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## ***Tahoe's* Requiem: The Death of the Scalian View of Property and Justice**

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### I. INTRODUCTION

In the two latest “takings” cases decided by the United States Supreme Court,<sup>1</sup> the string of recent victories by landowners against government seems to have come to an abrupt halt. Although *Palazzolo v. Rhode Island*<sup>2</sup> and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>3</sup> were not unmitigated defeats for landowners, the Court’s broad assumption in these cases that an ad hoc, balancing test should be used to resolve conflicting private and public claims in regulatory takings cases was certainly not what these landowners sought.

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<sup>1</sup>See U.S. CONST. amend. V (“nor shall private property be taken for public use without just compensation”).

<sup>2</sup>533 U.S. 606 (2001).

<sup>3</sup>535 U.S. 302 (2002).

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Of course, the idea that an ad hoc, balancing test might be used in takings cases is not new. For many years this approach has remained a residual doctrinal category into which cases not covered by the Court's other, *per se* rules<sup>4</sup> would fall. For instance, in *Penn Central Transportation Company v. New York City*,<sup>5</sup> the Court famously stated that a takings analysis involves "essentially ad hoc, factual inquiries" which weigh "[t]he economic impact of the regulation on the claimant" and the "character of the governmental action."<sup>6</sup> However, commentators have rightly sensed that the change wrought by *Palazzolo* and *Tahoe* is more than the simple return to prominence of a traditional idea. In *Tahoe*, in particular, the direct and emphatic nature of the Court's underscoring of this test signals more. *Tahoe* signals, in some fundamental way, a shift in the way that property rights and their protection are viewed.

In this article, I shall explore what this shift is and why it has so deservedly caught our attention. I will argue that beginning in the early 1990s, and continuing for a decade thereafter, what I shall call the "Scalian view" of property and its protection dominated Supreme Court takings jurisprudence. Under this doctrine, of which Justice Scalia was the principal architect,<sup>7</sup> the idea of property is a concrete, objectively knowable, and immutable legal barrier which marks the boundary between protected individual interests and the permissible exercise of government power. If government transgresses this line, the individual is (almost always) deemed to have been wronged. And compensation is required, as a matter of "justice," under the takings clause.

With the advent of *Palazzolo* and *Tahoe*, this doctrine collapsed. I shall argue that after these cases, no longer will the idea of property be deemed to mark, with certainty, the point where protected individual interests end and collective power begins. No longer will the fact of individual loss – even significant individual loss – necessarily compel the conclusion that a wrong has occurred. And no longer will justice, in

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<sup>4</sup>Such *per se* categories include the permanent physical occupation of land (*see, e.g.,* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)) and the loss of all or substantially all economic value of land (*see, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) and *Palazzolo*, 533 U.S. at 606).

<sup>5</sup>438 U.S. 104 (1978).

<sup>6</sup>*Id.* at 124.

<sup>7</sup>*See, e.g.,* Lucas, 505 U.S. at 1003.

takings disputes, be seen in only “compensatory” terms.

The sudden collapse of the Scalian view might be seen as an abrupt or startling turn. In fact, I shall argue that its collapse was a very predictable product of the Court’s prior takings jurisprudence. Neither the Scalian view’s idea of property nor its conception of justice could be sustained as the range of potential takings expanded and acknowledgment of the complexity of property conflicts grew. The very ideas that form the core of the Scalian view served to doom it, from the outset, as a viable juridical principle.

The collapse of the Scalian view was thus an entirely inevitable outcome. It is also, I shall argue, an entirely welcome outcome, in our effort to reassert sensible notions of takings and justice.

## II. VISIONS OF PROPERTY AND VISIONS OF JUSTICE: THE RISE OF THE ‘SCALIAN VIEW’ – AND ITS FALL

In order to understand the changes that *Palazzolo* and *Tahoe* represent, we must first sketch the competing visions of property and justice that shadow takings cases, and how one – what I shall call the “Scalian view” – came to dominate the Supreme Court’s approach to takings in the past decade.

Two philosophically divergent understandings of property and its protection can be identified in our popular and legal culture. Under the first, or “conservative” vision, the protection of private property is championed, while under the second, or “progressive” vision, it is not. Property, as protected by law, is – under the conservative vision – an individual’s right to unfettered possession, disposition, and use of land, chattels, or other corporeal or incorporeal things. It is the conservative project to protect property rights through legal and political strategies from collective predation or change. Under the progressive vision, on the other hand, there is nothing wrong with altering rights in property should collective goals demand it. For the progressive, the legal recognition of the protective force of property is contingent upon the absence of countervailing social interests.

These characterizations are of course overdrawn to some degree. Those who adhere to the conservative vision do not deny, for instance, that

previously recognized property rights must yield when confronted by particularly compelling public interests such as human health or safety. And most progressives would admit, if pushed, that the idea of property as contingent and yielding is not, in fact, how they view property in many situations. For instance, their enthusiasm for the idea that welfare benefits and public employment may be property<sup>8</sup> and their condemnation of the *Poletown* case<sup>9</sup> were not driven by a philosophical predilection toward the subordination of the individual to collective interests, or a vision of property that reflects that view. In the main, however, those who adhere to the progressive view have been far more open to the social contingency of property rights than have their conservative counterparts. Seen in broad brush strokes, the conservative viewpoint envisions property as individually protective, separative, and autonomy enhancing, while the progressive sees it as contingent, yielding, and dependent on social forces.

The takings clause of the Fifth Amendment has functioned in many ways as the contemporary constitutional battleground for these competing visions of property. In most of the past three decades of Supreme Court jurisprudence, neither vision was clearly dominant. Conservative majorities often succeeded in asserting their view of property's protective ideal, and protected property owners' rights against development restrictions of land, physical invasions of land, restrictions on the occupation or devise of land, and other actions by government.<sup>10</sup> Progressive Justices and their allies, on the other hand, upheld historic preservation laws, endangered species laws, zoning laws, anti-subsidence laws, and other social measures, even though those laws impaired what would be widely regarded as traditional property

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<sup>8</sup>*See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (public employment) and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (same); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (public assistance payments).

<sup>9</sup>*Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (upholding the condemnation of a working class neighborhood for the construction of a General Motors assembly plant).

<sup>10</sup>*See, e.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Loretto*, 458 U.S. at 419; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

rights.<sup>11</sup>

The clear ascendancy of a particularly strong form of the conservative vision in takings cases was marked by the Court's decision in *Lucas v. South Carolina Coastal Council*<sup>12</sup> in 1992. This case dealt with a garden-variety, and therefore extremely important, question: whether ecologically based shoreline regulations which prohibit further development constitute a "taking" of the landowner's "property." In an opinion that upheld the landowner's claims, Justice Scalia took the opportunity to entrench – as a philosophical matter, at least – a sweepingly conservative vision of takings and property. This "Scalian view," as assumed in *Lucas* and later cases, involves the following axioms:

- Property is something that is concrete, that we can define and understand with precision.
- Property protects the individual's interests from collective powers; that is its essential function.
- The takings clause reflects these truths: it is simply an extension of this function.

As a result of these axioms, in a takings case we must ask the following questions:

- With what property did "owner x" begin?
- What property does "owner x" have now?
- Should "owner x" be compensated for this loss?
  - with this answer being "yes" unless the loss is too trivial; there are other benefits that "owner x" has reaped; or government has acted to protect (physical) human health or safety.

This Scalian view has a great strength: it vindicates the idea of

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<sup>11</sup>See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Agins v. Tiburon*, 447 U.S. 255 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Cent.*, 438 U.S. at 104.

<sup>12</sup>505 U.S. 1003 (1992).

“property as protection” in which all of us, on some level, believe. In this view, property means the protection of our possessions; it means the protection of our “expectations”; it means the protection of what our efforts, labor, good luck, cunning, and other circumstances have given us. The Scalian view’s attempt to clearly, cleanly, and boldly vindicate this view has powerful intuitive appeal.

However, behind this structure many problems lurk. Any legally cognizable conception of property involves a theory of rights, applied to a particular conceptual space, protected with a particular stringency, and established at a particular time.<sup>13</sup> Beyond these general statements, however, the particular contours of “property” are far from obvious. For instance, what do the “right to use,” “rights under state law,” or “traditional rights” really mean? Is an individual’s “property” the regulated land, the legally described parcel, the landowner’s holdings, or some other idea? Should all “rights” that are “property” be protected with equal vigor, or should some be protected more strongly than others? Are the “rights” that comprise “property” those that existed at the moment of purchase, the moment of transfer, or some other moment in history? What of regulations that were authorized, but not yet issued? What of conditions that existed but were, at the moment chosen, not yet recognized?

In the face of those questions, the Scalian view of property and takings remained undaunted. In *Lucas*,<sup>14</sup> *Dolan*,<sup>15</sup> *Phillips*,<sup>16</sup> *Eastern Enterprises*,<sup>17</sup> *City of Monterey*,<sup>18</sup> and other cases, assumptions were simply made about the nature of protected individual interests. And once these assumptions were made, all that remained (as a practical matter) was the application of a compensatory remedy.

In 2001, however, a serious crack in this structure appeared. In *Palazzolo v. Rhode Island*,<sup>19</sup> a landowner was precluded from developing his parcel in the manner that he wished by a state wetlands-preservation

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<sup>13</sup>See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 16-33 (2003).

<sup>14</sup>*Lucas*, 505 U.S. at 1003.

<sup>15</sup>*Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>16</sup>*Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

<sup>17</sup>*Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

<sup>18</sup>*City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

<sup>19</sup>533 U.S. 606 (2001).

law. The most prominent issue was whether a landowner could challenge, as a taking, land use regulations that were already in place when he acquired the property. Most judges and commentators had rejected such claims on the ground that owners who took title with knowledge of limitations in place could not claim injury from lost value. *Palazzolo* rejected this analysis. Writing for the majority, Justice Kennedy asserted that the allowance of such claims was required by “the nature of property.”<sup>20</sup> Property rights (in this view) are an abstract ideal, which the takings clause protects from impairment. It makes no difference whether this claim is asserted by the one who owns the property when the regulation is imposed or by a later owner. Government cannot escape from a takings claim by reason of the sale or other transfer of the property. If a wrong has been done, the takings remedy is available not only to the person who holds title at that moment, but also to “[f]uture generations.”<sup>21</sup>

Up to this point, the case seems to be yet another triumph for the Scalian view of takings and property. We have a robust, compensatory takings guarantee for state interference with a concretely conceived and rigidly defined conception of property. Other elements in Justice Kennedy’s opinion, however, left the situation oddly open-ended. “The right to improve property, of course, is subject to the *reasonable* exercise of state regulatory authority, including the enforcement of valid zoning and land-use restrictions.” The ultimate inquiry, he wrote, is whether a particular state action “is *so unreasonable or onerous* as to compel compensation.”<sup>22</sup> To determine this question the state court should, on remand, “address ... the merits of petitioner’s claim under *Penn Central*.”<sup>23</sup>

The idea that the “onerousness” of government action might be dispositive in takings cases is in keeping with the Scalian view, since it makes what the claimant has lost the focus of the takings analysis. With the addition of the “*reasonableness*” of government action, however, comes a possibly very different inquiry. For instance, wetlands preservation laws that are “onerous” may nonetheless be “reasonable,” if conditions otherwise demand them. This seemingly broad formulation implies that *other* considerations or interests, especially public interests, can trump a property

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<sup>20</sup>*Id.* at 627.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* (emphasis added).

<sup>23</sup>*Id.* at 630.

owner's otherwise legitimate complaint about a particularly onerous regulation.

Indeed, the Court's endorsement of the *Penn Central* test reinforces this suggestion. *Penn Central* is a famous, pre-Scalian-view case that advocated an ad hoc, balancing-of-interests approach to takings questions.<sup>24</sup> Under this approach, it is not the property owner's interests alone that count in the takings calculation.

Whether *Palazzolo*'s majority opinion changed the assumptions behind takings law was the subject of dueling concurrences by Justices O'Connor and Scalia. In Justice O'Connor's view, "investment-backed expectations" – the idea which the Court had used in recent years to capture the sphere of protected individual interests – are "not talismanic under *Penn Central*." Rather, "[e]valuation of the degree of interference with investment-backed expectations ... is [only] one factor" in a more complex calculation. In her view, "[t]he purposes served [by the government action], as well as the effects produced, ... inform the takings analysis."<sup>25</sup> Justice Scalia resisted such murkiness and insisted that the focus remain on the owner's loss of value. Indeed, in his view, to allow government interests to swamp the property owner's loss "would [be to] ... giv[e] the malefactor the benefit of its malefaction."<sup>26</sup>

If *Palazzolo* suggested a retreat from the Scalian view, the Court's opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>27</sup> openly declared its abandonment. In *Tahoe*, the narrow question before the Court was "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation."<sup>28</sup> On its face, the case seemed to present an ideal opportunity for yet another application of the Scalian view of takings and property. All development of the petitioners' lakeshore lots was prohibited during various moratoria, depriving petitioners, during those periods, of all reasonable economic

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<sup>24</sup>See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>25</sup>*Palazzolo*, 533 U.S. at 634 (O'Connor, J., concurring).

<sup>26</sup>*Id.* at 637 (Scalia, J., concurring).

<sup>27</sup>535 U.S. 302 (2002).

<sup>28</sup>*Id.* at 306.

value.<sup>29</sup> In addition, the Court had previously held that temporary takings of all beneficial use of land were compensable.<sup>30</sup> If the focus remained on the landowners' losses, the complete loss of use for a period of years seemed to present a strong case for compensation.

Indeed, in their Supreme Court appeal, the landowners urged an analysis of the case that tracked the Scalian view of property and takings exactly. They contended that “the mere enactment of a temporary regulation that ... denies a property owner all viable economic use of her property gives rise to an unqualified constitutional obligation to compensate her for the value of its use during that period.”<sup>31</sup> Because the landowners had unquestionably borne a loss, in this sense, they argued that there was “no need to evaluate the landowners' investment-backed expectations” more deeply, or to consider “the importance of the public interest served by the regulation.”<sup>32</sup>

Surprising many observers, the *Tahoe* majority expressly rejected this invitation and concluded, instead, that the case was “best analyzed within the *Penn Central* framework.”<sup>33</sup> In his majority opinion, Justice Stevens drew a sharp distinction between “physical takings” – such as those resulting from a condemnation proceeding or a physical appropriation – and “regulatory takings,” which “prohibit a property owner from making certain uses of her ... property.”<sup>34</sup> The Court's jurisprudence “involving condemnations and physical takings is as old as the Republic” and involves,

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<sup>29</sup>The challenged prohibition on development lasted for at least 32 months, or as long as 6 years, in the views of various Justices. In the majority's view, the lower courts' rulings on the moratorium that was in effect from August 24, 1981, until August 26, 1983, and the one that was in effect from August 27, 1983 until April 25, 1984, were the only rulings encompassed within the Supreme Court's limited grant of certiorari. *Id.* at 306, 313-14. The dissenters argued that the effects of the 1984 Regional Plan (which succeeded these moratoria) were properly before the Court as well. That Plan, which – in theory – permitted construction, was enjoined by the District Court as violative of Tahoe Regional Planning Agency's own environmental standards. *See id.* at 312. In the dissenters' view, the Agency was the “moving force' behind petitioners' inability to develop [their] ... land” through 1987. *Id.* at 346-47.

<sup>30</sup>*See* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

<sup>31</sup>*Tahoe-Sierra*, 535 U.S. at 320.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 321.

<sup>34</sup>*Id.* at 321-22.

for the most part, “*per se* rules” of “straightforward application.”<sup>35</sup> Regulatory takings jurisprudence, by 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>36</sup> Although the landowner may clearly lose value as the result of regulation, that fact is not dispositive of the takings question. Rather, that loss must be evaluated in the context of the public program in which it occurs, and of that program’s adjustment of economic burdens and benefits.<sup>37</sup>

Quoting liberally from Justice O’Connor’s concurrence in *Palazzolo*, Justice Stevens identified the principles set forth in *Penn Central* as the “polestar” in determining regulatory takings claims.<sup>38</sup> “‘The Takings Clause requires careful examination and weighing of all the relevant circumstances ... .’”<sup>39</sup> In this calculation, “‘interference with ... investment-backed expectations’” – that is, the landowner’s loss – is only “‘one of a number of factors that a court must examine.’”<sup>40</sup> Only if the regulation effects “the permanent ‘obliteration of the value’ of a fee simple estate” is the landowner’s loss dispositive of the takings question.<sup>41</sup> Since the moratoria in *Tahoe* did not reach this extreme, they needed to be evaluated under the multi-factor, ad hoc, *Penn Central* test. In this and almost all cases, “the concepts of ‘fairness and justice’ that underlie the Takings Clause will be better served ... by a *Penn Central* inquiry into all of the relevant circumstances.”<sup>42</sup>

In dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, forcefully advocated the Scalian view of takings and property. There is, the Chief Justice wrote, a “‘practical equivalence’ from the landowner’s point of view” of the regulations at issue in *Tahoe* and a physical appropriation.<sup>43</sup> Under these circumstances, it is not plausible to

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<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 322 (quoting *Penn Cent.*, 438 U.S. at 124; *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring)).

<sup>37</sup>*Id.* at 324-25.

<sup>38</sup>*Id.* at 327 n. 23.

<sup>39</sup>*Id.* (quoting *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring)).

<sup>40</sup>*Id.* (quoting *Palazzolo*, 533 U.S. at 633 (O’Connor, J., concurring)).

<sup>41</sup>*Id.* at 330.

<sup>42</sup>*Id.* at 334.

<sup>43</sup>*Id.* at 348 (Rehnquist, J., dissenting).

assume that the regulations “simply ‘adjust[] the benefits and burdens of economic life’” or that the affected landowners receive any tangible benefits from their operation.<sup>44</sup> With clear evidence of the landowners’ loss, and no clear evidence of their offsetting benefit, the case for compensation was obvious. He argued that it is this approach – and not that of *Penn Central* – that is required by the Court’s most recent cases.

Although Chief Justice Rehnquist was undoubtedly correct that his approach is more in keeping with the spirit of *Lucas* and other Scalian-view decisions, the majority turned a deaf ear. Indeed, after *Tahoe* it is apparent that Justice O’Connor has won the *Palazzolo*-concurrence battle. If there had been any prior doubt about the seriousness of the Court’s embrace of *Penn Central*’s ad hoc, balancing, broad-gauged approach in takings cases, there is no doubt now. No longer will the showing of a landowner’s loss – even a significant loss – be sufficient, of itself, to compel compensation. After a decade of ascendancy, the Scalian view of property and takings appears to be dead.

*Why* did this happen? Was this simply the result of a shift in the philosophical winds, which might, in a few years, blow differently? Or are there deeper reasons – rooted in part, and ironically, in Justice Scalia’s own actions – that made this outcome inevitable?

### III. THE DEATH OF THE SCALIAN VIEW – THREE REASONS

In this section, I shall argue that the Scalian view of property and takings was doomed for three reasons. Those are: the Court’s opinion in the *Lucas* case; the extension of takings protection to less tangible legal interests; and the problem of accounting for justice in takings cases.

#### A. The *Lucas* Opinion

Treating the Court’s opinion in *Lucas* as something that undermined the Scalian view of property and takings is obviously paradoxical. All would probably agree that if there has ever been any Justice on the Court

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<sup>44</sup>*Id.* at 349-50 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-18 (1992)).

who has believed in property as a concrete instrument for protecting individual interests, it is Justice Scalia, who authored that opinion. It was undoubtedly the intention of the *Lucas* opinion – which established yet another, *per se*, compensatory takings rule – to shore up this conception of property. Indeed, the *Lucas* case marks the clear ascendancy in Supreme Court jurisprudence of the Scalian view of takings and property.

In *Lucas*, however, Justice Scalia’s doctrinal ambition in this regard ran afoul of another impulse: the desire to bring intellectual rigor to the Court’s takings jurisprudence. Given the opportunity to address the Court’s takings jurisprudence in potentially historic terms, Justice Scalia apparently could not resist exposing the intellectual incoherence that riddled the Court’s prior opinions.

Let us pause, for a moment, to consider these juxtaposed goals. The Scalian view of property and takings – in which individuals are strongly protected from government action, by compensation for their economic injuries – depends upon individual property being something that we can concretely understand. If we are to afford strong, consistent remedies for government takings of individual property, we must know what that property is and how it has been impaired by government action. We must know the “property” with which “owner x” began; we must know the “property” with which “owner x” is left – with the difference between those values being the measure of just compensation.

Of course, as noted above, the certainty of such “findings” in the Court’s decisions has been far more rhetorical than real. Indeed, the question of the “property” involved has generally received superficial gloss, with the Court moving quickly to the issue of “taking.”<sup>45</sup> Consider, for instance, *Dolan v. City of Tigard*,<sup>46</sup> a recent and prominent case. In *Dolan*, the City of Tigard, Oregon, attempted to condition the approval of a building permit upon the landowner’s compliance with open space, landscaping, and alternative transit requirements. The question before the Court was whether this attempted “exaction” by the City “constituted an uncompensated taking of ... property under the Fifth Amendment.”<sup>47</sup> At

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<sup>45</sup>See Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, IX CANADIAN J. L. & JURIS. 161, 165-66 (1996).

<sup>46</sup>512 U.S. 374 (1994).

<sup>47</sup>*Id.* at 13.

various points, the Court alternately implied that the “property” interest at stake was the right to exclude (which was sometimes portrayed as absolute in nature and sometimes not), the right to use, the entire parcel owned, or the narrow strip of land subject to the challenged regulation.<sup>48</sup> Problems of this sort have led a host of commentators to characterize the Court’s portrayals of property in takings cases as unexplained, unexplored, and essentially incoherent.<sup>49</sup>

In *Lucas*, Justice Scalia was apparently determined to avoid the intellectual murkiness and sleights of hand that so often have plagued the Court’s takings jurisprudence. Indeed, *Lucas* is replete with references to an intention to confront previous prevarications and to shine the spotlight of incisive intellect into the dark corners of applied takings doctrine. Incoherent areas that seemed to have been noticed by everyone but the Court were suddenly, startlingly, and refreshingly acknowledged. For instance, in the course of his opinion, Justice Scalia:

- acknowledged that the “conceptual severance” or “denominator” problem in takings cases had not been confronted by the Court. In determining the magnitude of the property owner’s loss, one must know the “property interest” against which the loss of value is to be measured. However, if (for instance) 90 percent of a tract of land must be left in its natural state, “it is unclear whether we would analyze the situation as one in which the owner has [lost all value] ..., or as one in which the owner has suffered a mere diminution in value of the tract as a whole.”<sup>50</sup>
- acknowledged that the distinction between “harm-preventing” and “benefit-conferring” regulations (with the former traditionally held to be a part of a property owner’s

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<sup>48</sup>*See id.* at 384-87.

<sup>49</sup>*See, e.g.*, Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1628 (1988); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles (Part 1)*, 77 CAL. L. REV. 1299, 1308-16 (1989); Joseph William Singer & Jack M. Beerman, *The Social Origins of Property*, 6 CANADIAN J.L. & JURIS. 217, 217 (1993); Underkuffler-Freund, *supra* note 45, at 165-67.

<sup>50</sup>*Lucas*, 505 U.S. at 1016 n. 7.

“expectations” and the latter not) “is often in the eye of the beholder” and is “difficult, if not impossible, to discern on an objective, value-free basis.”<sup>51</sup>

- acknowledged that the problem in determining what “law” frames property rights is a difficult one. For instance, “background principles of nuisance and property law” may be “manipulable,” and “[t]here is no doubt some leeway in a court’s interpretation of what existing state law permits.”<sup>52</sup>

After frankly acknowledging these problems, Justice Scalia did not attempt to resolve them. Rather, he pushed them aside as he drove toward his conclusion. On the “conceptual severance” or “denominator” problem, he announced that “we avoid this difficulty in the present case, since the ‘interest in land’ that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law.”<sup>53</sup> His response to the “harm-preventing”/ “benefit-conferring” problem was simply to jettison this as a valid consideration.<sup>54</sup> On the question of what “law” frames property rights, he vaguely cited state “nuisance law,” state “property law,” and “existing rules and understandings that stem from an independent source such as state law”<sup>55</sup> – potentially conflicting understandings.

In the end, the question of adequate doctrinal reckoning with these problems was dwarfed in importance by the acknowledgment of their presence. Once it is admitted that the Emperor has no clothes, it is far more difficult to take him seriously. The admission of these problems by the architect of the Scalian enterprise did not immediately doom it. Indeed, as described above, *Lucas* marks its clear ascendancy. However, even as *Lucas* struck a bold stroke for the Scalian view, however, it also undermined it. Belief in a rigidly protective view of takings law depends on belief in the fiction of property’s concreteness. Once Justice Scalia acknowledged the mythic nature of this image, the door was opened to more and more explicit challenges.

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<sup>51</sup>*Id.* at 1024, 1026.

<sup>52</sup>*Id.* at 1030, 1032 n. 18.

<sup>53</sup>*Id.* at 1016 n. 7.

<sup>54</sup>*Id.* at 1024-26.

<sup>55</sup>*Id.* at 1030-31.

B. “Property, Property Everywhere”: the *Eastern Enterprises* and *Phillips* Cases

Perhaps even more fatal to the old, concrete, unexamined idea of property were the Court’s two, arguably most protective takings cases: *Eastern Enterprises v. Apfel*<sup>56</sup> and *Phillips v. Washington Legal Foundation* (“*IOLTA I*”).<sup>57</sup>

These cases highlight a truth about takings cases that we must remember. Takings may involve more than land, chattels, and other traditional forms of property. Over the years, the right to vindicate one’s “reasonable expectations,”<sup>58</sup> the right to “anticipated [commercial] gains,”<sup>59</sup> the rights enumerated in an executed contract,<sup>60</sup> and the right to “economic advantages” “back[ed] by law”<sup>61</sup> have been protected by the Court. Indeed, *any* individual interest created by law might be something on which the individual sufficiently relies, or to which the individual has sufficient claim, to be constitutionally cognizable property. It was the question of the limits, if any, to property’s scope that *Eastern Enterprises* and *Phillips* explored.

*Eastern Enterprises* confronted a challenge to the Coal Industry Retiree Health Benefit Act of 1992 (“Coal Act”),<sup>62</sup> which stabilized funding for pension plans benefitting the nation’s retired miners. Under the Act, coal operators were assessed premiums to be paid to the plans, based upon their prior employment of miners now retired. Eastern Enterprises was assigned the obligation to pay premiums for some 1,000 miners who had worked for the company before 1966, some twenty-five years prior to the Coal Act’s adoption. Eastern sued, claiming that the Act effected a taking of its property without compensation.

In a series of prior decisions that spanned some thirty years, the

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<sup>56</sup>524 U.S. 498 (1998).

<sup>57</sup>524 U.S. 156 (1998).

<sup>58</sup>*E.g.*, *Agins v. Tiburon*, 447 U.S. 255, 262 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

<sup>59</sup>*E.g.*, *Andrus v. Allard*, 444 U.S. 51, 64-66 (1979).

<sup>60</sup>*E.g.*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935).

<sup>61</sup>*E.g.*, *Kaiser Atena v. United States*, 444 U.S. 164, 178 (1979); *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

<sup>62</sup>26 U.S.C. §§ 9701-9722 (1994 ed. and Supp. II).

Court had upheld similar social welfare legislation against employers' takings challenges.<sup>63</sup> The Black Lung Benefits Act of 1972<sup>64</sup> and the Multiemployer Pension Plan Amendments Act of 1980<sup>65</sup> required employers to pay disability or pension compensation to former employees or their survivors, despite the companies' refusal to voluntarily undertake that obligation. With respect to those statutes, the Court agreed that the legislatively imposed liability "constituted a permanent deprivation of assets" for social welfare purposes, but rejected the notion that it constituted an uncompensated taking prohibited by the Fifth Amendment.<sup>66</sup> Analysis in those cases began with recognition of the unquestionably broad power of Congress to fashion economic legislation.<sup>67</sup> "In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others."<sup>68</sup> As a result, "legislation is not unlawful solely because it upsets otherwise settled expectations."<sup>69</sup>

In *Eastern Enterprises*, however, the Court's plurality opinion took a sharply different tack. In the plurality's view, the Coal Act suffered from several constitutionally fatal defects. First, the financial burden that the Act imposed was not proportionate to the company's prior, voluntary undertaking. The industry's commitment to the funding of lifetime health benefits for retirees and their family members occurred after Eastern had ceased its coal mining operations. The plurality observed:

During the years in which Eastern employed miners, retirement and health benefits were far less extensive ..., were unvested, and were fully subject to alteration or termination. ... Although Eastern at one time employed Combined Fund beneficiaries that it has been assigned ..., the correlation between Eastern and its liability to the Combined Fund is tenuous ... . The company's obligations

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<sup>63</sup>See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602 (1993).

<sup>64</sup>30 U.S.C. §§ 901- 945 (2000) .

<sup>65</sup>Pub. L. No. 96-364, 94 Stat. 1208 (1980).

<sup>66</sup>*Connolly*, 475 U.S. at 222.

<sup>67</sup>See *Eastern Enterprises*, 524 U.S. at 528 (plurality opinion).

<sup>68</sup>*Connolly*, 475 U.S. at 223.

<sup>69</sup>*Eastern Enterprises*, 524 U.S. at 526 (plurality opinion).

under the Act depend solely on its roster of employees some 30 to 50 years before ..., without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted.<sup>70</sup>

Indeed, the plurality wrote, the Coal Act substantially interfered with Eastern's "property" – its "reasonable investment-backed expectations."<sup>71</sup> By imposing liability for employees employed many years ago, the Act attached "new legal consequences" to a completed employment relationship.<sup>72</sup> "Retroactive legislation ... presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."<sup>73</sup> The retroactive operation of the Coal Act was apparent, since it "divest[ed] Eastern of property long after the company believed its liabilities [to these employees were] ... settled."<sup>74</sup> Eastern had no notice from "the pattern of the Federal Government's involvement in the coal industry ... that lifetime health benefits might be guaranteed to retirees several decades later."<sup>75</sup> As a consequence, the Act effected a taking of property without compensation.

Of course, the Black Lung Benefits Act – which the Court had previously upheld – *also* charged employers with the health care costs of employees, whom those employers had employed decades before. Liability for the disabilities of black lung disease was no more contemplated or accepted by those coal operators, than was the pension liability contemplated or accepted by Eastern. The plurality distinguished the Black Lung Benefits Act, however, on the ground that it "merely imposed 'liability for the effects of disabilities bred in the past,'" and was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor."<sup>76</sup> "Likewise, Eastern might be responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of

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<sup>70</sup>*Id.* at 530-31.

<sup>71</sup>*Id.* at 532.

<sup>72</sup>*Id.* (internal quotation marks omitted).

<sup>73</sup>*Id.* at 533 (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).

<sup>74</sup>*Id.* at 534.

<sup>75</sup>*Id.* at 536.

<sup>76</sup>*Id.* (quoting *Turner Elkhorn*, 428 U.S. at 18).

employment ... .”<sup>77</sup> “There is no doubt that many coal miners sacrificed their health on behalf of this country’s industrial development,” and that Congress could afford them relief as a matter of policy.<sup>78</sup> The problem was that the solution that the Coal Act embodied imposed “such a *disproportionate and severely retroactive* burden upon Eastern.”<sup>79</sup>

The idea that proportionate impact and retroactivity might be relevant to a due process challenge to legislation is not shocking. Even notice and consent might conceivably be relevant as defenses to a charge that particular legislation violates particular individuals’ due process rights. By framing this as a *takings* issue, however, the plurality opinion extends citizens’ rights to a potentially unimaginable degree. The “property interest” that the Court protected in this case was not Eastern’s ability to retain its money; monetary liabilities to government for the ends of social welfare are ubiquitous, through taxation and other schemes. Rather, the “property interest” that Eastern was held to have is something far more: it is the right to be free of social welfare legislation that upsets expectations, affects one disproportionately, or is imposed without consent.

The potential reach of this holding is awe-inspiring. What piece of legislation does *not* upset expectations, affect some person disproportionately, or cause financial loss without consent? Whether one considers tax legislation, agricultural regulations, import-export duties, consumer product safety legislation, banking regulations, welfare programs, school funding programs, or a myriad of other government acts, it is obvious that the hundreds or thousands of these enacted every year upset expectations, impose liability on the basis of past relationships and actions, and disproportionately benefit some to the detriment of others. And never has the constitutionality of such laws hinged upon notice or consent. Do all citizens affected by such laws now have “property interests,” protected by “takings” law? What, indeed, is the reach of the *Eastern Enterprises* rationale?

The Justices of the Court were not unaware of the problem that the plurality’s opinion created. Justice Kennedy, concurring in the judgment and dissenting in part, strenuously argued that the Act “must be invalidated

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<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* (emphasis added).

as contrary to essential due process principles,” and *not* as a violation of the takings clause.<sup>80</sup> “The plurality opinion,” he wrote, “would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts.”<sup>81</sup> “Property” for takings purposes must be understood more specifically and traditionally, he argued, “lest all government action be subjected to examination [as takings] ... , with the attendant potential for money damages.”<sup>82</sup> “The liability imposed on Eastern no doubt will reduce its net worth and its total value, but this can be said of any law which has an adverse economic effect.”<sup>83</sup> Neither freedom from such impacts nor freedom from the laws that create them can be “property” that the takings clause protects. We cannot expand the scope of regulatory takings to include broad inquiries into what are essentially “normative considerations about the wisdom of government.”<sup>84</sup>

Similar concerns were expressed by Justice Breyer’s dissent, which Justices Stevens, Souter, and Ginsburg joined. “The ‘private property’ upon which the [Takings] Clause traditionally has focused,” he wrote, “is a specific interest in physical or intellectual property.” This case involves only “an ordinary liability to pay money, not to the Government, but to third parties.”<sup>85</sup> “If the Clause applies when the government simply orders A to pay B, why does it not apply ... [to any] tax?”<sup>86</sup> And why would it not apply “to some or to all statutes and rules that ‘routinely creat[e] burdens for some that ... benefit others?’”<sup>87</sup>

If *Eastern Enterprises* signaled a rush toward the finding of “property everywhere,” *Phillips* (“*IOLTA I*”) confirmed it. *Phillips* involved a challenge to Texas’ Interest on Lawyers Trust Account (IOLTA) program, which was virtually identical to programs enacted in 48 other States and the District of Columbia. Under this law, an attorney who received client funds was required to place them in a separate, interest-bearing, federally authorized (“IOLTA”) bank account, upon determining

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<sup>80</sup>*Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

<sup>81</sup>*Id.* at 542.

<sup>82</sup>*Id.* at 543.

<sup>83</sup>*Id.*

<sup>84</sup>*Id.* at 545.

<sup>85</sup>*Id.* at 554 (Breyer, J., dissenting).

<sup>86</sup>*Id.* at 556.

<sup>87</sup>*Id.* (quoting *Connolly*, 475 U.S. at 223).

that the funds “could not reasonably be expected to earn interest for the client or [that] the interest which might be earned ... is not likely to be sufficient to offset the cost of establishing and maintaining” a private, interest-bearing, non-IOLTA account.<sup>88</sup> The interest that the IOLTA account generated was then paid to the Texas Equal Access to Justice Foundation, which financed legal services for low-income persons.

This law was challenged by depositors of client funds, who claimed that it violated their rights under the takings clause. In *Phillips*, the question before the Court was a narrow one: whether “interest earned on client trust funds held by lawyers in IOLTA accounts [is] a property interest of the client or lawyer, cognizable under the ... Fifth Amendment.”<sup>89</sup>

The law of Texas, like most states, follows the general rule that “interest follows the principal.” Thus, as a general matter, interest earned by a client’s trust account funds is the property of the client. The twist in *Phillips* was that the client funds placed in IOLTA accounts were placed there because they would – on their own – generate no net interest. Held in a non-IOLTA account, these funds were too small in amount, and held for too brief a period, for any interest earned to offset the cost of establishing and maintaining the account, service charges, accounting costs, and tax reporting costs that the account would generate. In other words, the placing of these funds in IOLTA accounts deprived the claimants of *zero* dollars of economic value.

This did not deter the Court. In a 5 to 4 decision, the Court held that the claimants nonetheless demonstrated a property interest cognizable under the takings clause. Writing for the Court, Chief Justice Rehnquist asserted that “[w]e have never held that a physical item is not ‘property’ simply because it lacks a positive economic or market value.”<sup>90</sup> Indeed, “we [have] held that a property right was taken even when infringement of that right arguably *increased* the market value of the property at issue.”<sup>91</sup> Of course, *Phillips* involved no “physical item” in any traditional sense; at issue was interest that would not be earned, absent the challenged statutory

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<sup>88</sup>See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 162 (1998) (quoting Texas IOLTA Rule 6).

<sup>89</sup>*Id.* at 164 n. 4 (internal quotation marks omitted).

<sup>90</sup>*Id.* at 169.

<sup>91</sup>*Id.* at 170 (emphasis in original).

scheme. This, however, made no difference. Although not deprived of property in that sense, the claimants were deprived of “possession, control, and disposition” – and the “confiscation” of these rights is an interference with “property” cognizable under the takings clause.<sup>92</sup>

If *Eastern Enterprises* and *Phillips* are taken together, the potential scope of “takings” expands enormously. Any law that upsets expectations, imposes liability on the basis of prior relationships and actions, or disproportionately benefits some to the detriment of others, is now fair game. In addition, it is not even necessary that the claimant show economic injury – far more intangible interests, such as “control” over government actions, are protected as well. Rights under “existing legislation”? Immunities for specific groups, that regulations create? Disproportionate impacts of local laws, or complaints about the use of tax money? There is no apparent intellectual barrier to “property” interests in any of these cases, and to resultant takings claims.

As the scope of “property” expands, what the Court finds to be a “taking” of that property must contract. No complex society can adhere to a rule that makes it liable for every change in circumstance, disappointment, or frustration that every individual endures at government hands. Indeed, what the Court granted in “*IOLTA I*,” it took away five years later. In *Brown v. Legal Foundation of Washington* (“*IOLTA II*”),<sup>93</sup> the Court faced the question not reached in *Phillips*: whether the constitutionally cognizable “property” that the Court had found to be at stake in *Phillips* was “taken” by the Washington State IOLTA scheme, in a way that the Fifth Amendment recognized.<sup>94</sup> The Court held that it was not. What was the reason? The IOLTA scheme “had no adverse economic impact on petitioners and did not interfere with any investment-backed expectation.”<sup>95</sup> Since “the value of the petitioners’ net loss was zero, the compensation that is due” was also zero.<sup>96</sup> In short, without economic harm, there will not be (in the vast run of cases) a Fifth Amendment “taking” or a “right to compensation”.<sup>97</sup>

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<sup>92</sup>*Id.* at 170, 171.

<sup>93</sup>538 U.S. 216 (2003).

<sup>94</sup>*See id.* at 220.

<sup>95</sup>*Id.* at 234.

<sup>96</sup>*Id.* at 237.

<sup>97</sup>*See id.* at 234-40.

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Under the Scalian view of property and takings, property is the (effectively) limiting concept, with a taking routinely found if property is impaired. With the specter of “property” interests created by virtually any statute, court decision, regulation, and expectation, this approach became

untenable. No longer could the simple Scalian rule realistically provide its simple guarantee. While the expansionist ideas of property in *Eastern Enterprises* and *Phillips* may have cheered protectionist proponents, those same ideas worked – inevitably – toward the undermining of their ideal.

### C. The Problem of Justice

The final and most fundamental reason for the ultimate defeat of the Scalian view of property and takings is found in an old idea: the need to account for justice in applying the takings clause.

The conviction that justice is deeply involved in takings cases has long been articulated by the Court. In *Armstrong v. United States*,<sup>98</sup> decided more than forty years ago, the Court famously stated that the takings clause was “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>99</sup> Since *Armstrong* was written, this language has appeared in virtually every opinion that the Court has issued construing this clause.<sup>100</sup>

The repeated invocation of “justice” and “fairness” in takings opinions, however, generally has been an awkward one. Although justice is presented in these passages as the analytical lynchpin for these decisions, when the Court’s actual reasoning is examined it seems to be largely an afterthought.

Take, for instance, the *Dolan*<sup>101</sup> case, which involved a takings

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<sup>98</sup>364 U.S. 40 (1960).

<sup>99</sup>*Id.* at 49.

<sup>100</sup>*Accord, e.g.,* *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 836 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978).

<sup>101</sup>5*Dolan v. City of Tigard*, 12 U.S. 374 (1994).

challenge to “exactions” demanded by a city in exchange for the granting of a municipal building permit. In the first paragraph of his analysis, Chief Justice Rehnquist, writing for the majority, repeated the *Armstrong* language and declared that the achievement of justice and fairness must guide the resolution of the case.<sup>102</sup> Yet, in the ensuing and lengthy discussion of the issues involved, neither justice nor fairness is mentioned again. In holding that the City of Tigard had failed to establish a sufficient factual basis for its permit conditions, the Court reasoned from various legal premises that were identified in the opinion. In this process, neither “justice” nor “fairness” nor its equivalent appears.

This pattern is repeated in case after case. Although the question of “justice” or “fairness” is continually invoked as the central inquiry before the Court, it is rarely addressed in any depth in the discussion that follows. Indeed, when we think of the mass of the Court’s decisions in this field, it is difficult to articulate how “justice” or “fairness” *should* be evaluated in these cases. Exactions are demanded by a city as the price for approval of a development proposal. Is this “just”? Is this “fair”? A developer’s plans are thwarted by coastal wetlands regulations. Is this “just”? Is this “fair”? When we consider the Court’s opinions in this field, in the aggregate, there is little guidance on these issues. All sides claim the importance of justice, because it “feels right” and taps into our deep instinct that this must be the vital issue. Yet, after this acknowledgment, the question of “justice” or “fairness” is left unexplored, unexplained.

The reason for this failure to grapple with the question of justice has been undoubtedly different for different members of the Court. For those who have adhered to the Scalian view of takings and property, the meaning of “justice” in this context was apparently so obvious that it needed no explanation. For those who have opposed the Scalian view, the understanding of justice that it entails – although apparently often assumed by these justices to be correct as well – sat uneasily with the ends they have wished to reach. As a result, “justice” has been, for them, something to be simply, quietly, and almost conspiratorially ignored. Rather than rethink the question of justice, they have simply sidelined it.

What is this Scalian notion of justice, that has been assumed so powerfully in this context? Let us again consider the *Lucas* case. In *Lucas*,

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<sup>102</sup>*Id.* at 384.

the question was whether a state's prohibition of development of shorefront land, to preserve the beach/dune system and prevent erosion, was a taking of property without compensation. In his analysis of this question, Justice Scalia discussed how this law brought the landowner's plans "to an abrupt end," and severely impacted him financially.<sup>103</sup> He discussed how there might be situations, such as those involving zoning or other controls, when a complaining landowner gains from the challenged law – but that this was not such a case. He concluded, in brief, that Lucas should be saddled with such uncompensated loss only if the restriction should have been "expected" by him or "part of his title to begin with."<sup>104</sup> If neither was true, compensation would be owed.

What is most striking about this view of justice in takings is its completely one-sided character. Although the interests of the property owner are scrupulously considered, there is no consideration of the interests of the state, or of those whom it represents.

Indeed, it is fair to conclude that under the Scalian view, consideration of asserted public interests in the broad run of takings cases is not simply ignored – it is, in fact, *illegitimate*. In his concurrence in *Palazzolo*, for instance, Justice Scalia described the value that accrues to the public through wetlands preservation laws as "profit to the *thief*."<sup>105</sup> A thief is, of course, someone who has – by definition – no legitimate interest to assert. In this view, we do not have parties with legitimate, dueling interests; we have one party with legitimate interests, and the other party with none.

This view of the interests at stake is remarkable when we remember that the question of justice or fairness in law – on which takings cases are purported to depend – is an inherently *relational* inquiry. When we decide whether a law or its operation is "just," this is an inquiry about the advantages and disadvantages that "x" derives from the operation of that law, or its absence – and the advantages and disadvantages that are suffered by "y". Indeed, when considering "justice" in law, we cannot evaluate the claim of one party without reference to the other. Yet that is precisely what the Scalian view of justice in takings demands. It demands that we imagine

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<sup>103</sup>Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1008-10 (1992).

<sup>104</sup>*Id.* at 1027.

<sup>105</sup>Palazzolo v. Rhode Island, 533 U.S. 606, 637 (2001) (emphasis added).

the interests of one party – the takings claimant – and not the interests of the other.

The reason for the single focus of the Scalian view is its assumed, prior beliefs about the nature of the individual’s claimed right and of the competing public interest. The Scalian view sees the individual landowner as a project pursuer, with a right to act, who is wronged by government action. Because the government “transgresses the side constraints constituted by [the individual’s] rights,” it becomes the individual’s moral debtor.<sup>106</sup> The government must pay for the owner’s loss. It is a question of *compensatory justice*.

Public interests are eclipsed, in this view, because of its foundational assumption that the claimant is the *victim*, and the government the *aggressor*. With the moral stakes thus drawn, the “justice” question is simple. It is how to rectify this wrong – not whether there *is* a wrong, in light of the merits of (or need for) the opposing public action.

For those cases decided during the 1990s, when the Scalian view reigned, this view of justice was plausible. In this era, the typical case before the Court juxtaposed significant injury to property owners with relatively trivial public interests. For instance, the local land-use concerns in *Nollan*, *Dolan*, and *City of Monterey* (such as ocean viewing, drainage concerns, vegetation concerns, and so on) were not of a kind that demanded a public dimension to “justice.” Even *Lucas*, with its shoreline concerns, had little public impact by virtue of the “rare” facts presented. Seldom will a completely buildable lot be rendered “worthless,” as the result of government regulation.<sup>107</sup>

If this view of the competing interests at stake was plausible in all of these cases, it was not in *Palazzolo* and *Tahoe*. The simple story in which the landowner is the “victim” and the public the “aggressor” is unconvincing when individual actions destroy thousands of acres of wetlands, or threaten a resource as valued as Lake Tahoe. In these cases, the loss of individual landowners’ “rights” was viewed against the backdrop of a tremendous *public* loss if the Court were to adhere to the Scalian vision. Public interests could no longer be ignored – and the

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<sup>106</sup>See Loren E. Lomasky, *Compensation and the Bounds of Rights*, in NOMOS XXXIII: COMPENSATORY JUSTICE 13, 24-26 (John W. Chapman ed., 1991).

<sup>107</sup>See *Lucas*, 505 U.S. at 1018.

simple scheme of “compensatory” justice for “victims” of government action became suddenly and patently inadequate.

In *Palazzolo*, the Court’s majority hinted at the need for a more contextual and balanced approach to the ultimate takings question, which would include the consideration of public interests.<sup>108</sup> In *Tahoe*, this change in focus was explicit. We are concerned, Justice Stevens wrote, with a lake that is “uniquely beautiful, ... a national treasure that must be protected.”<sup>109</sup> Individual landowners’ development actions, however, threatened the lake’s pristine state and exceptional clarity.<sup>110</sup> “[U]nless the process [of degradation] is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for all eternity.”<sup>111</sup>

Against the magnitude and gravity of this potential loss, interference with the complaining landowners’ claimed right to build rapidly paled in comparison. The “ultimate constitutional question,” Justice Stevens wrote, “is whether the concepts of ‘fairness and justice’ that underlie the Takings Clause” will be better served by a *per se* compensatory rule, or by a “careful examination and weighing of all of the relevant circumstances.”<sup>112</sup> Building moratoria such as that imposed in the *Tahoe* case are used widely by land-use planners to preserve the status quo while they formulate a more permanent development strategy.<sup>113</sup> “The interest in facilitating informed decisionmaking by [such] regulatory agencies counsels against adopting a *per se* rule that would impose ... severe costs on their deliberations.”<sup>114</sup> Rather than assume that a compensatory obligation by government exists, we should use a careful, contextual, ad hoc approach in such cases.<sup>115</sup>

The shift toward an idea that justice requires consideration of *competing* interests and *competing* claims is apparent throughout Justice

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<sup>108</sup>See *Palazzolo*, 533 U.S. at 627, 630; *supra* text accompanying notes 22-23.

<sup>109</sup>*Tahoe v. Regional Planning Agency*, 535 U.S. 302, 307 (2002) (internal quotation marks omitted).

<sup>110</sup>*Id.*

<sup>111</sup>*Id.* at 308 (quoting the district court’s opinion).

<sup>112</sup>*Id.* at 334, 326 n. 23 (quoting *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring)).

<sup>113</sup>*Id.* at 337-38.

<sup>114</sup>*Id.* at 339.

<sup>115</sup>*Id.* at 339-42.

Stevens’s opinion. Although interference with a property owner’s investment-backed expectations must be considered, it “‘is [only] one of a number of factors that a court must examine.’”<sup>116</sup> Competing with the interests of the complaining landowners in the *Tahoe* case are other public and private interests that depend upon the lake’s preservation. *All* of these interests must be considered if “justice and fairness” – the bottom-line inquiries – are to be achieved in regulatory takings cases.<sup>117</sup>

The extent to which the majority veered from the Scalian path was not lost on the dissenters. Chief Justice Rehnquist, whom Justices Scalia and Thomas joined, argued that the case must be viewed “[f]rom the [complaining owners’] ... standpoint.”<sup>118</sup> Since value was taken from the owners with no return, the case required compensation. Indeed, the dissenters’ assumption that the landowners’ loss – and only the landowners’ loss – should be considered in such cases is graphically illustrated by the physical structure of the Chief Justice’s opinion. In a paragraph at the very end of his opinion, set apart from the rest by three asterisks, he acknowledged that “Lake Tahoe is a national treasure[,] and I do not doubt that respondent’s efforts at preventing further degradation of the lake were made in good faith in furtherance of the public interest.”<sup>119</sup> However, these “efforts,” as the physical and symbolic separation of their description attests, are simply an afterthought. They are a touching story, perhaps – but of no palpable legal interest.

To ignore the bilateral nature of justice in property cases is, in truth, the very deepest of ironies. Land-use disputes, of the kind that *Tahoe*, *Palazzolo*, *Lucas*, and like cases present, involve *competing* property interests.<sup>120</sup> What these cases really involve is the pitting of the interests of the complaining landowners to develop their land against the property interests of other shoreline owners and users. It is difficult to see why the property interests of some should be *exalted*, and the same interests of others *ignored*, in a searching assessment of “justice.”

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<sup>116</sup>*Id.* at 326 n.23 (quoting *Palazzolo*, 533 U.S. at 633 (O’Connor, J., concurring)).

<sup>117</sup>*Id.* at 334-35.

<sup>118</sup>*Id.* at 349 (Rehnquist, J., dissenting).

<sup>119</sup>*Id.* at 354.

<sup>120</sup>See UNDERKUFFLER, *supra* note 13, at 94-102, 123-24 (describing how claimed property rights and competing public interests in cases of this type are grounded in very similar property-based interests and values).

Indeed, more than other claims that are constitutionally based, property claims are so often – *by their very nature* – unavoidably reciprocal in character. Freedom of speech, due process of law, freedom of religion, and other basic rights are – in a sense – “public goods,” which can (in theory, at least) be enjoyed equally and freely by all, without cost to or deprivation of some by others. The character of property claims to physical, finite, nonshareable resources is necessarily the opposite. The claim of the takings claimant to unfettered control of land, chattels, or other resources necessarily and inevitably denies the *same* claims to control asserted, through government, by others. In this situation, we do not have a simple “evil” done by government to the takings claimant: we have reciprocal “evils,” done by reciprocal actors.

By simultaneously stressing the importance of justice in takings *and* attempting to restrict its scope, the Scalian view is an inherently unstable concoction. It forces us to imagine justice, in takings, as half of the whole – the sound of one hand clapping.

#### IV. CONCLUSION

With the decision in *Lucas* in 1992 and for almost ten years thereafter, the Scalian view of property and its protection dominated Supreme Court takings jurisprudence. Under this vision, property provides a concrete, objectively knowable, and immutable legal barrier which marks the line between protected individual interests and the exercise of collective power. If government transgresses this line, the individual is almost always deemed to have been wronged. And compensation is required, as a matter of “compensatory” justice, under the takings clause.

In the past few years, the hegemony enjoyed by this view has crumbled. After *Palazzolo* and *Tahoe*, no longer will the idea of property – itself – mark, with certainty, where protected individual interests end and collective power begins. No longer will the fact of individual loss, even significant individual loss, necessarily compel the conclusion that a wrong has occurred, or drive an award of compensation home. We must, instead, view individual losses in these cases in the social, economic, and political contexts in which they occur. We must “weigh all of the relevant circumstances.” We must make ad hoc, normative judgments. We must consider how *all* affected persons should share the “benefits and burdens

of economic life.”

The confidence with which I have declared the death of the Scalian view of takings is rooted less in a conviction about the constancy of Supreme Court jurisprudence, than in the contention that the ideas that form the core of the Scalian view doomed it from the start as a viable juridical principle. Its idea of property as a concrete, pre-political, self-defining concept was inevitably exposed as mythical. Its expansion – as “concretely” understood – to encompass virtually any reliance interest created by law inevitably proved to be impractical. And, as public costs loomed, its eclipse of public interests in the takings calculation could not, in the end, be reconciled with the idea of justice for all parties.

The Scalian view of property and its function is, of course, not a completely fanciful or improbable one. Indeed, it can be seen, at its core, as an attempt to articulate a vision of property that all of us, on some level, share. The idea of property rights as fixed, unyielding, bounded, and protected responds to the deep insecurity that individuals feel in the face of the constant threat posed by collective power. If we are honest, we must admit that each of us believes in this idea for some objects, for some claims, for some assurance that our own psychological needs will be respected and our own acquisitive efforts rewarded. The Scalian view’s bold attempt to guarantee the vindication of this idea has powerful appeal. Its assertion that the “takings” guarantee is simply an extension of this function seems, superficially at least, to be a natural one.

The problem arises when this vision of property is presented as the sole and motivating idea for resolving takings issues. Had the scope of American takings law remained what it was in the pre-*Mahon*<sup>121</sup> era – had it remained concerned with “physical,” as opposed to “regulatory” takings – the seeming equivalence of the idea of property and the outer boundaries of the permissible exercise of government power might have remained unquestioned. If, for instance, we limited the scope of takings questions to the takings of title by government, or to physical occupation of land by government, the cases would be simple enough, and our notions of protected interests in these cases would be strong enough, that the conclusion that the idea of property “resolves” these takings issues would (coincidentally) be true.

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<sup>121</sup>See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

But American takings law has not remained so limited. Instead, it has expanded to include regulatory takings, “intangibles” takings, takings of every conceivable form and fashion. This expansion has defeated the simple equivalence of pre-conceived notions of property and the permissible scope of government power. In these cases, we have no concrete, ready-made notions of property upon which to rely. Indeed, the idea of property as a concrete, fixed, and bounded entity *cannot*, by definition, be congruent with the idea of property as a potentially unlimited field of individual reliance interests. As notions of “property” and “takings” expand, we must concede that we cannot resolve these claims without considering the competing claims of others.

In a way, one might say, the Scalian view wanted it all. It wanted to maintain the image of property as clear, pre-ordained, fixed, and bounded. It wanted to extend this image to ever more far-flung and intangible legal interests. And when, as a result of this enterprise, conflicts with other (public) interests mounted, it claimed exemption from a balancing of interests. Although appealing in simple contexts, the Scalian view is, in the end, practically, legally, and philosophically impossible.

The idea of property rights as fixed, unyielding, bounded, and protected is an emotionally important one for each of us. However, the gulf between this vision of property rights and their necessary institutional contingency is profound. Property’s function, as a social and political institution, is the resolution of conflicting needs, visions, values, and histories. If we refuse to question the premise that the idea of property is, itself, *determinative* of these conflicts – if we refuse to acknowledge the complex, interrelated, and allocative nature of property conflicts – we will fail to account for the true costs of our actions, individually and collectively. We will fail to intelligently confront our choices. And we will fail to vindicate the ideal of justice, which takings jurisprudence has so stubbornly retained.

