ABHANDLUNGEN

"Takings" Jurisprudence in the U.S. Supreme Court: The Past 10 Years

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I. Introduction

No area of American property law has been more controversial in recent years than the government regulation of uses of private property. No aspect of American constitutional law more sharply poses the dilemma about the legitimate powers of the regulatory state than the requirement that the government pay compensation for takings of property. The purpose of this essay is to acquaint the non-American legal scholar who is unfamiliar with the recent developments in the United States Supreme Court's "takings" jurisprudence. The essay does not presuppose any background knowledge about either American constitutional or property law. Instead it attempts to familiarize those who are interested in comparative constitutional law with the major changes in this increasingly important area of American public law.

Several American commentators, particularly in the media, have argued that the past decade has witnessed a "revolution" in American takings law.[1] This essay will argue that while significant changes have occurred in takings doctrine, it is vastly premature to conclude that these changes

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[1] See the newspaper articles cited in William W. Fisher III, The Significance of Public Perceptions of the Takings Doctrine, 88 Colum. L. Rev. 1774, 1774 nn. 2–3 (1988).

amount to anything like a doctrinal revolution. Too much of the preexisting doctrinal structure remains intact, and too many important questions remain unresolved to warrant such a conclusion. A more balanced characterization of the current state of takings jurisprudence in the U.S. Supreme Court is that it is unsettled and increasingly contentious.

II. Background: The Pre-1987 Doctrinal Landscape

Before surveying the recent developments, it will be useful first to sketch the state of constitutional doctrine as it stood prior to 1987. That was the year in which the Supreme Court decided a quartet of cases that initiated the so-called takings revolution.[2] To evaluate whether the recent decisions truly constitute a change of such proportions, we need first to be clear about what preceded them.

The Fifth Amendment of the U.S. Constitution is a complex and multifaceted provision. With respect to constitutional protection of property, its text is beguilingly simple. It merely states that the government (both federal and state) shall not "take property" for "public use" without paying "just compensation." That simple text obscures the hard questions. Those questions are: (1) What actions by the government constitute "takings" of property? (2) What interests count as "property" for constitutional purposes? (3) What uses of property are "public" uses? (4) What does the requirement of "just" compensation require? Of these four questions, the most intractable have been the first two. While the second two are not unimportant, they have been less controversial and are more easily described. Let us begin with these relatively simpler matters, then, before proceeding to the more complex questions.

A. The Public-Use Requirement

Under the Fifth Amendment, the state may legitimately exercise its power of eminent domain to expropriate a person's property, even with payment of compensation, only if it does so for some public purpose. A compensated condemnation of property for private purposes is unconstitutional.

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[2] The cases are *Hodel* v. *Irving*, 481 U.S. 704 (1987); *First English Evangelical Church* v. *County of Los Angeles*, 482 U.S. 30 (1987); *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987); and *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987).

How much does this public-use requirement in fact restrict the state's eminent domain power? The short answer is "very little." As one commentator has noted, "[M]ost observers today think the public use limitation is a dead letter."[3] The most recent Supreme Court decision on this requirement indicates why this is so. In *Hawaii Housing Authority* v. *Midkiff*,[4] the Court upheld a Hawaii statute that authorized tenants in developments of five acres or more to condemn their landlords' ownership interest and thereby acquire full ownership themselves.[5] The Court specifically concluded that the statute satisfied the public-use requirement, reasoning that the statute was aimed at "[r]egulating oligopoly and the evils associated with it."[6] The test that the Court used provides little, if any, basis for invalidating condemnations on public-use grounds. "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose," Justice O'Connor wrote, "the Court has never held a compensated taking to be proscribed by the Public Use Clause."[7] While academic commentators have proposed interesting and at least plausible theories of the public-use requirement that would add some teeth to it,[8] there seems little prospect that the Court will adopt any of these theories in the near future. Consequently, one can largely ignore this requirement.

B. "Just Compensation"

Turning to the requirement of just compensation, the Supreme Court has held that "just" compensation does not necessarily mean full compensation. It means that the owner is entitled to the full market value of the property interest which has been taken from him, not the value that he attaches to it. Judge Posner recently explained the difference:

> [J]ust compensation has been held to be satisfied by payment of market value ... Compensation in the constitutional sense is therefore not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property.[9]

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[3] Thomas Merrill, The Economics of Public Use, 62 Cornell L. Rev. 61 (1986).
[4] 467 U.S.229 (1984).
[5] Haw. Rev. Stat. secs. 516–22 – 516–23 (1976).
[6] 467 U.S.at 242 (emphasis added).
[7] Id. at 241.
[8] See Merrill, note 3.
[9] *Coniston Corp* v. *Village of Hoffman Estates*, 844f.2d 461, 464 (7th Cir. 1988).

The reason that the Court has given for confining compensation to market value rather than full personal value is that personal valuation would create insuperable "practical difficulties."[10] Commentators have proposed various methods of dealing with these practical problems,[11] but, as with the public-use requirement, there seems little likelihood that the Court will change its view anytime in the near future.

C. Has "Property" Been "Taken"?

We come, then, to the two questions that are at the heart of the current controversy over takings doctrine, what interests constitute property for constitutional purposes, and what governmental acts constitute takings. The current Court has tended to collapse the distinction between these two questions, although, as we will see, it is increasingly important to keep them analytically distinct.

In the regulatory state determining whether the government has taken some private property without paying compensation becomes most acutely difficult and most politically charged in the context of those governmental acts that formally are mere regulations of property use, that is, actions that are purportedly exercises of the state's so-called "police power," for which no compensation is required, rather than its power of eminent domain, which does require compensation. If the line between compensable takings and non-compensable regulations was drawn strictly on the basis of the formal character of the government action, of course, there would be little protection under the Just Compensation Clause of the Fifth Amendment. The state could nearly always avoid the compensation requirement merely by characterizing its action as a regulation rather than an expropriation. For the Fifth Amendment to have any teeth, there has to be some recognition of the fact that some acts that formally are mere regulations in fact are expropriations. American constitutional law reflects this awareness in the crucial doctrine known as the "regulatory taking." It is no exaggeration to say that the American law of takings today has become virtually synonymous with "regulatory takings."

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[10] *United States* v. *564.54 Acres of Land*, 441 U.S.506, 511 (1979).

[11] See, e.g., Merrill, note 3, 82–85, 90–92; Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi.L. Rev. 681, 736–737 (1973).

The first case to recognize the regulatory taking doctrine was the famous case of *Pennsylvania Coal Co.* v. *Mahon*,[12] decided in 1922. In that case, Justice Holmes, writing for the Court, stated that a purported exercise of the state's police power becomes a taking when it "goes too far." Since that case, the Court has not made much headway in specifying the parameters of regulatory takings, but it has made some progress.

Until 1987, there were two, but only two, categories of regulations that triggered rules of per se unconstitutional takings. These were the "permanent physical occupation" and the "nuisance-abatement" categories. Under the first rule, a per se taking occurs whenever a regulation authorizes the state or someone acting under the state's authority to occupy the owner's property physically and permanently. That this rule is a true per se rule is indicated by the fact that a taking will be found in such situations regardless of how slight the degree of occupation, trivial the effect of the owner, or how important the need for the occupation. In *Loretto* v. *Teleprompter Manhattan CATV Corp.*,[13] the Supreme Court, speaking through Justice Thurgood Marshall, stated that the per se rule was quite narrow. Until recently, it has been. To trigger the per se rule, the occupation must be direct and it must be permanent. This is why, for example, in *Pruneyard Shopping Center* v. *Robins*,[14] no per se taking was found when a state law required owners of private shopping centers to allow members of the public to enter their shopping centers for purposes of distributing leaflets. The state-authorized occupation, although direct and physical, was only temporary, the Court reasoned. The effect of the three requirements that the occupation be direct, physical, and permanent was to make the scope of this per se rule exceedingly narrow.

The other per se rule is one of per se validity, rather than invalidity. This rule concerns regulations that are designed to prevent a public nuisance. Under this rule, government actions that abate a public nuisance are never held to be takings. The theory is that the range of legally-protected behavior that private ownership confers on individuals does not include the power to harm the public.[15] When the state acts to prevent such behavior, then, it does not take any property right that the owner had in the

[12] 260 U.S. 393 (1922).

[13] 458 U.S. 419 (1982).

[14] 447 U.S. 74 (1980).

[15] See, e.g., *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Just* v. *Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

first place. The problem with this rule, of course, as several commentators have pointed out,[16] is that public-harm prevention and public-benefit conferring (to which the per se rule of validity does not apply) are two sides of the same coin. Every regulation that prevents a harm to the public by definition confers a benefit on the public. The characterization of a regulation as "harm-preventing," then, is a conclusion, not a reason. Until recently, the Court has never explained how this distinction can be drawn in a principled way.

As to all other regulatory actions, the Court has used a very different method of analysis. Eschewing per se rules, the Court has engaged in a process of reasoning that it has itself characterized as one of "essentially ad hoc factual inquir[y]."[17] While ad hoc, however, the Court's analysis has not been entirely formless. It has focused on three factors: (1) the character of the governmental action; (2) the extent to which the regulation interferes with what the Court calls "distinct investment-backed expectations"; and (3) the degree of diminution in value.

1. The Character of the Governmental Action

Joseph Singer has succinctly and aptly explained the first factor. "The 'character of the government action,'" Singer states, "concerns the issue of whether the regulation is more closely analogous to a physical invasion or seizure of a core property right [on the one hand] or [on the other hand] to a general regulatory program affecting numerous parcels and designed to protect the public from harm by adjusting the benefits and burdens of economic life to promote the common good."[18] There was some indication in the Court's opinion in the 1978 case of *Penn Central Transportation Co.* v. *City of New York* that the harmful character of the conduct that the regulation proscribes is no longer important, or at least that it is less important than it once was. As we shall see, however, that has turned out to be a false signal.

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[16] The classic discussion of the problem is Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1196–1197 (1972).

[17] *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978).

[18] Joseph William Singer, Property Law: Rules, Policies, and Practices (Boston, MA 1993), 1228.

2. *"Distinct Investment-Backed Expectations"*

The phrase, "distinct investment-backed expectations," as well as the concept that the phrase described, were first developed by Frank Michelman in his justly celebrated 1967 article entitled "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law."[19] The basic idea that the phrase is intended to suggest is that the owner's reliance interest merits particular attention. A taking is more likely to be found where the regulation interferes with an investment that the owner had already made in reliance on a preexisting regulatory regime, rather than frustrating some future, yet uncrystallized plan or investment opportunity that the owner had contemplated. This factor has not appeared in the Supreme Court's analysis before the Court recognized it in the *Penn Central* case, but since then it has played a prominent role.[20]

3. *Diminution in Market Value*

The third factor to which the Court has paid attention in its balancing analysis is the extent to which the regulation resulted in a diminution in the market value of the owner's property interest. The idea here, of course, is that if a regulation effects a substantial diminution in value, it will be treated as a de facto expropriation. Two problems have plagued this factor from the time when the Court first introduced it in the 1922 *Pennsylvania Coal Co.* v. *Mahon* decision. The first problem is determining the relevant property interest that is the basis for calculating the degree of diminution. The test requires that the Court compare the market value of that interest with the value of the remaining property interest in order to determine the percentage or fraction of diminution. But what is the relevant denominator of the fraction? Is it the entire bundle of rights that the owner initially held or only that discrete interest that the regulation has affected? If the former is chosen, then the degree of diminution will usually be less. If it is the latter, then the degree of diminution may approach one hundred percent. The second problem with this factor is what degree of diminution is too much. How does one determine in a

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[19] See note 16 *supra*.

[20] See, e.g., *Connolly* v. *Pension Benefit Guarantee Corp.*, 475 U.S.211 (1986); *Ruckelshaus* v. *Monsanto* Co., 467 U.S.986 (1984); *Kaiser Aetna* v. *United States*, 444 U.S.164 (1979).

principled way at what point diminution in market value becomes constitutionally impermissible?

Until quite recently, neither of these factors has been terribly important. The Court determined in the *Penn Coal* case that the relevant denominator is the entire bundle of rights in the legally-recognized estate that the owner held. The consequence was that while regulations might produce considerable diminution in value in some instances, in no instance did it approach one hundred percent. This has made it easier for the Court to avoid finding a taking on the basis of this factor alone. Between 1922 and 1991, the Supreme Court had never found that a regulation constituted a taking solely on the basis of the degree of diminution in value. As we shall shortly see, that history ended with the Court's 1992 decision in *Lucas* v. *South Carolina Coastal Commission.*[21]

III. 1987 – a Takings Revolution?

The Big Picture began to change with the Supreme Court's 1987 Term, although, as I will argue, there is reason to doubt that a "revolution" had occurred in takings jurisprudence. Three major doctrinal developments in the Supreme Court's post-1987 takings jurisprudence warrant special attention. These are (1) the rise of conceptual severance; (2) the broadening of the physical occupation factor; and (3) the emergence of a new per se rule in *Lucas* v. *South Carolina Coastal Commission.*

A. The Rise of Conceptual Severance

"Conceptual severance," a term first coined by Margaret Jane Radin,[22] refers to the idea that each incident or set of incidents of ownership in the bundle of rights itself constitutes a fully protectable property interest. If accepted, this idea obviously would enormously broaden the reach of the takings clause. Conceivably, every regulation which does not fit into a properly defined nuisance exception could be viewed as a taking under this theory.[23]

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[21] 112 S.Ct. 2886 (1992).

[22] Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676 (1988).

[23] Indeed, this is the gist of the argument put forward in Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (Cambridge, MA 1985).

Earlier decisions of the Supreme Court had pretty clearly rejected conceptual severance.[24] The 1987 Term cases sent mixed signals about the future of conceptual severance. On the one hand, *Keystone Bituminous Coal Association* v. *DeBenedictis*[25] seemed squarely to reject the idea. Quoting from its earlier decision in *Andrus* v. *Allard*, the Court stated: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one strand of the 'bundle' is not a taking because the aggregate must be viewed in its entirety."[26]

On the other hand, two other decisions from the same Term indicated that the Court was indeed prepared to apply the conceptual severance technique. In *Hodel* v. *Irving*,[27] the Court struck down a federal statute which provided that upon the death of the owner of an excessively fractionated undivided ownership share in tribal Indian lands allotted to individuals, the interest shall not pass either to the deceased owner's devisees or heirs but instead shall escheat to the tribe whose land it originally was.[28] Characterizing the statute as a total restriction on the power to control the disposition of property at death, the Court ruled that it constituted an uncompensated, and therefore unconstitutional, taking of property. The right to pass on property at death, the Court said, is among "the most essential sticks in the bundle of rights that are commonly characterized as property."[29]

The other case in which the Court employed a form of the conceptual severance technique is *First English Evangelical Lutheran Church* v. *County of Los Angeles*.[30] There the Court held that a landowner was entitled to damages in an inverse condemnation action when an ordinance temporarily deprived the owner of all economically viable use. The ordinance, while not stating any durational limit, was rescinded after it was judicially declared to constitute an unconstitutional taking. The rescission, the Court held, did not deprive the owner of its right to recover damages

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[24] See, e.g., *Andrus* v. *Allard*, 444 U.S. 51 (1979); *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978).

[25] 480 U.S. 470 (1987).

[26] Id. at 497, quoting *Andrus* v. *Allard*, 444 U.S. at 65–66.

[27] 481 U.S. 704 (1987).

[28] The purpose of this statute was to facilitate prudent leasing and management of Indian land by reconsolidating multiple small fractionated interests. Without such reconsolidation, Congress felt, efficient management and use of the land would likely be frustrated by coordination problems.

[29] 107 S. Ct at 2083.

[30] 482 U.S. 304 (1987).

for the period of time when the ordinance was in effect. Temporary takings, Chief Justice Rehnquist reasoned, have the same status as permanent ones because for the period in question it is permanent. This is temporal, or durational, as distinguished from functional conceptual severance. The bundle of rights is sliced into temporal shares, each of which is a whole "thing." As Frank Michelman has pointed out, this "establishe[s] a major new beachhead in takings jurisprudence for conceptual severance."[31] It does not take a great deal of effort to imagine the same technique – divided into discrete segment ownership interests that are formally undivided – being used to extend the functional version of conceptual severance much more broadly than the Court did in *Hodel* v. *Irving*, in effect repudiating its disavowal of conceptual severance in both *Penn Central* and in a case decided the same Term as *First English, Keystone Bituminous Coal Association* v. *DeBenedictis*.[32] The Court has not yet taken that step, and perhaps it will not do so. It could fairly easily distinguish *First English* from the more typical situation by relying on an interpretation that Michelman has offered. According to Michelman,[33] what was crucial to the decision in *First English* was the fact that the ordinance, as enacted, had an indefinite duration and, therefore, would have effected a total taking without any offer of compensation. "Such behavior on the part of government," Michelman states, "is (by hypothesis) unconstitutional and lawless."[34]

Nonetheless, I do not think that we ought to dismiss out of hand any likelihood that the present Court will extend its use of conceptual severance. As Michelman emphasized, the majority in *First English* included Justice Brennan, the author of three opinions that explicitly rejected conceptual severance – the majority opinions in *Penn Central* and *Andrus* v. *Allard* and a concurring opinion in *Hodel* v. *Irving* affirming the continued vitality of *Andrus*. The majority also included Justices White, Blackmun, and Marshall, all of whom had joined Brennan in *Penn Central* and *Andrus*. None of those four justices is on the present Court, and at least some of their replacements – Justice Thomas leaps most quickly to mind – may well be more favorably disposed to extending the reach of conceptual severance. At least three members of the Court now can probably be counted as firm conceptual severance supporters: Chief

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[31] Frank Michelman, Takings 1987, 88 Colum. L. Rev. 1600, 1617–1618 (1988).
[32] 480 U.S. 470, 496–498 (1987).
[33] Michelman, note 31, 1619–1621.
[34] Id. at 1619.

Justice Rehnquist and Justices Scalia and Thomas. Justice O'Connor used it in *Irving* and might be inclined to apply it again under the right circumstances. That leaves us just one short of a conceptual severance majority. Stay tuned.

B. The Broadened Physical Occupation Factor: The *Nollan-Dolan* Doctrine

The second major post-1987 development concerns the physical occupation factor. Since 1987, the Supreme Court has sent several signals indicating that it may be prepared to expand somewhat the physical-occupation category of regulatory takings. The most important of these signals is the development of the *Nollan-Dolan* doctrine.

The doctrine concerns a practice that has been quite common in cities throughout the country in recent years-exactions. Exactions are concessions that cities extract from landowners who wish to change the use of their land in some way and are required to obtain the city's permission to do so. The typical scenario involves an application for a development permit which the city conditions on the landowner's agreeing to dedicate a portion of her land to some public use. The ostensible purpose of the exaction to minimize the negative externalities of the proposed development.[35] Clearly, though, their increased popularity reflects the fact that few cities today can afford to pay for public dedications of private land.

In *Nollan* v. *California Coastal Commission*,[36] the Court for the first time imposed a requirement that there be an "essential nexus" between the purpose of an exaction and the purpose that would be served by denying the requested development permit. Then, 1994, the Court in *Dolan* v. *City of Tigard*[37] added to this doctrine the further requirement that a "rough proportionality" exist between the exaction and the expected impact of the proposed development. The city, moreover, is assigned the burden of proving that this proportionality exists.

These two requirements have cast doubt on the viability of exactions generally. Commentators have suggested that the doctrine will be means

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[35] On exactions, both generally and in relation to the *Nollan-Dolan* doctrine, see Douglas T. Kendall/E. Ryan, Paying for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan, 81 Va. L. Rev. 1801 (1995); Stewart E. Sterk, Nollan, Henry George, and Exactions, 88 Colum. L. Rev. 1731 (1988).

[36] 483 U.S. 825 (1987).

[37] 114 S.Ct. 2309 (1994).

for constitutionalizing a wide variety of disputes between local governments and landowners concerning land development[38] and severely limiting the flexibility of local governments to regulate land use in the public interest.

All of this may yet come to pass, but there are reasons to think that the reach of the new doctrine is more limited. Both cases involved exactions that authorized the public to enter private land over which the owners had previously had an unlimited right to exclude. In *Nollan*, the California Coastal Commission required the owners of beachfront property to permit the public to cross laterally across their private stretch of beach, located between two state parks. The requirement in effect exacted a public easement of way, an action that if done directly clearly would have required compensation. In *Dolan*, the city conditioned a permit to expand the owner's store and parking lot on dedicating a portion of the land to the city for the purposes of creating a pedestrian and bicycle path and a flood control greenway. As in *Nollan*, the exaction would have had the effect of restricting the owner's power to exclude the public from her land. Both decisions, then, reflect, as Frank Michelman stated with respect to *Nollan*, "the talismanic force of 'permanent physical occupation' in takings adjudication."[39] To date, there has been no indication that the Court would apply the same heightened scrutiny where the government condition does not interfere with the landowner's right to exclude.[40]

Further evidence that the Court seems not prepared to launch a massive expansion of the physical occupation category, subject to a rigid per se rule, is its decision in *Yee* v. *City of Escondito*.[41] That case involved a mobile home rent control ordinance. California state law restricts the ability of owners of mobile home parks to order, while the rental agreement is still in effect, the removal of a mobile home upon its sale. The combined effect of that law with a local rent control ordinance, the park owner argued, was to constitute a taking by physical occupation. The Supreme Court disagreed, emphasizing that there was no "compelled physical occupation" here. It is, the Court stated, the "element of required acquies-

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[38] See Note, Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution, 102 Harv. L. Rev. 992, 992–993 (1989).

[39] Michelman, note 31, 1608.

[40] See Eric T. Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. Rev. 77, 87 N.41 (1995).

[41] 112 S.Ct. 1522 (1992).

cence [that] is at the heart of the concept of occupation."[42] The exactions involved in *Nollan* and *Dolan* were both of the type that could easily be viewed as "required acquiescence" of just that sort, but many other municipal exactions cannot. It seems unlikely, then, that the *Nollan-Dolan* doctrine will put an end to that practice.

C. Another Categorical Rule (Sort of): *Lucas* and Total Economic Deprivations

The final development is one that has received the greatest public attention. It may also be the one that has the least practical effect. In *Lucas* v. *South Carolina Coastal Commission*,[43] the Court concluded that environmental regulations that deprive the landowner of all economically viable use are per se takings unless the intended use constituted a public nuisance under what the Court called "relevant background principles." Writing for the majority, Justice Scalia stated: "Where the State seeks to sustain regulations that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[44] In other words, the state, to avoid a compensation obligation, must locate some land-use prohibitions existing in the historical common law of nuisance and link that prohibition with the use proscribed by the challenged regulation.

There are a host of problems with Justice Scalia's analysis, as several commentators have effectively pointed out.[45] The point that I wish to emphasize here is that *Lucas'* categorical rule may not amount to all that much if it is confined to the unusual circumstance of a judicial finding of fact that the regulation deprived the owner of all economically viable use and if the Court does not broaden that circumstance through a more extensive use of the conceptual severance technique. The real significance of *Lucas* may be less its practical effect that the signal it sends regarding the current Court's desire to remold takings law along more formal lines. The Rehnquist Court seems increasingly impatient with the open-ended bal-

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[42] Id. at 1528.

[43] 112 S.Ct. 2886 (1992).

[44] 112 S.Ct. at 2899 (footnote omitted).

[45] For trenchant criticisms of *Lucas*, see Freyfogle, note 40, 118–127; William W. Fisher III, The Trouble with Lucas, 45 Stan. L. Rev. 1393 (1993); John A. Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 Colum. J. Envtl. L. 1 (1993).

ancing approach of *Penn Central*. *Lucas* and *Dolan* may indicate that the Court is responding positively to calls from some commentators for "a good dose of formalization."[46]

Conclusion

Is it fair to characterize the Court's post-1987 takings decisions as constituting a "revolution" in takings jurisprudence? I think not. The basic structure and substance of the doctrine have remained largely intact. But clearly things are changing. Structurally, the doctrine is increasingly becoming formalized. Substantively, the new formality has enhanced the takings clause's role in restricting the power of state and local governments. Once a backwater of constitutional law, the takings clause has emerged as one of the Rehnquist Court's main tools for constructing the minimal state. No one interested in American public law can afford any longer to ignore it.

[46] Susan Rose-Ackerman, Against Ad Hockery, 88, Colum. L. Rev. 1697, 1700 (1988).