unquestionably have been a taking.<sup>68</sup> He then asked whether and under what circumstances the government could avoid takings liability if it imposed a requirement that the owner grant a right of way as a condition of approving the development. To answer this question, he turned to *Agins*, stating:

We have long recognized that land-use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den[y] an owner economically viable use of his land,” *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) (“[A] use restriction may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial government purpose”).<sup>69</sup>

Justice Scalia’s statement that the Court had “long recognized” this formula was patently disingenuous, given that the *Agins* decision he cited to support this test was only seven years old, and its progenitor, *Penn Central*, was only nine years old.

Scalia acknowledged that the Court had not “elaborated on the standards for determining . . . what type of connection between the

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66. See *id.* at 540 (“There is no question that the ‘substantially advances’ formula was derived from due process, not takings, precedents.”).

67. *Nollan*, 483 U.S. at 841–42.

68. *Id.* at 831.

69. *Id.* at 834 (alterations in original).

regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter."<sup>70</sup> The Court ruled that, in the context of a challenge to a permit condition, the substantially advance standard could only be met by showing that "the permit condition serves the same governmental purpose" that would be served by permit denial.<sup>71</sup> Absent such an "essential nexus," Scalia wrote, the exaction "becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."<sup>72</sup>

Four justices dissented.<sup>73</sup> They did not directly criticize the use of a means-ends analysis to assess whether the permit condition constituted a taking. Justice Brennan, author of the principal dissent, argued that the Court had departed without warrant from the traditionally deferential standard applied in evaluating the rationality of the government action. He criticized the Court for imposing "a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."<sup>74</sup> Referring to the Court's modern substantive due process precedents, he contended that it is "by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."<sup>75</sup> Justice Scalia responded by pointing to *Agins*:

Contrary to JUSTICE BRENNAN's claim . . . our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." *Post*, at 843, quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).<sup>76</sup>

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70. *Id.*

71. *Id.* at 837.

72. *Id.*

73. *Id.* at 842 (Brennan, J., dissenting, joined by Marshall, J.); *id.* at 865 (Blackmun, J., dissenting); *id.* at 866 (Stevens, J., dissenting, joined by Blackmun, J.).

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

75. *Id.* at 843.

76. *Id.* at 834 n.3.

Tellingly, none of the dissenters in *Nollan* (all of whom had joined the opinion for the Court in *Agins*) responded to Scalia's discussion of *Agins*, or sought to justify or explain away their decisions to join in that opinion. Having failed to object to Justice Powell's transposition of due process analysis into takings law, or his articulation of a rigorous standard of means-ends analysis, Justice Brennan and his colleagues were in a poor position to object to Scalia's reliance on *Agins*. In other words, Justice Powell may have successfully set a trap in *Agins*, and Justice Scalia sprung it. Moreover, Justice Brennan himself was in an especially poor position to object because his *Penn Central* decision supported, and indeed was the progenitor of, the *Agins* formula.

While *Nollan* was an important victory for property rights advocates, the precise scope and meaning of the ruling were open to debate. Insofar as the *Nollan* Court invoked and purported to apply the "substantially advance" test, the case could be read as endorsing broad application of the first branch of the *Agins* two-part test. In other words, any regulatory restriction could potentially be challenged as a taking on the theory that it failed to substantially advance a governmental interest. But the case was also susceptible to a narrower reading, as setting and applying the standard for evaluating a takings claim based on an exaction attached to the discretionary grant of a permit where the exaction requirement, if imposed independently, would have effected a taking. The latter eventually became the consensus reading of *Nollan*, but that outcome was by no means foreordained.

Justice Scalia's concurring opinion in a takings case decided the following year, *Pennell v. City of San Jose*,<sup>77</sup> illustrates the bold ambition that Justice Scalia held for the "substantially advance" test. The case involved takings, due process, and equal protection challenges to a city rent control ordinance permitting the city to consider "hardship to a tenant" in determining whether to approve a landlord's rent increase application.<sup>78</sup> The Court, in an opinion authored by Chief Justice Rehnquist, rejected all of the claims. The Court ruled that the takings claim was "premature" because the hardship provision had never been invoked to deny a requested increase in rent, and the due process and equal protection claims failed on the merits because the tenant hardship provision was "rationally related" to the city's legitimate goal of protecting tenants from burdensome rent increases.<sup>79</sup>

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77. *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988).

78. *Id.* at 4.

79. *Id.* at 9–10, 13–14.

Justice Scalia, joined by Justice O'Connor, took a very different tack. He agreed, without discussion, that the ordinance did not violate the Equal Protection Clause or the Due Process Clause. But he said that the Court erred in rejecting the takings claim as premature, and argued that the claim was meritorious. He thought that the claim was ripe because, insofar as the plaintiffs relied on the theory that consideration of tenant hardship failed to substantially advance a legitimate state interest, no further action was required to make that legal claim more concrete.<sup>80</sup> And he would have ruled for the plaintiffs on the merits because the provision, on its face, “singled” out landlords to bear the burden of solving a social problem that they had no hand in creating: “the existence of some renters who are too poor to afford even reasonably priced housing.”<sup>81</sup>

Justice Scalia's theory of takings liability—that private property can only be regulated if it is the direct source of the social problem being addressed—effectively revived a judicial theory (albeit one advanced under the Due Process Clause) sidelined since the New Deal era. For example, though he did not cite the case, Justice Scalia's analysis in *Pennell* is indistinguishable from the analysis in the Court's 1923 ruling in *Adkins v. Children's Hospital of the District of Columbia*.<sup>82</sup> In *Adkins*, the Court struck down a minimum wage law under the Due Process Clause on the ground that “it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do.”<sup>83</sup> Significantly, Justice Scalia agreed with the *Pennell* majority in that the Court should reject the Due Process Clause claim, presumably because he did not dispute the majority's observation that “we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare.”<sup>84</sup> Illogically, even though the “substantially advance” takings claim is—in its origins and in substance—a due process claim, Scalia took the position that the Court should have allowed the “substantially advance” takings claim to proceed.

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80. *Id.* at 15–19.

81. *Id.* at 21.

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

83. *Id.* at 558. The Court went on to say, “the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty.” *Id.*; see generally Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 620 (1996) (explaining the centrality of “cause/effect” analysis in *Lochner*-era review of social and economic legislation under the Due Process Clause).

84. *Pennell*, 485 U.S. at 13, 15.

Over the next 17 years, the “substantially advance” test slowly became embedded in the Court’s takings precedents through force of repetition. In *Dolan v. City of Tigard*,<sup>85</sup> the Court addressed a takings challenge to a requirement that the owner provide a floodway and a bike path as a condition of receiving a permit. Extending *Nollan*, the Court ruled that, to avoid a finding of a taking, a permit exaction must not only meet the “essential nexus” test, but also be “roughly proportional” to the projected impacts of development.<sup>86</sup> Like the *Nollan* decision, the *Dolan* decision cites *Agins* and recites the “substantially advance” test.<sup>87</sup> Other cases during this period simply assumed the validity of the “substantially advance” test by referring to it in dicta.<sup>88</sup>

Yet, the “substantially advance” test simultaneously suffered erosion in the high Court, most notably at the hands of Chief Justice Rehnquist. As discussed above, Rehnquist expressed doubts about the *Agins* test from the outset.<sup>89</sup> In *Dolan*, the Chief Justice cited the “substantially advance” takings test, but he did not make the test a central part of his analysis of the exactions issue as Scalia had in *Nollan*.<sup>90</sup> Instead, Rehnquist justified the rough proportionality test by invoking the unconstitutional conditions doctrine, and highlighted that the exactions at issue, imposed unilaterally, would have constituted per se physical takings.<sup>91</sup> Even though he recognized the existence of the “substantially advance” test, Rehnquist subtly undermined the idea that this test was necessary to the *Nollan/Dolan* inquiry.

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85. *Dolan v. City of Tigard*, 512 U.S. 374, 378 (1994).

86. *Id.* at 386, 391.

87. *Id.* at 385.

88. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 314 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016, 1023–24 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). Despite the length of time that the “substantially advance” test was riding high in the Supreme Court, the test gained remarkably little traction in the lower federal and state courts. Perhaps most notably, the U.S. Court of Appeals for the Federal Circuit, which has exclusive appellate jurisdiction over takings claims against the United States, effectively treated the test as nonexistent. The notable exception to this pattern was the U.S. Court of Appeals for the Ninth Circuit, which took up this takings theory with enthusiasm. One of the Ninth Circuit’s applications of the test generated the *Lingle* case (*Chevron U.S.A. Inc. v. Bronster*, 363 F.3d 846, 849, 854 (9th Cir. 2004)), leading the defendants, the Republican Governor, Linda Lingle, and the Attorney General of Hawaii, Margery Bronster, to petition the Court to reconsider the validity of the “substantially advance” test. The Court granted the petition and tossed away 25 years of misguided takings jurisprudence.

89. Memorandum from Justice Rehnquist to Justice Powell (May 29, 1980) (on file in the Blackmun Papers with the Library of Congress).

90. *Dolan*, 512 U.S. at 385.

91. *Id.* at 384–85.

Though it was not apparent at the time, private property rights advocates' victory in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*<sup>92</sup> seriously undermined the "substantially advance" test. The *First English* Court resolved the longstanding debate about the proper remedy for a regulatory taking by ruling that an award of "just compensation," rather than an injunction, is the proper remedy for a taking.<sup>93</sup> The Court's reasoning had subtle, but important, implications for the substantive standard for takings liability. The *First English* Court justified its ruling on the remedy issue by explaining that the Takings Clause is "designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of *otherwise proper* interference amounting to a taking."<sup>94</sup> By emphasizing that a valid takings claim assumes that the government has acted properly, the Court cast considerable doubt on the idea that the invalidity of a government action can provide a proper basis for finding takings liability. More specifically, this emphasis contradicts the idea that when a regulation fails to "substantially advance" a government interest, a finding of a takings claim should result. Justice Scalia joined the majority in the *First English* case, but by doing so he helped set the stage for interring the "substantially advance" test.

The "substantially advance" test suffered further erosion in several subsequent cases.<sup>95</sup> In 1998, in *Eastern Enterprises v. Apfel*,<sup>96</sup> five Justices stated that the Court should address questions about the legitimacy of economic legislation under the Due Process Clause, rather than under the Takings Clause.<sup>97</sup> Justice Kennedy explicitly noted the "uneasy tension" between his view that the claim in *Eastern Enterprises* should have been evaluated under the Due Process Clause and the *Agins* "substantially

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

93. *Id.* at 306–07, 314.

94. *Id.* at 315 (final emphasis added).

95. This process was aided and abetted, at least to some degree, by amicus briefs encouraging the Court to reexamine the "substantially advance" takings test. *See, e.g.*, Brief Amicus Curiae of League for Coastal Protection, Planning and Conservation League, Center for Marine Conservation, Chesapeake Bay Foundation, National Trust for Historic Preservation, National Wildlife Federation, and Sierra Club in Support of Respondents, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (No. 97-1235), 1998 WL 297461 (providing support to Respondents and arguing that the court of appeals erred in two ways: first, by relying on *Dolan v. City of Tigard*; and second, by concluding that the appropriate test to use is to determine "whether a government action furthers a legitimate public purpose").

96. *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

97. *Id.* at 522, 545 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting).

advance” test.<sup>98</sup> Justice Scalia joined in Justice O’Connor’s plurality opinion, which applied the traditional three-part *Penn Central* analysis and did not cite either *Agins* or *Nollan*.<sup>99</sup> The following year, in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*,<sup>100</sup> the Court, while affirming a finding of takings liability based on the “substantially advance” theory, declined to address the merits of the theory because the defendant had explicitly agreed to jury instructions including this test.<sup>101</sup> Authors of several separate opinions, most notably Justice Scalia, went out of their way to “express no view” about whether the *Agins* test was correct.<sup>102</sup> By at least 1999, even Justice Scalia apparently recognized that the jig was up with the “substantially advance” claim.

In 2005, in *Lingle*,<sup>103</sup> the axe finally fell on the “substantially advance” test. *Lingle* arose from a major oil company’s challenge of a Hawaii statute that controlled the rents that companies can charge independent gas station operators who lease company-owned stations.<sup>104</sup> The statute was designed to protect consumers from high gasoline prices.<sup>105</sup> The company contended that flaws in the design of the program prevented the act from serving its intended purpose—that is, that the statute failed to “substantially advance” a legitimate state interest.<sup>106</sup> The case presented the question of whether the “substantially advance” test represented a legitimate takings test.<sup>107</sup>

The Court unanimously concluded that it did not.<sup>108</sup> First, the Court observed that the “substantially advance” test had been derived from due

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98. *Id.* at 545. Justice Kennedy further remarked: “Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress’ judgment rather than on the availability of compensation . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.” *Id.* (Kennedy, J., concurring). Justice Breyer, for the four dissenters, wrote, “As th[e] language [of the Takings Clause] suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes ‘private property’ to serve the ‘public’ good.” *Id.* at 554 (Breyer, J., dissenting).

99. *Id.* at 503, 522–23 (O’Connor, J., plurality).

100. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

101. *Id.* at 704.

102. *Id.* at 732 n.2 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 753 n.12 (Souter, J., concurring in part and dissenting in part) (“I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments.”).

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

104. *Id.* at 532.

105. *Id.* at 534.

106. *Id.* at 534–35.

107. *Id.* at 537, 540.

108. *Id.* at 530, 532.

process precedents (e.g., *Nectow*), not takings precedents.<sup>109</sup> Second, the Court said that the “substantially advance” test does not fit in takings law, because the test asks whether a regulation is effective in achieving some legitimate public purpose, and does not address the core concern in takings law about the burdensomeness of government action.<sup>110</sup> Third, the Court reasoned that the “substantially advance” test was inconsistent with the requirement that a government taking serve a “public use”—that is, a legitimate public purpose.<sup>111</sup> Finally, the Court observed that the use of the word “substantially” in the test was problematic because it could “be read to demand heightened means-ends” scrutiny, which “would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited.”<sup>112</sup> The outcome of *Lingle* was that Justice Scalia’s effort to develop the “substantially advance” inquiry into a robust test for challenging regulations was defeated.

How should one judge Justice Scalia’s effort to develop the “substantially advance” test into a major, robust branch of takings analysis? Based on the amount of effort expended to develop the argument, and the Court’s ultimate abandonment of the test, the project was obviously a failure. While Scalia could point to *language* in prior decisions to support his effort, his legal position was untethered from the actual facts and holdings of the cases he relied upon, most notably *Agins*. Therefore, Justice Scalia’s misstep was the predictable result of an instinctive desire to push the law in a novel direction without adequately considering whether there was a valid doctrinal basis for the effort.

The deeper problem with Justice Scalia’s advocacy of the “substantially advance” test is that he was a fervent critic of substantive due process throughout his career, and yet the “substantially advance” test was, in substance, a substantive due process test. He called the doctrine of substantive due process a “judicial usurpation” of the democratic process<sup>113</sup> and an “oxymoron.”<sup>114</sup> In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>115</sup> he caustically observed that “[t]he great attraction of substantive due process as a substitute for more specific constitutional guarantees is that it *never* means never—because it never means anything precise.”<sup>116</sup> Of course, many of the same criticisms

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109. *Id.* at 540.

110. *Id.* at 542.

111. *Id.* at 543 (emphasis omitted).

112. *Id.* at 544.

113. *City of Chi. v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

114. *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring).

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

116. *Id.* at 725.

could be made of the “substantially advance” test—in particular, that the test authorized judicial second-guessing of the policy judgments of representatives of the other branches, as the Court emphasized in *Lingle*.<sup>117</sup> Thus, from Justice Scalia’s standpoint, the “substantially advance” test violated his deepest held views regarding the role of courts in our society. It is remarkable that he did not recognize what was afoot until the entire Court was compelled to “eat crow.”<sup>118</sup>

A final question is whether Justice Scalia’s error can be attributed to his reliance on Justice Powell’s subtle linguistic revival of searching means-ends analysis in *Agins*, or whether Scalia consciously sought to revive *Lochner*-type scrutiny of social and economic regulation surreptitiously by disguising a due process inquiry as a takings inquiry. For example, Justice Scalia may be viewed as carrying out Richard Epstein’s activist constitutional agenda, in particular his explicit call in the book *Takings* to revive *Lochner*.<sup>119</sup> I am inclined to give Justice Scalia the benefit of the doubt on this point. There is evidence that Justice Scalia opposed conservative judicial activism in the name of protecting economic rights, and explicitly opposed Richard Epstein’s aggressive agenda.<sup>120</sup> Justice Scalia was unquestionably ideologically inclined to uphold private property rights claims and constrain regulation. But, in supporting the “substantially advance” test, it appears that Scalia thought he was applying plausible precedent and not promoting a new doctrine, which of course he was.<sup>121</sup>

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117. *Lingle*, 544 U.S. at 544.

118. Transcript of Oral Argument at 21, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (No. 04-163).

119. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 128 (1985).

120. See Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG. (Apr. 17, 2005), <http://www.nytimes.com/2005/04/17/magazine/the-unregulated-offensive.html> (recounting debate between Richard Epstein and Antonin Scalia over the legitimacy of conservative judicial activism to defend economic rights).

121. An unfortunate coda to the demise of the “substantially advance” takings test is the Court’s decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), which contains language that can be read to suggest that the Court’s conservative majority (then including Justice Scalia) was willing to revive some form of the “substantially advance” test. See *id.* at 2600 (2013) (stating that the *Koontz* case “implicate[d] the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property”). See also John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573 (2015) (exploring the potential implication of *Koontz*). On the other hand, the Court made this statement in the context of explaining why so-called monetary exactions should be subject to the *Nollan/Dolan* standards, and perhaps it should be interpreted as confined to that relatively narrow context.

IV. THE *LUCAS* DECISION

Justice Scalia's other major contribution to takings law was writing the opinion for the Court in *Lucas v. South Carolina Coastal Council*.<sup>122</sup> The *Lucas* case presents a challenge in terms of assessing Scalia's legacy because it is a single opinion and the author of an opinion for the Court speaks for the Court and not only herself. This is an especially important factor to consider because the Court was sharply divided in *Lucas* and there is substantial evidence from the Blackmun papers that the final opinion reflects various modifications and compromises designed to retain a majority in favor of reversing the South Carolina Supreme Court.<sup>123</sup> Thus, Justice Scalia only deserves so much blame for the opinion's problematic features, which are numerous.

The case arose from a takings challenge brought by David Lucas based on the 1988 South Carolina Beachfront Management Act.<sup>124</sup> Lucas was a developer extensively involved in development of the Isle of Palms, a barrier island along the South Carolina Atlantic shore.<sup>125</sup> At the end of one major development project he purchased two coastal lots for his own account for approximately \$1,000,000.<sup>126</sup> Two years later, in response to concerns about coastal erosion, the South Carolina legislature enacted the Beachfront Management Act, establishing a setback line along the coast and prohibiting development seaward of the line.<sup>127</sup> As applied to Lucas, the effect of the statute was to prohibit him from constructing occupied improvements on either of his two lots.<sup>128</sup> Lucas filed suit in the South Carolina Court of Common Pleas seeking just compensation for the alleged taking of his property.<sup>129</sup>

The trial court ruled that Lucas had suffered a taking of his private property, relying primarily on a factual finding that the act had rendered Lucas's lots valueless.<sup>130</sup> The South Carolina Supreme Court reversed,<sup>131</sup> relying on U.S. Supreme Court precedent suggesting that harm-preventing regulatory restrictions on the use of land do not constitute takings.<sup>132</sup> The

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

123. *See, e.g.*, Lazarus, *supra* note 20, at 801–05 (explaining the drafting history of the *Dollan* decision and the Justices' votes).

124. *Lucas*, 505 U.S. at 1008–09.

125. *Id.* at 1006–08.

126. *Id.*

127. *Id.* at 1007–08.

128. *Id.* at 1007.

129. *Id.* at 1009.

130. *Id.* at 1007, 1009.

131. *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895 (S.C. 1991).

132. *Id.* at 899 (citing *Mugler v. Kansas*, 123 U.S. 623 (1887)).

U.S. Supreme Court granted Lucas's petition for certiorari<sup>133</sup> and, in a six-to-three ruling—with Justice Kennedy concurring in the judgment only—reversed.<sup>134</sup> The Court held that the government has a “categorical” duty to pay compensation when a regulation eliminates “all economically beneficial or productive use of land,” a test that the Court said was met in this case.<sup>135</sup> Scalia distinguished this categorical or per se rule from the “essentially ad hoc, factual inquiries” conducted under *Penn Central*.<sup>136</sup> However, the Court also ruled that, even when a regulation destroys all economically viable use, it will not result in a compensable taking if it is parallel with “background principles” defining the scope of vested property interests.<sup>137</sup> While expressing doubt that Lucas's claim would be barred by applicable background principles, the U.S. Supreme Court remanded the case to the South Carolina courts.<sup>138</sup> The South Carolina Supreme Court ruled that no background principle of South Carolina law barred Lucas from claiming a right to develop his property.<sup>139</sup> Thereafter, the State settled the case on terms favorable to Lucas.<sup>140</sup>

Scalia described the *Lucas* categorical takings rule as if it were an established part of the Court's takings jurisprudence. But the only authority he cited to support the test was the *Agins* case and other subsequent Court cases reciting the *Agins* two-part test.<sup>141</sup> *Agins* itself did not explicitly establish a new per se rule, which in any event was unnecessary to justify rejection of the takings challenge to the zoning regulation at issue in that case. At the same time, the two-part test articulated in *Agins* departed from the multifactor test announced three years earlier in *Penn Central*, suggesting more of a per se, or categorical rule. But Justice Scalia's statement that this categorical rule was well-established was just as disingenuous as his statement in *Nollan* that the Court had “long recognized” the “substantially advance” test.<sup>142</sup>

Justice Scalia also sought to justify adoption of a categorical rule based on first principles. First, he said that, from a landowner's point of view, a regulation that deprives the owner of all economic use is “the equivalent of

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133. *Lucas*, 505 U.S. at 1010.

134. *Id.* at 1005, 1032.

135. *Id.* at 1015.

136. *Id.* (quoting *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)).

137. *Id.* at 1030.

138. *Id.* at 1030–32.

139. *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992).

140. Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in *PROPERTY STORIES* (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

141. *Lucas*, 505 U.S. at 1015–16.

142. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987).

a physical appropriation” which did warrant per se treatment under established takings doctrine.<sup>143</sup> Second, he said that, “in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply ‘adjusting the benefits and burdens of economic life.’”<sup>144</sup> Finally, he thought the categorical rule had “affirmative support” because regulations that impose severe economic burdens “carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”<sup>145</sup>

Notwithstanding Scalia’s attempt in *Lucas* to draw a clear line, the decision is full of ambiguities and confusing limitations. In the first place, the scope of regulatory actions covered by the new rule was left quite vague. The trial court found that the regulation rendered the property valueless,<sup>146</sup> the South Carolina Coastal Council did not challenge that finding at the petition stage,<sup>147</sup> and the U.S. Supreme Court accepted this finding for the purpose of its review.<sup>148</sup> But it was implausible that the coastal lots were rendered truly valueless by the act, and several justices expressed discomfort with this factual premise.<sup>149</sup> Moreover, Justice Scalia used a wide array of linguistic formulations to describe the trigger for the per se rule, including “total taking,” eliminating “all economically productive or beneficial uses” of property, “total deprivation of beneficial use,” or requiring that property “be left substantially in its natural state.”<sup>150</sup> Justice Scalia ultimately used so many different formulations that it appears that he wanted to leave the resolution of *Lucas*’s scope to another day.<sup>151</sup>

*Lucas* also raises more questions than it answers about what it means to apply a “categorical” rule. The Court plainly intended to distinguish a *Lucas*-type taking from a *Penn Central*-type taking, but beyond that the

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143. *Lucas*, 505 U.S. at 1017.

144. *Id.* at 1017–18 (quoting *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)).

145. *Id.* at 1018.

146. *Id.* at 1007.

147. *Id.* at 1008.

148. *Id.* at 1007.

149. *Id.* at 1033–34 (Kennedy, J., concurring); *id.* at 1076 (Souter, J., statement).

150. *Id.* at 1017–18, 1030.

151. Subsequently, the Supreme Court provided some, but not too much, guidance on how to read *Lucas*. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court, in an opinion authored by Justice Kennedy, ruled that the landowner’s opportunity to build a single house on a 20-acre coastal property precluded application of the *Lucas* rule; while the government “may not evade the duty to compensate on the premise that the landowner is left with a token interest,” the Court stated, “regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’” *Id.* at 631. On the other hand, in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 330 (2002), the Court read *Lucas* more narrowly, emphasizing that it would only apply to a “complete elimination of value,” or a “total loss.”

opinion is not very clear. In particular, it remains unclear whether the reasonableness of the claimant's investment expectations remains relevant in a *Lucas*-type taking. Lucas was allowed to invoke a per se rule when he purchased his property and the South Carolina legislature subsequently passed a measure barring development of his property.<sup>152</sup> But the question remains: does the *Lucas* per se rule also apply when the regulation barring development was adopted first and then the owner purchased the property knowing about the regulations already in place? The courts have advanced conflicting answers to this question. For example, in *Good v. United States*,<sup>153</sup> a panel of the U.S. Court of Appeals for the Federal Circuit ruled that, when a regulation bars all economically viable use, it does not eliminate the requirement that a takings claimant have reasonable investment-backed expectations.<sup>154</sup> A year later, another panel of the same court—contradicting the holding of the first panel—ruled that the reasonableness of investment expectations is irrelevant in a *Lucas*-type case.<sup>155</sup> As this article was going to print, a petition for certiorari filed by the United States seeking resolution of this issue was pending in the Supreme Court.<sup>156</sup>

Finally, Scalia's decision in *Lucas* identified various exceptions to the per se rule that raise important questions about the practical scope of this precedent, as well as the wisdom of a per se rule in this context. The best-known, and most frequently litigated *Lucas* exceptions involve so-called "background principles" of property and nuisance law.<sup>157</sup> Government defendants have successfully raised "background principles" defenses in so many different cases that one commentator has questioned whether the *Lucas* exceptions have effectively swallowed the *Lucas* rule.<sup>158</sup> In addition, the Court's description of how nuisance principles should be applied in a total takings case suggests that the kind of balancing analysis that *Lucas* supposedly eschewed might be reintroduced into *Lucas* cases through the

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152. Michael Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 323 (2005).

153. *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

154. *Id.* at 1360–61.

155. *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000).

156. See *United States v. Lost Tree Vill. Corp.*, petition for cert. filed (Mar. 22, 2016) (No 15–1192), at I (presenting the following question: "Whether the court of appeals erred in holding that the absence of reasonable, investment-backed expectations could not be considered in determining whether the denial of the permit resulted in a categorical regulatory taking of the residual wetlands tract under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).").

157. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

158. See Blumm & Ritchie, *supra* note 152, at 324–25 (discussing the Court's evolution from a narrow exception under *Lucas* to a broader rule).

backdoor of “background principles.”<sup>159</sup> Moreover, even as “background principles” defenses have been raised with fair regularity, “background principles” of nuisance law have only played a small part in post-*Lucas* litigation. Instead, relatively clear-cut rules of property law have been raised far more frequently and with greater success as background principle defenses.<sup>160</sup> To an extent that neither Justice Scalia nor readers of *Lucas* initially contemplated, the nuisance defense has turned out to be a difficult, bordering on unworkable, doctrine in takings cases. As a general matter, nuisance law is malleable and vague, and it is difficult to predict how courts will apply it when some action is alleged to produce a nuisance. The litigation experience under *Lucas* suggests that the task of applying nuisance law becomes even more complicated when the government has barred an activity, triggering a takings lawsuit. Then, the issue becomes whether the activity, if it had been allowed, would have risen to the level of a nuisance. Given the speculation inherent in this inquiry, both litigants and courts have shied away from trying to apply a nuisance background principles defense in takings cases.<sup>161</sup>

The challenge of implementing the nuisance defense in *Lucas* cases has important implications for the viability of the *Lucas* per se test itself. There is a strong implication, in the law and as a matter of common sense, that regulations restricting actions that threaten the community or individual neighbors with harm should not be disabled by takings claims. In *Lucas*, Justice Scalia rejected South Carolina’s attempt to defend the Beachfront Management Act as a harm-prevention measure, fearing that allowing this defense would give governments too much latitude to impose onerous regulations and defeat takings claims.<sup>162</sup> He offered the nuisance defense as a substitute, hoping that traditional common law nuisance doctrine would provide an effective way of disposing of takings claims threatening serious harms.<sup>163</sup> But if the application of nuisance doctrine to justify barring takings claims is unworkable, then the *Lucas* safety valve for regulations controlling harmful activities threatens to collapse. If a meaningful defense to takings claims based on the harmful character of regulated activities is

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159. See *Lazarus*, *supra* note 20, at 800 (“Because the [Second] Restatement [of Torts] 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.”).

160. Blumm & Ritchie, *supra* note 152, at 340–41, 367.

161. See *id.* at 367 (maintaining that the nuisance defense requires a multifactor balancing test, which is why the Court has shied away from it).

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

163. *Id.* at 1029.

not available, then courts will be reticent to recognize *Lucas*-type takings claims.

Another problem with the *Lucas* exceptions arises from the ad hoc exceptions allowed by Justice Scalia, which do not fit into any recognizable background principle. The fact that Justice Scalia, or at least the Court majority, felt compelled to include these exceptions cast doubt on the plausibility of a per se rule to begin with. To avoid takings liability, the Court said,

[a] law or decree [that eliminates all economically viable use] must . . . 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>164</sup>

The Court explained the ambiguous phrase “or otherwise” with an equally ambiguous footnote:

[t]he *principal* “otherwise” that we have in mind is litigation 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.<sup>165</sup>

The use of the word “principal” obviously suggests further exceptions yet to be identified. The normative judgment underlying this catchall exception appears to be that certain government actions are either so necessary or important that they should be permitted to proceed without fear of takings liability. As a matter of public policy, this exception is surely defensible. But it is hard to know how to justify this exception within the *Lucas* framework. The fundamental question is whether the Supreme Court—as opposed to the legislature—has the authority to decide whether the government should have the power to enact legislation to prevent this type of harm.<sup>166</sup>

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164. *Id.* (emphasis added).

165. *Id.* at 1029 n.16 (quoting *Bowditch v. Boston*, 101 U.S. 16, 18–19 (1880)) (emphasis added).

166. The same analysis applies to the Court’s statement that “the corporate owner of a nuclear generating plant [would not be entitled to compensation] when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.” *Id.* at 1029. Again, the policy judgment underlying this exception seems unremarkable, but why should the Court have authority to recognize such an exception when the other branches of government, which have greater

The deepest flaw in the *Lucas* decision is the application of a per se takings rule to the facts of the *Lucas* case itself, knowing what we know now about climate change and the threat of rising seas.<sup>167</sup> Although not mentioned in any of the opinions in *Lucas*, the threat of sea level rise was lurking in the background of the case. Coastal erosion and accretion have been a constant along the South Carolina shore.<sup>168</sup> But, according to Professor Vicki Been, in the 1980's, South Carolina coastal officials attended a conference addressing sea level rise due to climate change.<sup>169</sup> In direct response to that educational experience, coastal officials supported enactment of the Beachfront Management Act. The Act drew a setback line along the shore that would be adjusted landward in response to erosion due to rising seas.<sup>170</sup>

Since the enactment of the Beachfront Management Act and the publication of Justice Scalia's *Lucas* opinion, the evidence regarding the likelihood of significant sea level rise has grown more compelling. Over the last several decades, the Intergovernmental Panel on Climate Change ("IPCC"), a United Nations group, has periodically published extensive reports documenting the projected impacts of climate change.<sup>171</sup> These reports have all predicted significant sea level rise in response to climate change, with the more recent studies predicting larger changes.<sup>172</sup> The most recent report published by the IPCC predicts an increase in sea level of between 0.2 meters and 1 meter by 2100.<sup>173</sup> However, the IPCC reports tend to be on the conservative side because they treat potential sea level rise due to the melting of glaciers and the polar icecaps as too unpredictable to support robust estimates.<sup>174</sup> Other studies predict even greater sea level

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expertise regarding the public health and safety issues associated with nuclear power, are disabled from doing so? *See id.* at 1027–28 (stating that, “in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale)”) (citing *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979)).

167. Been, *supra* note 140, at 306.

168. *Id.* at 300, 306, 310–11.

169. *Id.* at 307.

170. *Id.* at 308.

171. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 2 (Rajendra K. Pachauri et al. eds., 2015), [http://ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_FINAL\\_full\\_wcover.pdf](http://ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf).

172. *Id.* at 16 (maintaining that it is “*virtually certain*” that the sea level rise will continue).

173. *Id.* at 13.

174. Glenn Scherer, *Climate Science Predictions Prove Too Conservative*, SCI. AM. (Dec. 6, 2012), <https://www.scientificamerican.com/article/climate-science-predictions-prove-too-conservative/>.

rise.<sup>175</sup> The greatest flaw with the *Lucas* decision is that it effectively disables the nation from employing the most direct and effective way of managing the coastline in the face of rising seas.

#### CONCLUSION

Justice Antonin Scalia's contributions to takings doctrine are both meager and regrettable. As a jurisprudential matter, his effort to construct a robust test for takings liability based on the "substantially advance" test failed utterly as a result of its legal incoherence. The test was ultimately repudiated by the Supreme Court, including Justice Scalia himself. The *Lucas* decision remains a governing Supreme Court precedent, but the test's numerous qualifications and limitations make its future viability uncertain. In the meantime, the *Lucas* decision is a deeply maladaptive response to the single greatest long-term threat facing the nation and the world—climate change.

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175. See Tatiana Schlossberg, *Rising Sea Levels May Disrupt Lives of Millions, Study Says*, N.Y. TIMES (Mar. 14, 2016), <http://www.nytimes.com/2016/03/15/science/rising-sea-levels-global-warming-climate-change.html> (referencing studies that estimate sea level rise between three and six feet by 2100).