



2016

When Scalia Wasn't Such an Originalist

Michael Lewyn

Touro Law Center, mlewyn@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Judges Commons](#), [Property Law and Real Estate Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Lewyn, Michael (2016) "When Scalia Wasn't Such an Originalist," *Touro Law Review*. Vol. 32 : No. 4 , Article 4.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol32/iss4/4>

This Scalia Tribute is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

WHEN SCALIA WASN'T SUCH AN ORIGINALIST

*Michael Lewyn**

Justice Scalia described himself as an originalist¹- that is, a judge who relies heavily on the “original meaning”² of Constitutional provisions. According to Justice Scalia, the originalist judge should ascertain the “meaning of the words of the Constitution to the society that adopted it.”³ Yet in *Lucas v. South Carolina Coastal Council*,⁴ Justice Scalia’s majority opinion upheld a Takings Clause claim while rejecting originalist arguments made in Justice Blackmun’s dissent.⁵ Can Justice Scalia’s refusal to apply his own method be defended, or was he ignoring the Constitution’s original understanding in order to achieve a morally correct result? This article suggests that pre-*Lucas* Supreme Court precedent and the ambiguity of the Fifth Amendment’s original meaning might justify the Scalia opinion.

I. BACKGROUND: LUCAS AND JUSTICE SCALIA’S NON-ORIGINALIST MAJORITY OPINION

In 1986, David Lucas purchased two residential lots on a South Carolina island, roughly 300 feet from the beach.⁶ But in 1988, the state of South Carolina passed a statute limiting improve-

* Associate Professor, Touro Law Center. B.A., Wesleyan University; J.D., University of Pennsylvania, L.L.M., University of Toronto.

¹ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-65 (1989).

² *Id.* at 862 (claiming that alternative modes of constitutional interpretation fail to adequately resolve question of “what, precisely, is to replace *original meaning*”) (emphasis added).

³ Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 253 (2009) (citation omitted).

⁴ 505 U.S. 1003 (1992).

⁵ *Id.* at 1036 (Blackmun, J., dissenting). I note in passing that Justice Stevens also dissented, on grounds not relevant to the primary subject paper. *Id.* at 1061 (Stevens, J., dissenting).

⁶ *Id.* at 1008.

ments on beachfront land.⁷ Lucas filed suit, asserting that the new law constituted a taking of his property without just compensation, in violation of the Fifth Amendment.⁸ A South Carolina trial court agreed, holding that the law “constituted a permanent ban on construction insofar as Lucas’ lots were concerned . . . and render[ed] them valueless.”⁹ The State Supreme Court reversed, holding that because the legislation was designed to prevent serious public harm, no compensation was necessary even if South Carolina law made Lucas’s land valueless.¹⁰

The U.S. Supreme Court reversed, holding that government regulation was a compensable taking when the “regulation denies all economically beneficial or productive use of land.”¹¹ Justice Scalia’s majority opinion noted that in the 1922 case of *Pennsylvania Coal Co. v. Mahon*,¹² the Court held that the Takings Clause was not limited to government appropriation of property, but instead required compensation “if regulation goes too far.”¹³ The majority also quoted later case law stating that a compensable taking occurs when regulation “denies an owner economically viable use of his land.”¹⁴ The majority added that this rule made sense as a matter of policy, because such a deprivation is “from the landowner’s point of view, the equivalent of a physical appropriation.”¹⁵

In dissent, Justice Blackmun wrote, *inter alia*,¹⁶ that “the Fifth Amendment’s takings clause originally did not extend to regulations of property, whatever the effect.”¹⁷ In support of this view, he relied heavily on 19th-century state court precedent holding that the Consti-

⁷ *Id.* at 1008-09 (citation omitted).

⁸ U.S. CONST., amend. V.

⁹ *Lucas*, 505 U.S. at 1009.

¹⁰ *Id.* at 1009-10 (describing decision) (citations omitted).

¹¹ *Id.* at 1015 (citations omitted). The Court added that even a state law imposing such a complete deprivation of value would not constitute a compensable taking if “background principles of nuisance and property law,” justified the law—for example, if Lucas’s development constituted a public nuisance. *Id.* at 1031.

¹² 260 U.S. 393 (1922).

¹³ *Lucas*, 505 U.S. at 1014 (quoting *Mahon*, 260 U.S. at 415).

¹⁴ *Id.* at 1016 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

¹⁵ *Id.* at 1017 (citation omitted).

¹⁶ Justice Blackmun raised a variety of other arguments. He asserted that the state law was not a taking because it was necessary to prevent public harm arising from beach erosion, the case was not ripe for review, and Lucas’s property in fact had economic value. *Id.* at 1036, 1039-43, 1047-51 (Blackmun, J., dissenting). Justice Stevens dissented on other grounds. *Id.* at 1061 (Stevens, J., dissenting).

¹⁷ *Id.* at 1057.

tution only protected the right to possess land rather than property values.¹⁸ Similarly, 18th-century common law limited landowners' rights to develop land; for example, an 18th-century landowner could "build nothing on his land that would alter the natural flow of water."¹⁹

Justice Scalia's majority opinion did not respond to Justice Blackmun's historical analysis with its own persuasive historical analysis. Instead, Justice Scalia relied on the precedent discussed above, and on "the historical compact recorded in the Takings Clause that has become part of our constitutional culture."²⁰ Where this "historical compact" came from is anything but clear: in a footnote, Scalia admitted that the Court's rule was not "supported by early American experience."²¹

In response to Justice Blackmun's dissent, Justice Scalia again relied on precedent, pointing out that "even [Justice Blackmun] does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the [Takings] Clause can be read to encompass regulatory as well as physical deprivations . . . we decline to do so as well."²² So at first glance, Justice Scalia appears to have chosen precedent over the Constitution's original meaning.

II. DEFENDING THE INDEFENSIBLE

So why would Justice Scalia ignore originalist methodology in the Takings Clause context? One reason is Scalia's willingness to adhere to nonoriginalist precedent. Scalia has written that originalism, like any other legal theory, "must accommodate the doctrine of *stare decisis*; it cannot make the world anew."²³ Were this not the case, originalism would be "so disruptive of the established order of things that it will be useful only as an academic exercise and not as a

¹⁸ *Id.* at 1057-58.

¹⁹ *Id.* at 1059 (citation omitted). Justice Blackmun also wrote that "James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government." *Id.* at 1057 n.23. He did not elaborate on this point, which is addressed in more detail. See *infra* notes 31-36 and accompanying text.

²⁰ *Id.* at 1028.

²¹ *Id.*

²² *Id.*

²³ ANTONIN SCALIA: A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (1997).

workable prescription for judicial governance.”²⁴ In earlier cases, the Supreme Court had written that a regulation is a taking if it “denies an owner economically viable use of his land.”²⁵ Even if the *Lucas* Court’s categorical rule that such regulations are *always* takings went too far,²⁶ the Court’s (then) 70-year-old rule that government regulation can be a taking²⁷ certainly supports some protection for property owners such as Lucas.

More importantly, the original understanding of the Takings Clause does not require a contrary rule. If the Takings Clause had a legislative history, and that history was flatly inconsistent with the *Lucas* rule, an originalist’s duty might be clear. But in fact, this is not the case. “There are apparently no records of discussion about the meaning of the clause in either [the ratifying] Congress, or, after its proposal, in the states.”²⁸ Justice Blackmun relied on state court precedent,²⁹ but such precedent has limited value, because the Takings Clause was originally designed to apply only to the federal government,³⁰ and its drafters therefore expected federal power to be more limited than state power.

It could be argued that post-enactment statements by James Madison, the author of the Takings Clause,³¹ are more decisive. Madison never directly explained the purpose of the Takings

²⁴ *Id.* I note that Justice Scalia’s willingness to adhere to nonoriginalist precedent is quite controversial among originalist scholars. Cf. Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 433-37 (2006) (describing several commentators’ views).

²⁵ *Agins*, 447 U.S. at 260. *But see Lucas*, 505 U.S. at 1061, 1064 (Stevens, J., dissenting) (describing such remarks as dicta).

²⁶ The Court could have held that such complete deprivations of value would be judged by a balancing test, rather than being categorically invalid. Cf. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2002) (where regulation reduces land’s value but does not completely deprive landowner of all economically beneficial use, court weighs economic harm to landowner’s property values and investment-backed expectations along with character of government action at issue); *Lucas*, 505 U.S. at 1061, 1071 (Stevens, J., dissenting) (suggesting application of balancing test to case at hand).

²⁷ See *supra* notes 12-13 and accompanying text.

²⁸ William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995).

²⁹ See *supra* notes 18-19 and accompanying text.

³⁰ See Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U.L. REV. 181, 227, 240 (1999) (noting that “the Takings Clause originally did not apply to the states” and suggesting that Framers of Constitution trusted states more than federal government); Treanor, *supra* note 28, at 809 (Takings Clause applied to states only after enactment of Fourteenth Amendment).

³¹ *Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting).

Clause.³² But in a 1792 essay attacking high tariffs and a federal debt repayment plan that favored some speculators,³³ Madison wrote:

If there be a government which . . . provides that none shall be *taken directly* even for public use without indemnification of the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly violates* their property, in their actual possessions, in the labor that acquires their daily subsistence . . . such a government is not a pattern for the United States.³⁴

Madison's essay contrasts "direct" takings (which were compensable under the Takings Clause) with "indirect violations" of property rights (which he opposed but did not suggest were compensable). So it could be argued that Madison believed that "the Takings Clause did not prevent the national government from using its taxing and regulatory powers to affect the distribution of wealth"; otherwise, he would have argued that "indirect violations" were takings as well.³⁵ But this omission shows only that Madison thought that some "indirect violations" were not takings, not that no "indirect violation" could ever be a taking. Moreover, Madison did not really define "direct" takings; thus, it is not clear where he would draw the line between "direct" and "indirect" violations.³⁶

III. CONCLUSION

In sum, there is no smoking gun that establishes whether the Framers expected the Takings Clause to limit non-confiscatory regulations of property. Given the uncertainty of the historical record, an originalist judge such as Justice Scalia could quite reasonably rely on other factors, such as precedent.

³² See Treanor, *supra* note 28, at 847 (Madison "nowhere directly addressed" question of why "a takings clause was needed.").

³³ *Id.* at 837-38 (describing background of essay).

³⁴ *Id.* at 838 (citation omitted) (emphasis added).

³⁵ *Id.* at 840.

³⁶ See Gold, *supra* note 30, at 202-04 (discussing these issues in more detail).