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In Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010), the U.S. Supreme Court granted certiorari to determine whether the Florida Supreme Court had violated a group of littoral property owners' Fifth Amendment rights—or committed a "judicial taking"—by upholding the state of Florida's Beach and Shore Preservation Act. Under the Act, the State is entitled to ownership of previously submerged land it restores as beach; this is true even though the normal private/state property line, the mean-high water line, is moved seaward, and the affected littoral owner(s) lose their right to have their property abut the water. Although a four-justice plurality led by Justice Scalia held that that the Florida Supreme Court did not violate the Fifth Amendment in this instance, the plurality recognized that it is unconstitutional for any branch of state government to declare that what was once an established private property right no longer exists—*

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without providing just compensation. In so doing, the plurality appears to endorse a judicial taking doctrine.

This Article explores the institutional and policy ramifications of such a doctrine—ultimately concluding that the due process analysis advocated by Justice Kennedy in concurrence is a better doctrinal mechanism to corral wayward judges. After exploring the procedural and federalism concerns raised by a judicial takings doctrine, the Article hypothesizes the viewpoints of several famous deceased takings scholars. The Article then evaluates the position of living taking scholars Eduardo M. Penalver and Lihor Strahilevitz, whom propose a flexible approach that considers Takings Clause and due process analysis on a case-by-case basis.

INTRODUCTION

Can a judge commit a taking? Despite befuddling courts and property scholars for years, this deceptively simple question was not scrutinized by the U.S. Supreme Court until recently. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[1] a four-justice plurality affirmed that the judiciary should be treated like any other state entity under the Takings Clause of the Fifth Amendment[2]—implicitly endorsing a "judicial takings" doctrine in the process. Although the other four justices[3] concurred in the judgment of the case, they did not endorse a judicial takings doctrine. Justices Breyer and Ginsburg avoided the judicial takings question altogether,[4] while Justices Kennedy and Sotomayor argued that judicial takings should be invalidated under the Due Process Clause of the Fourteenth Amendment.[5]

Stop the Beach arose after a group of oceanfront property owners in the City of Destin and Walton County challenged Florida's Beach and Shore Preservation Act of 1961 (the "Act").[6] The Act authorized the local government to add approximately seventy-five feet of dry sand seaward of the mean high-water line (the "MHWL") across 6.9 miles of eroded beach.[7] To the property owners' chagrin, this restored beach was to be owned by the state.[8] After the property

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[1] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010).

[2] *See id*. at 715 ("In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking."); U.S. CONST. amend. V.

[3] Justice Stevens recused himself from the case. *See infra* note 137.

[4] *See Stop the Beach*, 560 U.S. at 742–45 (Breyer, J., concurring).

[5] *See id.* at 733–42 (Kennedy, J., concurring); U.S. CONST. amend. XIV.

[6] *See Stop the Beach*, 560 U.S. at 710–12; Beach and Shore Preservation Act of 1961, FLA. STAT. §§ 161.011–.45 (2020).

[7] *Stop the Beach*, 560 U.S. at 711.

[8] *See id.*

owners exhausted their administrative remedies without success,[9] the Florida First District Court of Appeal (the "First DCA") heard the case on direct appeal.[10] The First DCA held that the property owners were entitled to compensation, but the Florida Supreme Court disagreed.[11] The U.S. Supreme Court subsequently granted certiorari to determine whether the Florida Supreme Court's judgment itself constituted a judicial taking or otherwise violated the property owners' due process rights.[12] Citing the state's right to fill submerged land and take ownership of land created by avulsion,[13] the U.S. Supreme Court affirmed the Florida Supreme Court's judgment and found no judicial taking.[14] Nevertheless, the plurality was crystal-clear that a taking occurs when "a court declares that what was once an established right of private property no longer exists."[15] Unfortunately, the plurality did not expound upon the ramifications of this mandate.

This Article begins with a summary of the major principles and landmarks of takings law in Part I. Dicta from the U.S. Supreme Court on judicial takings is also explored here. Part II covers the history of *Stop the Beach* and breaks down the opinions of Justices Scalia, Kennedy, and Breyer. Part III details the procedural and federalism concerns raised by a judicial takings doctrine and examines the potential for judicial abuse of "background principles" of state property law. The part concludes with an argument for due process.

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[9] *See* Save Our Beaches, Inc. v. Dep't of Env't Prot., DOAH Case Nos. 04-2960/04-3261, 2005 WL 1543209 (Fla. Div. Admin. Hrgs. Jun. 30, 2005) (recommended order). This recommended order from the Florida Division of Administrative Hearings was later enforced by the Florida Department of Environmental Protection. *See* Save Our Beaches, Inc. v. Fla. Dep't of Env't Prot., DEP Nos. DEP:05-0791/04-1370, 2005 WL 1927305 (Fla. Dep't Env't Prot. Jul. 27, 2005) (final order).

[10] *See* Save Our Beaches, Inc. v. Fla. Dep't of Env't Prot., 27 So. 3d 48 (Fla. Dist. Ct. App. 2006), *rev'd sub nom.* Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008)*, aff'd sub nom. Stop the Beach*, 560 U.S. 702.

[11] *Walton County*, 998 So. 2d at 1121.

[12] *See Stop the Beach*, 560 U.S. at 707, 712.

[13] *See Stop the Beach*, 560 U.S. at 730; An avulsion refers to a sudden gain or loss of land resulting from the action of water. *Avulsion*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[14] *Stop the Beach*, 560 U.S. at 733.

[15] *Id.* at 715 (emphasis omitted).

The last part of this Article, Part IV, analyzes an article authored on judicial takings by Professors Eduardo M. Peñalver and Lior Strahilevitz.

I. THE ROAD TO *STOP THE BEACH*

A. *The Takings Clause and Substantive Due Process*

A quick review of pertinent constitutional law is necessary. The Due Process Clause of the Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property without due process of law."[16] The Takings Clause of the Fifth Amendment follows "[N]or shall private property be taken for public use, without just compensation."[17] Although the Fifth Amendment does not apply directly to the states, the Fourteenth Amendment—which contains a Due Process Clause with similar language to the Fifth Amendment's Due Process Clause—does.[18] Further, the Fourteenth Amendment incorporates the Fifth Amendment's Takings Clause.[19] Thus, the states may not take private property for public use without providing compensation.

The Due Process and Takings Clauses both limit the police power reserved to the states under the Tenth Amendment.[20] Although "insusceptible of strict definition,"[21] the police power generally permits the state to regulate the conduct and property of its citizens for the health, safety, and moral welfare of the public.[22]

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[16] U.S. CONST. amend. V.

[17] *Id.*

[18] U.S. CONST. amend. XIV, § 1.

[19] Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236–37 (1897); Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994); *see* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 829 (1987).

[20] *See* U.S. CONST. amend X.

[21] CARMAN F. RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 10 (1894); *accord* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) ("Except for the substitution of the familiar term of 'reasonableness,' the Court has generally refrained from announcing any specific criteria [for the police power].").

[22] *See* ERNST FREUND, THE POLICE POWER 6 (1904); *see also* Noble State Bank v. Haskell, 219 U.S. 104, 111–13 (1911); Hadacheck v. Sebastian, 239 U.S. 395, 410–11 (1915); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Miller v. Schoene, 276 U.S. 272, 279–80 (1928).

Examples of the police power include protecting resources,[23] preventing nuisances,[24] and enacting zoning ordinances.[25] In evaluating an exercise of police power, courts usually apply the "rational basis" test, which assesses whether the regulation is non-arbitrary and reasonably related to a legitimate public purpose.[26] The flexible nature of this test makes it difficult to identify concrete limits to the police power. As former Massachusetts Chief Justice Lemuel Shaw eloquently put it, "[i]t is much easier to perceive and realize the existence and source of this [police] power, than to mark its boundaries or prescribe limits to its exercise."[27]

A regulation may be challenged as an invalid exercise of police power under the substantive language of the Due Process Clause.[28]

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[23] Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (navigable waters); Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) (forests).

[24] *Hadacheck*, 239 U.S. at 411 (air pollution); *Miller*, 276 U.S. at 278–80 (tree disease).

[25] Village of Euclid v. Amber Realty Co., 272 U.S. 365, 397 (1926) (upholding a zoning ordinance to prevent industry growth); Nectow v. City of Cambridge, 227 U.S. 183, 188–89 (1928) (holding zoning ordinance invalid under the Due Process Clause).

[26] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (establishing rational basis review for economic activity). When the regulation under review affects fundamental rights or people classified by race, religion, or national origin, "strict" judicial scrutiny applies instead of "rational basis" review. *See* Strauder v. West Virginia, 100 U.S. 303, 310–11 (1880) (holding that states cannot prohibit jury service based solely on race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (finding that laws that target a racial group are "immediately suspect" and subject to "the most rigid scrutiny"); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that restricting the right to marry based on race is subject to the rigid scrutiny); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (explaining that some liberties are so rooted in the traditions and conscience of our people as to be ranked as fundamental and therefore cannot be deprived without compelling justification). Under this heightened level of review, a court asks whether the act is narrowly tailored to meet a compelling public purpose. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973). Likewise, regulations based on gender and illegitimacy are subject to "intermediate" judicial scrutiny. *See* Craig v. Boren, 429 U.S. 190, 197–200 (1976). This test asks whether the act is "substantially related to an important public interest." *Id*.

[27] RANDOLPH, *supra* note 21, at 10 (quoting Commonwealth v. Alger, 61 Mass. 53, 85 (1851)); *see also* CURRENT CONDEMNATION LAW 3 (Alan T. Ackerman & Darius W. Dynkowski eds., 2d ed. 2006) ("The concept of public welfare is broad and inclusive . . . ." (quoting Berman v. Parker, 348 U.S. 26, 33 (1954))).

[28] TAKING SIDES ON TAKINGS ISSUES 6 (Thomas E. Roberts ed., 2002).

The merit of such claims has fluctuated with the U.S. Supreme Court's stance on substantive due process. Initially, the Court correlated substantive due process protections with vested property interests.[29] In the early twentieth century, the Court moved towards the "liberty" end of the due process spectrum, protecting employers' rights to establish employee wages and working conditions.[30] However, the harsh economic realities of the Great Depression eventually convinced the Supreme Court to defer to the legislature on such employment matters.[31] Consequently, the Court ceased applying the Due Process Clause to economic regulation.[32] A popular criticism of Justice Kennedy's due process approach is that it would signal a return to the *Lochner* era of the early twentieth century, as property law typically involves some form of economic regulation.[33] Nevertheless, the Court continues to rely on the Due Process Clause to protect "fundamental" individual rights, including property interests.[34]

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[29] *See, e.g.*, Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 449–52 (1857) (finding that slaves were a vested property interest), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[30] *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down a state statute prescribing employee hours); Adkins v. Child.'s Hosp., 261 U.S. 525, 561–62 (1923) (rejecting federal minimum wage legislation for women).

[31] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937) ("We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent.").

[32] *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies.").

[33] *See* Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 419 (2001) ("To rely on due process would risk resuscitating one of the most discredited doctrines in the Court's history—the repudiated *Lochner* view that substantive due process limits government economic regulation.").

[34] *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that the Fourteenth Amendment guarantees a defendant who would be entitled to a jury trial in federal court the right to a jury trial in state court); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 204–05 (Brennan, J., dissenting) (arguing that the Due Process Clause creates an affirmative duty for the state to protect children from abuse); Roe v. Wade, 410 U.S. 113, 153 (1973) (finding that the right to privacy under the Fourteenth Amendment extends to a woman's right to choose whether to have an abortion); Moore v. City of East Cleveland, 431 U.S. 494, 520–21 (1977) (invalidating a housing code provision that restricted which family

B. *The U.S. Supreme Court's Takings Jurisprudence*

After the Supreme Court stopped analyzing economic regulation under the Due Process Clause, it found another avenue to attack such regulation affecting property rights: a regulatory takings doctrine. In *Pennsylvania Coal Co. v. Mahon*,[35] Justice Holmes proclaimed that a regulation that "goes too far" may constitute a taking.[36] The only measuring stick Holmes provided was the "extent of diminution" of the property value.[37] Holmes did not clarify when the judiciary should invalidate a regulation under the Due Process Clause as opposed to order the government to pay compensation under the Takings Clause.[38] In practice, *Mahon* prevented the government from dodging compensation by regulating property rather than seizing it.

About fifty years later in *Penn Central Transportation Agency v. New York City*,[39] the Court finally added some substance to its regulatory takings doctrine. Endorsing a judicial ad hoc factual inquiry into state property legislation, Justice Brennan set forth a test (the "*Penn Central* Test") weighing the (1) character of the government action and (2) economic effect of the regulation on the property owner; particularly the extent to which the regulation has interfered with any "distinct investment-backed expectations."[40] By permitting judges to evaluate the merits of property regulation, the Court blurred the line between the Takings and Due Process Clauses. Consequently, it is not always clear whether a regulation should be viewed as an act of eminent domain requiring compensation or an invalid exercise of police power.[41] Notably, however, in

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members could live together under substantive due process); Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962) (upholding a town mining ordinance as a valid exercise of the police power).

[35] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[36] *Id.* at 415.

[37] *Id.* at 413.

[38] *Id*. at 415 (discussing both the Due Process Clause and Takings Clause but offering no clear indication of when the judiciary should invalidate a regulation under either Clause).

[39] Penn Cent. Transp. Agency v. N.Y. City, 438 U.S. 104 (1978).

[40] *Id.* at 124–25.

[41] *Compare* First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314–15 (1987) (compensation is due for temporary taking resulting from a zoning ordinance), *with* Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (applying an ad hoc balancing test to a zoning ordinance).

Lingle v. Chevron U.S.A. Inc.,[42] the Court discounted the role substantive due process plays in regulatory takings analysis.[43] Speaking for the majority, Justice O'Connor emphasized the deference courts should give to legislative judgments.[44] Property owners *seeking redress for the burden imposed on their property* by a state action may not seek to invalidate the state action—they may only seek compensation for it; a due process challenge to the *efficacy of a regulation* is a wholly distinguishable, separate action.[45]

The *Penn Central* test has been relied upon and tinkered with by the U.S. Supreme Court for many years now.[46] It is arguably the most important takings case in U.S. history. That said, no case has been more important to the rise of judicial takings than *Lucas v. South Carolina Coastal Council*.[47] In *Lucas*, the Court held that the state may restrict private property use without compensation as long as the restriction accords with "background principles" of state property and nuisance law.[48] As discussed later in this Article, illusory "background principles" are the common foundation for a judicial taking.[49] However, the most immediate and practical consequence of *Lucas* resulted from the Court's clarification that a per se taking occurs when a property owner is deprived of *all* economically

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[42] Lingle v. Chevron U.S.A. Inc.,544 U.S. 528 (2005).

[43] *Id.* at 540 ("We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence."). Justice Kennedy submitted a brief concurrence "to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process." *Id.* at 548 (Kennedy, J., concurring).

[44] *See id.* at 545 (majority opinion).

[45] *See id.* at 536–37.

[46] *See, e.g.*, *Agins*, 447 U.S. at 260–62 (applying a modified two-step *Penn Central* balancing test, asking whether the regulation (1) substantially advances a state interest, and (2) deprives the owner economically viable use of his land). *Lingle*, 544 U.S. at 545 (rejecting the *Agins* test in favor of the *Penn Central* test); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 342 (2002) (rejecting a per se taking rule and favoring the *Penn Central* test for temporary takings).

[47] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[48] *Id.* at 1029. The logic is that such property use was never part of the owner's title to begin with. *Id.* For an in-depth discussion of background principles see TAKING SIDES ON TAKINGS ISSUES, *supra* note 28, at 163–79.

[49] *See infra* Part III.C.

beneficial use of his land.[50] Indeed, nine years later in *Palazzolo v. Rhode Island*,[51] the Court denied a per se taking had occurred because the affected parcel retained approximately six percent of its total value.[52]

The Court affirmed the "deprivation of all economically beneficial use" per se taking standard in *Lingle*.[53] There, Justice O'Connor iterated that the only other instance when a per se taking occurs is where the government physically invades private property.[54] (According to O'Connor, other takings claims must be analyzed under *Penn Central*.[55]) In *Stop the Beach*, Justice Scalia seemed to identify a third per se takings standard, where "[the state] recharacterize[s] as public property what was previously private property."[56] This standard is the premise for the judicial takings doctrine raised by the *Stop the Beach* plurality.[57]

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[50] *Lucas*, 505 U.S. at 1019.

[51] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[52] *See id.* at 616. The Court did, however, remand the case to apply a *Penn Central* test. *Id.* at 632.

[53] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005).

[54] *See id*. at 547–48. For precedent establishing the "physical invasion" per se taking standard, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438, 441(1982) (holding that negligible cable installation equipment constitutes a permanent physical invasion of property and is therefore a taking). *See also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) (discussing "physical invasion" per se taking standard).

[55] *See Lingle*, 544 U.S. at 548. The only other exception is land-use exactions, which are analyzed under a two-step test established in Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994). *See Nollan*, 483 U.S. at 837 (proposing the "essential nexus" requirement between the condition imposed on development and state interest advanced by the restriction); *Dolan*, 512 U.S. at 391 (describing the "rough proportionality" requirement between the condition imposed and the estimated impact of the proposed development).

[56] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010) ("States effect a taking if they recharacterize as public property what was previously private property." (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–65 (1980))).

[57] To compare a state "recharacterizing as public property what was previously private property," *id.*, with "declar[ing] what was once an established right of private property no longer exists," see *supra* note 15 and accompanying text. These are very similar actions.

C. *The U.S. Supreme Court's Historic Approach to Judicial Takings*

The Supreme Court first hinted at the idea of a judicial taking in *Muhlker v. New York & Harlem Railroad Co.*[58] A four-justice plurality enounced that state courts can declare or modify property law as they see fit but cannot divest one's contractual rights (under the Contracts Clause of the Constitution) in the process.[59] However, four dissenting justices argued that property law was a "construction of the courts" that can be changed regardless of constitutional restrictions.[60] Consequently, *Muhlker* did not create any strong precedent for judicial takings.[61]

Around the 1930s, the Court released a series of opinions suggesting that judicial changes in the law cannot violate the Takings Clause. In *Tidal Oil Co. v. Flanagan*,[62] the Court reasoned that because no constitutional issue arises when a state court defines property, no constitutional issue arises when a state court re-defines property.[63] Therefore, the Supreme Court lacks jurisdiction to hear such cases.[64] The Court reconciled its decision with *Muhlker*—which involved a similar contractual right of property enjoyment—by pointing out that the *Muhlker* plaintiff's rights had been impaired by a state statute.[65] Thus, the constitutional protections of the Contracts Clause only apply to legislative acts, not judicial decisions.[66]

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,[67] the Court reversed a state court ruling that abruptly altered state jurisdiction over administrative manners, thereby depriving the plaintiff of a forum

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[58] *See* Muhlker v. N.Y. & Harlem R.R., 197 U.S. 554, 570 (1905). The Supreme Court had already established that the Takings Clause applies to judicial action. *See* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233–35 (1897). However, the *Quincy Railroad* court did not address whether the Takings Clause applies when the judiciary actually *changes* property law. *See id.*

[59] *Muhlker*, 197 U.S. at 570.

[60] *Id.* at 572–74 (Holmes, J., dissenting).

[61] *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1465 (1990) ("Faced with internal disagreement on judicial takings, the Court proceeded to waffle on the issue for several decades.").

[62] Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924).

[63] *See id.* at 452–53, 455.

[64] *Id.* at 455–56.

[65] *Id*. at 452–53.

[66] *See id.* at 450–51.

[67] Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673 (1930).

to challenge a property tax.[68] Because the plaintiff was deprived of an opportunity to be heard, however, the Court had only rectified a procedural due process violation.[69] Justice Brandeis underscored that "[s]tate courts . . . may [still] ordinarily overrule their own decisions without offending constitutional guarantees, even though parties may have acted to their prejudice on the faith of the earlier decisions."[70] Two years later, in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*,[71] Justice Cardozo emphasized that state courts are entitled to "adhere[] to precedent" however they see fit.[72] According to Cardozo, nothing in the Constitution prevents a state court from retroactively applying a new statute or rule of law to a prior decision.[73] Read together, *Tidal Oil*, *Brinkerhoff*, and *Great Northern Railway* seem to discard any notion of judicial takings that can be gleaned from *Muhlker*.

It wasn't until 1967 that Justice Stewart would single-handedly revive the judicial takings concept. In *Hughes v. Washington*,[74] the Court granted certiorari to determine ownership of an accretion[75] between a littoral property owner and the state.[76] The Washington Supreme Court overruled precedent favoring the property owner by granting the accretion to the state, claiming that any private right to the accretion was forfeited when the state adopted its constitution in 1889.[77] By abruptly interpreting the state constitution to override established precedent, the Washington Supreme Court essentially "changed" state property law.[78] The U.S. Supreme Court majority reversed the judgment, but dodged the judicial takings question by holding that accretion ownership is controlled by federal law, which dictates that property owners are entitled to accretions.[79] In a

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[68] *Id.* at 675–78.
[69] *Id.* at 681–82.
[70] *Id.* at 681 n.8.
[71] Great N. Ry. v. Sunburst Oil & Refin. Co., 287 U.S. 358 (1932).
[72] *See id.* at 364.
[73] *Id.* at 364–65.
[74] Hughes v. Washington, 389 U.S. 290 (1967).
[75] In the context of property law, accretion refers to the gradual accumulation of land by natural forces. *Accretion*, BLACK'S LAW DICTIONARY (9th ed. 2009).
[76] *Hughes*, 389 U.S. at 290–91.
[77] *Id.* at 291.
[78] *Id.* at 297 (Stewart, J., concurring).
[79] *Id*. at 291, 294 (majority opinion).

concurring opinion, Justice Stewart argued that the ownership question in *Hughes*—like all real property issues—should be decided under state law.[80] Stewart further explained that constitutional safeguards prevent state courts from abruptly abrogating established property rights:

> To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes *a sudden change in state law, unpredictable in terms of the relevant precedents*, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.[81]

Despite Justice Stewart's overture, the Supreme Court continued to evade the judicial takings question.[82] In 1993, Justice Stewart's concurrence in *Hughes* was affirmatively cited by Justice Scalia (with Justice O'Connor) in dissent from the Court's denial of certiorari in *Stevens v. City of Cannon Beach*.[83] *Stevens* featured a littoral property owner that was denied a permit to construct a seawall.[84] The Oregon Supreme Court relied on the custom of the public's right to beach access as a "background principle[]" under *Lucas* to uphold the permit denial.[85] Scalia was skeptical of this reasoning, citing the

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[80] *Id.* at 295 (Stewart, J., concurring) ("Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer.").

[81] *Id.* at 296–97 (emphasis added).

[82] *See, e.g.*, Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994); Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 331 (1973) (quoting Justice Stewart's concurrence in *Hughes* but finding it "unnecessary" to resolve the "serious constitutional issue" posed by judicial takings).

[83] *See Stevens*, 510 U.S. at 1211–12 (Scalia, J., dissenting) (quoting *Hughes*, 389 U.S. at 296–97 (Stewart, J., concurring)).

[84] *Stevens*, 854 P.2d at 451.

[85] *See id.* at 453–57. The Oregon Supreme Court relied on *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), where it established that "[t]he custom

Oregon Supreme Court's dubious and inconsistent record of defining the custom in similar contexts.[86] Scalia seemed to imply that the Oregon Supreme Court had applied the custom doctrine as a means to an end for judgment. According to Scalia, "*Lucas* . . . would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights."[87] Despite never being heard by the Court, *Stevens* had laid the foundation for the *Stop the Beach* plurality opinion seventeen years later.

Before hearing *Stop the Beach*, however, the Supreme Court heard several other cases involving apparent judicial takings. *Pruneyard Shopping Center v. Robbins*[88] featured a group of students excluded from petitioning in a public shopping center.[89] The California Supreme Court overturned precedent by holding that the state constitution required the shopping centers to permit petitioners on their premises.[90] The U.S. Supreme Court affirmed the judgment, concluding that no taking occurred because the petitioning did not unreasonably impair the value or use of the shopping center.[91] By subjecting the California Supreme Court's judgment to the standard *Penn Central* analysis, the Court seemed to dismiss the notion of any distinction between legislative and judicial takings. Indeed, Scalia argues as much in *Stop the Beach*.[92]

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of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites [for establishing a custom]" and that denying beachfront property owners the right to develop the "dry-sand" portion of their land "takes from no man anything which he has had a legitimate reason to regard as exclusively his." *Thornton*, 462 P.2d at 677–78. To be sure, *Thornton* poses a judicial takings question in its own right. *See Stevens*, 510 U.S. at 1212 & nn.4–5 (Scalia, J., dissenting) (questioning the Oregon Supreme Court's application of the custom doctrine); W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1487–88 (2004) (introducing the article with a discussion of *Thornton*).

86 *See Stevens,* 510 U.S. at 1208–10 (Scalia, J., dissenting).

87 *Id.* at 1211.

88 Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74 (1980).

89 *Id.* at 77.

90 *Id.* at 78.

91 *Id.* at 83.

92 *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 714 (2010) ("Our precedents provide no support for the proposition that

The same year *Pruneyard* was decided, the Court issued another opinion, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[93] implicitly equating legislative and judicial takings. In *Webb's Fabulous Pharmacies*, the Court reviewed the Florida Supreme Court's interpretation of a state statute assigning interest generated from an interpleader fund.[94] The Florida Supreme Court had reasoned that because the fund is considered "public money" until it leaves the circuit court's account, any interest the fund generates belongs to the county.[95] The Court, however, found that in departing from the "long established general rule" that interest in such accounts is classified as private property,[96] the Florida Supreme Court had effected a taking.[97] *Webb's Fabulous Pharmacies* illustrates that the Court will not tolerate the judiciary "transform[ing] private property into public property without compensation."[98] To reinforce this point, the Court granted certiorari to review the Florida Supreme Court's decision in *Stop the Beach*.[99]

II. THE HISTORY OF *STOP THE BEACH*

A. *The First District Court of Appeal Opinion*

In 1995, Hurricane Opal swept through the gulf coast of Florida and critically eroded beaches along the City of Destin (the "City") and Walton County (the "County").[100] The City and County then

takings effected by the judicial branch are entitled to special treatment, and in fact suggest to the contrary.").

93 Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

94 *Id.* at 155–56.

95 *Id.* at 158–59.

96 *Id*. at 162–63.

97 *Id*. at 164 ("Neither the Florida Legislature by statute, *nor the Florida courts by judicial decree*, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court." (emphasis added)). Just as in *Pruneyard*, the Court analyzed the case under *Penn Central*. *See id.*

98 *Id.*; *see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 714, 715 (2010); RICHARD EPSTEIN, TAKINGS 12 n.17 (1985).

99 *See Stop the Beach*, 560 U.S. at 712.

100 *See* Save Our Beaches, Inc. v. Fla. Dep't of Env't Prot., 27 So. 3d 48, 50 (Fla. Dist. Ct. App. 2006), *rev'd sub nom.* Walton County v. Stop the Beach

initiated a lengthy administrative process to restore the beaches (the "Project") that culminated in July 2003 when they filed for a Joint Coastal Permit.[101] A year later, the Florida Department of Environmental Protection (the "Department") released a notice of intent to issue the permit.[102] Two groups of affected oceanfront property owners, Save Our Beaches, Inc. and Stop the Beach Renourishment, Inc., each petitioned for an administrative hearing to challenge the Project.[103] The property owners disputed ownership of the restored beach, which the State planned to open to the public.[104] In June 2005, the cases were consolidated and heard by the Florida Division of Administrative Hearings.[105] The Department followed the Administrative Board's recommendation to issue the Joint Coastal permit, and the property owners appealed to the First DCA.[106]

At issue before the First DCA was whether the Department unconstitutionally applied Florida's Beach and Shore Preservation Act (the "Act").[107] Passed in 1961, the Act endorses "beach restoration and nourishment projects," whereby sand is deposited and maintained on eroded beaches.[108] Once a restoration project is approved, an erosion control line (the "ECL") is *fixed* according to the present

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Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), *aff'd sub nom*. *Stop the Beach*, 560 U.S. 702.

[101] *Id.* The permit proposed dredging sand along the beach to redistribute it in accordance with a planned design. *Id.* at 50–51.

[102] *Id.* at 51.

[103] *Id.*

[104] *See id.*; *Walton County*, 998 So. 2d at 1106–07, 1109 ("The State holds the fore-shore in trust for its people for the purposes of navigation, fishing and bathing." (quoting White v. Hughes, 190 So. 446, 449 (Fla. 1939))).

[105] *Save Our Beaches*, 27 So. 3d at 51; *see* Save Our Beaches, Inc. v. Dep't of Env't Prot., DOAH Case Nos. 04-2960/04-3261, 2005 WL 1543209 (Fla. Div. Admin. Hrgs. Jun. 30, 2005) (recommended order); Save Our Beaches, Inc. v. Fla. Dep't of Env't Prot., DEP Nos. DEP:05-0791/04-1370, 2005 WL 1927305 (Fla. Dep't Env't Prot. Jul. 27, 2005) (final order).

[106] *Save Our Beaches*, 27 So. 3d at 50. The Department issued a final order validating the permit in July 2005. *Id.* at 51. The property owners did not appeal the Administrative Board's finding that the project would not adversely affect water quality standards. *Id.*

[107] *Id.* at 50; Beach and Shore Preservation Act of 1961, FLA. STAT. §§ 161.011–.45 (2020).

[108] FLA. STAT. § 161.088 (2020); *see also* FLA. STAT. § 161.021(3)–(4) (2020).

MHWL.[109] This ECL replaces the MHWL as the boundary between state and private property.[110] Significantly, the MHWL (unlike the ECL) fluctuates with accretion and erosion.[111] Thus, when beach restoration efforts move the MHWL seaward, property owners do not attain any new land.[112] Rather, the state holds title to the new strip of beach that abuts the ocean.[113]

After the district court dismissed Save Our Beaches' appeal for lack of standing, it proceeded to analyze the littoral rights of the members of Stop the Beach Renourishment.[114] According to the court's interpretation of the Florida Constitution, title to littoral property inheres that such property extends to the MHWL.[115] The court supported this reading by citing several Florida cases that emphasized the importance of this rule.[116] The court also pointed out that the Project would cause the property owners to lose their right to have their property abut the water.[117] The right to ingress and egress to the ocean—which is preserved by the Act[118]—did not sufficiently preserve the property owners' littoral rights.[119] Accordingly, in April 2006, the First DCA reversed the Department's order

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109 FLA. STAT. § 161.191(2) (2020).

110 FLA. STAT. § 161.191(1) (2020).

111 *See Save Our Beaches*, 27 So. 3d at 59.

112 *See id.*

113 *See id.*

114 *See id.* at 56–60. Unlike the 6 individual members of Stop the Beach Renourishment, the 150 members of Save Our Beaches did not all own property in the Project zone. *Id.* at 55–56; *see also* Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 n.5 (Fla. 2008), *aff'd sub nom*. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010).

115 *Save Our Beaches*, 27 So. 3d at 58 ("The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, *including beaches below mean high water lines*, is held by the state . . . ." (quoting FLA. CONST. art. X, § 11)).

116 *Id.* at 58 (citing Bd. of Trs. of the Internal Improvement Tr. Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 213 (Fla. Dist. Ct. App. 1973); Bd. Of Trs. of the Internal Improvement Tr. Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987); Teat v. City of Apalachicola, 738 So. 2d 413, 414 (Fla. Dist. Ct. App. 1999)).

117 *See Save Our Beaches*, 27 So. 3d at 60 ("Florida's law is clear that [littoral] rights cannot be severed from [littoral] uplands absent an agreement with the [littoral] owner, not even by the power of eminent domain.").

118 FLA. STAT. § 161.201 (2020).

119 *Save Our Beaches*, 27 So. 3d at 59.

to issue the Joint Coastal Permit,[120] and the Department appealed to the Florida Supreme Court.[121]

B. *The Florida Supreme Court Opinion*

Noting that the district court had certified the takings question to be of "great public importance," the Florida Supreme Court agreed to hear the case two years later.[122] The Florida Supreme Court determined that the case presented a facial challenge to the Act, and rephrased the issue as follows: "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?"[123] Before delving into its analysis, the court accentuated the State's property rights. The court emphasized that Florida has a "constitutional duty to protect [its] beaches, part of which it holds 'in trust for all the people.'"[124]

Although the court acknowledged several exclusive littoral rights, it distinguished the right to accretion as a future interest contingent upon accretion occurring.[125] According to the court, however, the beach restoration endorsed by the Act does not constitute accretion; rather, it is a public remedy to avulsion.[126] Under Florida law, the boundary between state and private property remains the MHWL before the "avulsive event" occurred.[127] Significantly, the Act dictates that the impact of avulsion on the existing MHWL be

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120 *Id*. at 60.

121 *See* Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 (Fla. 2008), *aff'd sub nom*. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010).

122 *Id.* at 1105. The certified question had asked whether the Act was unconstitutionally *applied* to grant the permit at Stop the Beach Renourishment's expense. *Id.*

123 *Id.* (citations omitted). In dissent, Judge Wells argued that the court should treat this case as an applied constitutional challenge because the district court treated it as such. *Id.* at 1121 (Wells, J., dissenting).

124 *Id.* at 1110–11 (majority opinion) (quoting FLA. CONST. art. X, § 11).

125 *Id.* at 1112.

126 *See id.* at 1119 ("[T]he common law rule of accretion . . . is not implicated in the context of this Act."); *id.* at 1116 ("The doctrine of avulsion is pivotal because, under that doctrine, the public has the right to reclaim its land lost by an avulsive event.").

127 *Id.* at 1114.

taken into account when delineating the ECL.[128] Therefore, *on its face*, the Act does not unconstitutionally deprive property owners of any land they possessed before the avulsive event occurred.[129] As the court acknowledged, however, it is not clear whether the state took Hurricane Opal into account when delineating the ECL here.[130] By restricting its analysis to the facial constitutionality of the Act, the court dodged this question altogether.

In upholding the constitutionality of the Act, the court rejected the notion of any littoral right to have one's property abut the water.[131] According to the court, such a right is ancillary to the littoral right of access to the water.[132] Therefore, contrary to the district court's contentions, the preserved right of ingress and egress to the ocean did sufficiently preserve the property owners' littoral rights.[133] This point was vigorously argued in dissent by Justice Lewis, who proclaimed that "[i]n this State, the legal essence of littoral or riparian land is contact with the water."[134] Lewis explained that, while the barrier of state land between private land and the water may only be a few yards here, nothing in the majority opinion restricts the barrier from being "hundreds or even thousands of yards" in other instances.[135] Indeed, the precedent in Florida appears to be set: Oceanfront property need not extend to the ocean to maintain its littoral status.

C. *The U.S. Supreme Court Opinion*

Of course, the U.S. Supreme Court did not grant certiorari to resolve any issues of Florida property law. The Court, rather, granted certiorari to determine whether "the Florida Supreme Court's decision itself effected a taking of the [Stop the Beach Renourishment] Members' littoral rights contrary to the Fifth and

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128 *Id.* at 1117.

129 *Id.* ("In light of this common law doctrine of avulsion, the provisions of the Beach and Shore Preservation Act at issue are facially constitutional.").

130 *Id*. at 1117 n.15.

131 *See id.* at 1119.

132 *Id.*

133 *Id.*

134 *Id.* at 1122 (Lewis, J., dissenting).

135 *Id.* at 1126.

Fourteenth Amendments."[136] Justice Scalia was joined by the entirety of the Court in ruling for the state, but only Chief Justice Roberts and Justices Thomas and Alito joined the sections of Scalia's opinion addressing judicial takings.[137] Justices Kennedy and Breyer each authored separate concurring opinions to address their stance on judicial takings.[138] Justices Sotomayor and Ginsburg joined Kennedy and Breyer respectively in these concurrences.[139]

1. JUSTICE SCALIA'S PLURALITY OPINION

A unanimous U.S. Supreme Court agreed that the State had not taken Stop the Beach Renourishment members' property.[140] The property owners relied on *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*,[141] which held that that the artificial nature of an accretion does not alter the littoral right to accretion in Florida.[142] The Court, however, deferred to the Florida Supreme Court's determination that the Act implicated avulsion, not accretion.[143] In Florida, submerged land seaward of the MHWL that becomes exposed by an avulsion belongs to the State.[144]

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[136] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 712 (2010). The Court declined to address the property owners' other two claims: (1) the Project—not just the Florida Supreme Court opinion—constituted a taking; and (2) the Act was a deprivation of property without due process. *Id.* at 729 n.11; *see also* Petition for Writ of Certiorari at i, *Stop the Beach*, 560 U.S. 702 (2010) (No. 08-1151).

[137] *Id.* at 705. Justice Stevens recused himself because he owns littoral property in Florida. D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 904 (2011).

[138] *Stop the Beach*, 560 U.S. at 733–742 (Kennedy, J., concurring); *id*. at 742–45 (Breyer, J., concurring).

[139] *Id.* at 733 (Kennedy, J., concurring); *id*. at 742 (Breyer, J., concurring).

[140] *Id.* at 733 (Kennedy, J., concurring).

[141] Bd. of Trs. of the Internal Improvement Tr. Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934 (Fla. 1987).

[142] *Stop the Beach*, 560 U.S. at 732 (citing *Sand Key*, 512 So. 2d at 937–38).

[143] *See id.* at 732. Unlike the Florida Supreme Court, which focused on the beach loss resulting from Hurricane Opal as the pertinent avulsion, the U.S. Supreme Court characterized the beach restoration efforts as the avulsion warranting analysis. *Accord* Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105 (Fla. 2008), *aff'd sub nom*. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 116–17 (2010).

[144] *See Walton County*, 998 So. 2d at 1116–17 (citing Bryant v. Peppe, 238 So. 2d 836, 838–39 (Fla. 1970)).

Applying this principle, the Court reasoned that the State is entitled to land recovered by beach restoration.[145] To justify state action (beach restoration) as a qualifying avulsion, the Court relied on *Martin v. Busch*,[146] which suggests that artificial avulsions are treated no differently than natural avulsions in Florida.[147] The Court also rejected the property owners' claim that the Florida Supreme Court "took" their right to have their property abut the water.[148] After affirming that the right to contact is ancillary to the right to access in Florida, Scalia offers a sneak peek of the plurality's new judicial takings doctrine in action: "One cannot say that the Florida Supreme Court contravened established property law by rejecting it."[149]

Scalia is blunt in his judicial takings analysis.[150] Citing cases such as *Webb's Fabulous Pharmacies* and *Pruneyard*, Scalia dismisses any conceivable precedent for the idea that a taking effected by the judiciary should be treated any differently than a taking effected by the legislature.[151] Rather, it is a violation of the Fifth Amendment for *any* branch of state government to declare that an established private property right no longer exists.[152] Scalia therefore reasons that *a judicial decision* can abrogate private property rights just as state appropriation or regulation can.[153] Although Scalia tries to downplay the significance of this assertion, a potentially groundbreaking new doctrine had just been affirmed by a Supreme Court plurality with shockingly little analysis.[154]

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[145] *See Stop the Beach*, 560 U.S. at 730–31.

[146] Martin v. Busch, 112 So. 274, 287 (Fla. 1927) (holding that state owns previously submerged land in a lakebed that state owns and drains).

[147] *See Stop the Beach*, 560 U.S. at 730–31 (citing *Martin*, 112 So. 274 at 87–88).

[148] *Id.* at 732–33.

[149] *Id.* at 733.

[150] *See id.* at 713–15.

[151] *See id.* at 714–15.

[152] *Id.* at 715 ("[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking . . . . [Th]e particular state *actor* is irrelevant.").

[153] *See id.*

[154] This is certainly not the first Scalia opinion that fails to clarify a legal standard. *See, e.g.*, United States v. Jones, 565 U.S. 400, 412–13 (2012) (holding that the warrantless use of a tracking device on a motor vehicle constitutes a search under the Fourth Amendment but failing to clarify whether the Court was actually

Rather than discussing the nuances and ramifications of a judicial takings doctrine, Scalia took time to criticize Kennedy and Breyer.[155] Scalia accuses both Justices of the same logical fallacy: "conclud[ing] that the Florida Supreme Court's action here does not meet the standard for a judicial taking, while purporting not to determine what is the standard for a judicial taking, or indeed whether such a thing as a judicial taking even exists."[156] Clearly, Scalia was not enamored with the judicial restraint exhibited by the concurring justices. Kennedy's push for due process likewise elicits Scalia's wrath. Specifically, Scalia denounces Kennedy for overlooking clear precedent, betraying the Court's policy of not applying substantive due process to economic rights, misconstruing the framers' intent, and proposing an illusory substitute for the Takings Clause without limits to guide the Court.[157]

Scalia also spends plenty of time on the defensive. Notably, Scalia labels the procedural obstacles to judicial takings as "nonexistent [and] insignificant."[158] Scalia also systematically and somewhat abrasively dismisses the federalism concerns advanced by the State, including the federal courts' knowledge of state law, the common law's need for flexibility, and the *Rooker-Feldman* doctrine's requirement that lower federal courts not review state court decisions unless specifically authorized by Congress to do so.[159] An overarching theme of criticism directed at a judicial takings doctrine is that federal courts should not be defining state property rights; yet, according to Scalia, "the test [the plurality has] adopted . . . contains within itself a considerable degree of deference to state courts."[160] Justice Breyer was not convinced.

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articulating a new test for government trespasses); District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that a D.C. law violated the Second Amendment but refusing to articulate a standard for future challenges to gun regulations).

155 *See Stop the Beach*, 560 U.S. at 719–25.

156 *Id.* at 719.

157 *See id.* at 719–25.

158 *Id.* at 723.

159 *See id.* at 726–27 (citing Rooker v. Fidelity Tr. Co., 263 U.S. 413, 415–16 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983)).

160 *Id.* at 726 n.9.

2. JUSTICE BREYER'S CONCURRENCE

Breyer's brief concurrence is an archetype of judicial restraint. Because no judicial taking occurred here, Breyer did not see the point in validating a judicial takings doctrine.[161] Although he stops short of criticizing the constitutional theory behind the doctrine, Breyer questions whether federal courts could effectively implement it.[162] Breyer accurately adverts that judicial takings claims will turn on property rights of "considerable complexity" traditionally left for the states.[163] Moreover, the federal courts will be overrun with takings challenges from nonparties to state court cases who nevertheless allege they are adversely impacted by that state court's decision.[164] Breyer also succinctly responds to Scalia's admonishment of his judicial restraint by reminding the plurality that "courts frequently find it possible to resolve cases—even those raising constitutional questions—without specifying the precise standard under which a party wins or loses."[165] Justice Kennedy echoes this sentiment in his concurrence[166] but also challenges the merit of the plurality's judicial takings doctrine while presenting an intriguing alternative in the process.

3. JUSTICE KENNEDY'S CONCURRENCE

Kennedy's concurrence strikes a careful balance between critiquing the Takings Clause and promoting the Due Process Clause. Prognosticating that a judicial takings doctrine would essentially allow the judiciary to exercise the power of eminent domain,[167] Kennedy argues that the power to abrogate property rights should be left

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[161] *See id.* at 744–45 (Breyer, J., concurring) ("In the past, Members of this Court have warned us that, when faced with difficult constitutional questions, we should 'confine ourselves to deciding only what is necessary to the disposition of the immediate case.'" (quoting Whitehouse v. Ill. Cent. R.R., 349 U.S. 366, 373 (1955))).

[162] *See id.* at 743–44.

[163] *Id.* at 743–44.

[164] *See id.* at 743.

[165] *Id.* at 744.

[166] *See id.* at 733–34 (Kennedy, J., concurring) ("As Justice Breyer observes . . . this case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause of the Fifth Amendment of the United States Constitution.").

[167] *See id.* at 739.

to political branches that are qualified to evaluate the necessity and utility of regulatory action branches.[168] Moreover, subjecting the courts to the Taking Clause may actually *encourage* judicial changes in property law: Courts will be confident that new rules will be upheld as takings (with compensation granted), rather than invalidated under due process.[169] Kennedy also expresses apprehension over the procedure for raising a judicial takings claim and the remedies available.[170] May the claim be raised on appeal or in a separate suit?[171] Is compensation to the aggrieved party mandated and, if so, by the courts or the legislature?[172] Kennedy warns the plurality that by "reach[ing] beyond the necessities of the case to recognize a judicial takings doctrine," the Court must now resolve these intricate issues in the future.[173]

To avoid these issues, Kennedy proposes that the Court rely on the Due Process Clause to rectify judicial takings. More specifically, Kennedy contends that federal courts should invalidate state court decisions that substantially alter or eliminate established property rights by finding them "arbitrary or irrational" under the Due Process Clause.[174] Kennedy reminds the Court that it has a long history of invalidating property regulation under the Due Process Clause, which already dissuades and ultimately prevents state courts from "abandon[ing] settled principles" of the common law.[175] Moreover, assessing whether a judicial decision is "arbitrary or irrational" is no more difficult than assessing whether a judicial decision has altered

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168 *See id.* at 735 ("[A]s a matter of custom and practice, these [decisions made in exercising eminent domain] are matters for the political branches—the legislature and the executive—not the courts."); *id.* at 736 ("Courts, unlike the executive or legislature, are not designed to make policy decisions about the 'need for, and likely effectiveness of, regulatory actions.'") (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005))).

169 *See id.* at 738–39.

170 *See id.* at 740. Scalia explains that the Court would *not* mandate compensation if it determined that a judicial taking occurred here. *See id.* at 723–24 (majority opinion). Rather, it would give the state *legislature* the choice to pay compensation or decline to complete the Project. *See id.*

171 *See id.* at 740 (Kennedy, J., concurring).

172 *See id.* at 740–41.

173 *Id.* 741–42.

174 *Id.* at 737.

175 *See id.* at 735–738.

or eliminated an established property right.[176] Thus, Kennedy finds it natural and practicable to apply the Due Process Clause to judicial takings.[177] So does this Article's author.

III. COMMENT ON THE DRAWBACKS OF A JUDICIAL TAKINGS DOCTRINE AND THE BENEFITS OF DUE PROCESS

A. *Procedural Concerns Raised by a Judicial Takings Doctrine*

The greatest problem with the judicial takings doctrine proposed in *Stop the Beach* is that it is not clear how it will overcome the procedural hurdles it faces. Although *Stop the Beach* involved a state actor and a private party, other disputes between private litigants may also raise the judicial takings question. Take a hypothetical instance of adverse possession. If a state supreme court radically alters the common law by holding that X has acquired ownership of a tract on Y's property through adverse possession, it would seem to have declared that Y's clearly established property right no longer exists. According to Scalia, Y's only option to raise a judicial taking claim is through petition for writ of certiorari to the U.S. Supreme Court.[178] However, suppose that numerous other landowners ("L") in the state now face similar claims from their own adverse possessors ("A"), or are concerned that the state court's ruling terminated their property rights. Several difficult questions arise.

Has the door to federal court been opened for L to file a judicial takings claim? Scalia suggests as much, equating a judicial takings claim to any other takings claim.[179] Until recently, however, the door to federal court for takings claims remained nearly closed. As

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[176] *See id.* at 737 ("The objection that a due process claim might involve close questions concerning whether a judicial decree extends beyond what owners might have expected is not a sound argument; for the same close questions would arise to whether a judicial decision is a taking.").

[177] *Id.* at 736 ("It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.").

[178] *See id.* at 727 (majority opinion).

[179] *See id.* at 728 ("[W]here the claimant was not a party to the original suit, he would be able to challenge in federal court the [judicial] taking effected by the state supreme-court opinion to the same extent that he would be able to challenge [a legislative or executive taking] in federal court . . . .").

the U.S. Supreme Court stated in the 2005 case *San Remo Hotel, L.P. v. City & County of San Francisco*,[180] "there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's Takings Clause."[181] *San Remo Hotel* upheld *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[182] which held that a federal takings claim is not ripe until the state fails to provide adequate compensation.[183] Additionally, *San Remo Hotel* affirmed that the Full Faith and Credit Clause bars federal re-litigation of whether "just compensation" ought to be provided.[184]

However, in the 2019 case *Knick v. Township of Scott*,[185] a sharply divided Supreme Court overruled the state-litigation requirement of *Williamson County* in a five to four decision.[186] Writing for the majority, Justice Roberts explained that, "[c]ontrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it."[187] Roberts surmised that *Williamson County* would have a different outcome if the Court foresaw the "preclusion trap . . . sprung by *San Remo Hotel*."[188] Writing for the dissent, Justice Kagan defended *Williamson County* as unremarkable and consistent with stare decisis.[189] More pertinent here, Kagan warned that "[t]oday's decision sends a flood of complex state-law issues to federal courts . . . . It betrays judicial federalism."[190]

Notwithstanding Justice Kagan's (justifiable) judicial federalism concerns, federal courts are a better forum to hear L's and

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180 San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323 (2005).

181 *Id.* at 347.

182 Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

183 *See San Remo Hotel*, 545 U.S. at 345–48; *Williamson*, 473 U.S. at 195 ("[T]he State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.'" (quoting Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984))).

184 *See San Remo Hotel*, 545 U.S. at 345–48.

185 Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

186 *See id.* at 2167–68.

187 *Id.* at 2170.

188 *Id.* at 2174.

189 *See id*. at 2183 (Kagan, J., dissenting).

190 *Id*. at 2188–89.

others' judicial takings claims. Simply put, state courts are not positioned to adequately address judicial takings claims. To illustrate, L's judicial takings claim would need to be filed with or certified to the state supreme court because a lower state court is institutionally incapable of classifying the state supreme court's judgment for X as a taking. Yet, it seems highly unlikely that the state supreme court would overrule itself by retrospectively determining that its judgment for X was a taking.[191] Indeed, higher state courts may also be reluctant to find that lower courts committed judicial takings; such judgments could bring negative attention and embarrassment to the judiciary. In sum, state supreme and appellate courts would be bogged down by numerous judicial takings claims, many of which would conceivably be dismissed out of principle. Thus, it seems inefficient for non-party claimants such as L to litigate judicial takings claims in state court.[192] Accordingly, the *Stop the Beach* plurality should have expounded upon the proper forum for non-party claimants to file judicial takings claims—perhaps vesting exclusive subject matter jurisdiction in federal courts.

The Fifth Amendment only provides for compensation to be awarded to aggrieved parties.[193] Thus, should L prevail on his judicial takings claim, A would seemingly be entitled to stay on L's property so long as L is compensated accordingly (or until L wins a separate action to oust A). Nothing in the Fifth Amendment, however, authorizes private parties to pay compensation or the state to compensate for land use that does not further a public purpose. Thus, L would appear to be without a remedy for the "judicial taking" of his property. Even if A leaves after judgment for L is entered, a

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[191] *Compare* Robinson v. Ariyoshi, 441 F. Supp. 559, 585–86 (D. Haw. 1977), *aff'd in part, vacated in part,* 753 F. 2d 1468, 1468 (9th Cir. 1985), *vacated mem.* 477 U.S. 902 (1986), *with* Robinson v. Ariyoshi, 658 P. 2d 287, 294–300 (Haw. 1982) (Hawaii State Supreme Court responds to certified questions issued by Ninth Circuit with self-serving answers that ultimately insulated its prior decision from constitutional challenge).

[192] Of course, the federal courts (including the U.S. Supreme Court) face their own efficiency concerns in supplementing their dockets with judicial takings claims. These concerns would obviously be buttressed if the federal courts were granted exclusive subject matter jurisdiction over such claims.

[193] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005) (emphasizing that the Takings Clause's focus is on providing just compensation for interference with property rights, not restricting the nature of such interference).

temporary taking would seem to have occurred in the interim.[194] In theory, L would be entitled to compensation for A's period of adverse possession between judgment for X and judgment for L. There is another wrinkle: Suppose that Y had a petition for rehearing denied by the state supreme court and a petition for writ of certiorari denied by the U.S. Supreme Court. Even if the federal court rules for L, there is now no apparent remedy for Y, who was not a party to L's suit. Not only have Y's procedural due process rights seemingly been violated,[195] res judicata would seem to bar Y from bringing a subsequent claim against X.[196]

To be clear, the foregoing procedural concerns are speculative. As judicial takings questions continue to pervade in light of *Stop the Beach*, the Supreme Court will hopefully provide more lucid guidance on how and by whom judicial takings may be alleged. The Court's pre-existing takings jurisprudence does offer some doctrinal tools for courts to narrow the scope of judicial takings in practice. Indeed, a court could conceivably bar L's judicial takings claim by holding that adverse possession is governed by "background principles" of state property law and thus the state supreme court's judgment for X does not warrant compensation for aggrieved parties under the Takings Clause. Nevertheless, the Court missed a golden

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[194] An adverse possessor has physically invaded the landowner's property, which is a per se taking, even though only a portion of the land was invaded temporarily. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436–37 (1982) (finding that constitutional takings protections do not depend on the size of the area physically occupied); First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987) (finding that abandonment of a taking still requires compensation for the period during which the regulation that constitutes the taking was in effect).

[195] *See* Sotomura v. Cnty. of Hawaii, 460 F. Supp. 473, 482–83 (D. Haw. 1978) (holding that the Hawaii Supreme Court violated procedural due process when it denied petition for rehearing after introducing property ownership into litigation). Like most other procedural complexities posed by a judicial takings doctrine, procedural due process concerns were not addressed in *Stop the Beach*. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 729 n.11 (2010).

[196] This assertion mirrors the plurality's position in *Stop the Beach*. *See Stop the Beach* 560 U.S. at 727–28 ("If certiorari were denied . . . the matter would be res judicata."). Justice Kennedy disagrees. *Id.* at 740 (Kennedy, J., concurring) ("[U]ntil the state court in Case A changes the law, the party will not know if his or her property rights will have been eliminated. So res judicata probably would not bar the party from litigating the takings issue in Case B.").

opportunity to solidify the boundaries for judicial takings in *Stop the Beach*.

B. *The State Courts' Need for Flexibility*

Perhaps the most popular objection to a judicial takings doctrine rests upon federalism grounds.[197] As the State argues in *Stop the Beach*, "[f]ederal courts should not involve themselves in and second-guess the evolution of state common law, which can vary widely from state to state."[198] This quote illustrates two important points: (1) the common law, by its very nature, changes over time; and (2) property law is not uniform amongst the states. These principles advocate against granting federal judges the power to define property interests—a power traditionally reserved to the states.[199]

The U.S. Supreme Court has emphasized "the 'great respect' that [it] owe[s] to state legislatures *and state courts* in discerning local

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[197] *See, e.g.*, Thompson, *supra* note 61, at 1509 ("Indeed, the most frequently heard objection [to a judicial takings doctrine] is that the development and specification of property law is a matter for the state courts, and that federal courts should not interfere with this process through assertion of the takings protections."); Frank I. Michelman*, Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 305 (1993) ("[G]iving federal judges the last word on questions of the meanings of laws emanating from state authorities . . . seems to be a gross contravention of Our Federalism."); John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 332–33 (1988) (arguing that the Supreme Court should not interfere with a state court's "fundamental social choice" to adjust law to "evolving social reality").

[198] Brief of Respondents, Florida Department of Environmental Protection & Board of Trustees of the Internal Improvement Trust Fund at 58, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010) (No. 08-1151); *see also* Brief for Respondents Walton County & City of Destin at 28, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010) (No. 08-1151) ("Wide variations exist among the States in their understanding of property rights associated with riparian lands. State courts will be more attuned to these differences, and have a comparative advantage relative to federal courts in explicating their own property systems." (citations omitted)).

[199] *See, e.g.*, *Stop the Beach*, 560 U.S. at 707 ("Generally speaking, state law defines property interests . . . ."); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are *created* and their dimensions are *defined* by existing rules or understandings that stem from an independent source such as state law . . . ." (emphasis added)).

public needs."[200] Unlike the federal courts, state courts are designed to implement changes in the law for the welfare of their respective communities. It follows that state courts have an intrinsic advantage in interpreting its own property law, and—contrary to Scalia's assertions—*do* have a "peculiar need of flexibility."[201] This is particularly true for property rights incorporated into legal areas where the Federal Government offers little guidance, such as family and probate law.[202]

Suppose, for example, that a state supreme court contravenes settled common law by adopting the approach endorsed by Uniform Probate Code (the "UPC") §2-802, which bars divorcees from receiving the life insurance premium from their deceased former spouse.[203] Consequently, local divorcees are abruptly deprived of a seemingly "clearly established property interest"[204] in their deceased former spouse's life insurance—a radical yet conceivable judicial takings claim. Although the financial impact on affected divorcees could be substantial, the state supreme court's judgment may lie in well-grounded policy concerns.[205] Perhaps a large increase in the

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[200] *See* CURRENT CONDEMNATION LAW, *supra* note 27, at 306 (emphasis added) (quoting Kelo v. City of New London, 545 U.S. 469, 482 (2005)); *see also* Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930) ("[T]he courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State . . . .").

[201] *Stop the Beach*, 560 U.S. at 727.

[202] *See generally* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. S.C. Coastal Council, 45 STAN. L. REV. 1433, 1446–49 (1933) (discussing how states have continuously changed property laws in response to economic and social changes).

[203] *See* UNIF. PROB. CODE § 2-802 (amended 2019) (UNIF. L. COMM'N 2020). In the absence of clear legislation, courts have been willing to follow and even expressly "adopt" UPC provisions. *See, e.g.*, *In re* Estate of Thompson, 423 N.E. 2d 90, 94 (Ohio 1981) ("As a result, we adopt these specific [UPC] sections as the law of this state."); *In re* Estate of Safran, 306 N.W. 2d 27, 32 (Wis. 1981) (relying on provisions of the UPC and noting that several states have adopted the UPC); California-Western States Life Ins. Co. v. Sanford, 515 F. Supp. 524, 532 (E.D. La. 1981). *See generally* Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 609–12 (1985) (discussing how UPC has been used by various courts in jurisdictions where UPC has not been formally adopted).

[204] *See Stop the Beach*, 560 U.S. at 725.

[205] *See generally* Andersen, *supra* note 203, at 609–12 (describing where judges have relied on UPC § 2-802 to address policy issues).

divorce rate has resulted in numerous lawsuits where divorcees are receiving substantial portions of their deceased former spouse's estate at the expense of their deceased former spouse's new family. Accordingly, the court adapted the UPC provision in conformance with its policy of honoring the testator's intent.[206] If a judicial takings doctrine came to fruition, however, the court might be reluctant to take such action since it could be construed as a taking. Consequently, the apposite UPC provision would need to negotiate the legislative process.[207] Meanwhile, divorcees would continue to profit off their deceased former spouses until a law is finally passed. This scenario is hard to justify on efficiency or moral grounds, especially to second families of decedents.

Like inheritance rights, littoral rights vary from state to state.[208] Consider the foreshore at issue in *Stop the Beach*. Florida holds its foreshores in trust for the public,[209] but Maine and Massachusetts restrict public use along the foreshore of private littoral property.[210] Contrarily, public use rights extend to the vegetation line in Hawaii and Texas.[211] Each state has its own, unique reasons for adapting these laws.[212] Federal courts are not privy to these reasons. Indeed, as Scalia admits, federal courts are not free to explore the policy

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[206] Presumably, a testator would prefer that his new family inherit contested assets of his estate over his former spouse.

[207] *See Overview*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview (last visited May 15, 2021) ("[N]o uniform law is effective until the state legislature adopts it.").

[208] Brief for Respondents Walton County & City of Destin, *supra* note 198, at 16; *see also* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702–03 (1899) ("[A]s to every stream within its dominion, a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.").

[209] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 707 (2010) (first citing FLA. CONST. art. X, § 11; and then citing Broward v. Mabry, 58 Fla. 398, 407–409 (1909)).

[210] *See, e.g.*, Bell v. Town of Wells, 557 A.2d 168, 169 (Me. 1989); *In re* Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974).

[211] *See* Diamond v. State, 145 P.3d 704, 712 (Haw. 2006); TEX. NAT. RES. CODE ANN. § 61.011(a) (West 2019).

[212] *See, e.g.*, *Diamond*, 145 P.3d at 716 ("[T]he [state] legislature's intent [was] to reserve as much of the shore as possible to the public").

behind established property rights.[213] Yet, this is exactly what federal courts would be doing in assessing judicial takings claims.

Although federal courts must apply the property law of different states in traditional takings contexts,[214] the focus is on whether a regulation's *effect upon property rights* mandates compensation, not the extent to which the regulation *alters the law*.[215] In other words, judicial takings actually require a judge to assess the precedent for the "state action" (or the judge's decision), rather than simply its end result. Of course, the merit of a judge's reasoning may not be measured under the firm, universal standards that govern traditional takings (e.g., physical invasion is a per se taking, parcel is viewed as a whole, etc.). Therefore, in applying a judicial takings doctrine, federal courts would have little guidance in embarking on ad hoc inquiries into diverse and complex areas of state law.

C. "*Background Principles" of State Law*

Proponents of a judicial takings doctrine counter federalism arguments by denoting state court abuse of the "background principles" enunciated in *Lucas*.[216] By examining the extent of a claimant's title instead of the regulation's impact on property rights,

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[213] *See Stop the Beach*, 560 U.S. at 732.

[214] As an example, Scalia identifies the "background principles" of state property law federal courts must apply in determining whether a parcel has been deprived of all economically beneficial use. *See id.* at 726–27 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)).

[215] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005) ("[T]he Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' In other words, it 'is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" (quoting First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1982))).

[216] *See, e.g.*, David W. Saratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1490–95 (2004) ("[T]he *Lucas* rule's background-principles exception invites state courts to reshuffle property rights in ways that state legislatures cannot, potentially allowing the state to avoid paying compensation for takings of property."); Walston, *supra* note 33, at 423–25 (explaining that *Lucas*'s "background principles" present issues in the context of judicial takings); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1442–46 (1996) (discussing how state courts have used custom to circumvent takings protections).

courts avoid the just compensation question.[217] In such a circumstance, courts typically act in accordance with the legislature's directive; indeed, courts often rely on historical policy to uphold a statute or other official declaration.[218] However, the legislature may be unable or unwilling to pass a regulation directly and look to judicial enforcement as an alternative. For example, the legislature may authorize private conservation groups to bring nuisance suits against private property owners on behalf of the public welfare.[219] The judiciary can then classify such nuisances as background principles of state property law to justify the termination of the source property interests.

Flexible legal doctrines such as custom and the public trust doctrine permit state courts to advance background principles of their jurisdictions' property law. *Matthews v. Bay Head Improvement Ass'n*,[220] a New Jersey Supreme Court case, provides a particularly vivid example of the power of the public trust doctrine. *Matthews* centered around the public's access to the area between the MHWL and the vegetation line of private littoral property.[221] New Jersey precedent appeared to indicate that the public's interest in this area was contingent on it being municipally owned.[222] Nevertheless, the court—noting that the "dynamic" public trust doctrine is not "fixed or static" and may "be molded [or] extended"—held that even private dry sand area must remain accessible and usable by the public

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[217] *See* Saratt, *supra* note 216, at 1491–92.

[218] *See supra* Part I.C.; *supra* note 79 (discussing Oregon Supreme Court's use of custom); *see also supra* page 20 (quoting the Florida Supreme Court's reference to the public trust in *Stop the Beach*); Crane Neck Ass'n, Inc. v. N.Y.C./Long Island Cnty. Servs. Grp., 460 N.E.2d 1336, 1339 (N.Y. 1984) (finding that "long-standing public policy" favoring community residences for the mentally handicapped prevents enforcement of a restrictive covenant against such a residence); Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 903 P.2d 1246, 1268 (Haw. 1995) (denying shoreline development permit because private development rights are subject to preexisting Native Hawaiian gathering rights).

[219] *See*, *e.g.*, Saratt, *supra* note 216, at 1492 (providing a hypothetical twist of the facts in *Lucas*); Thompson, *supra* note 61, at 1507 (discussing laws passed in Oregon and Texas encouraging public lawsuits for greater beach access).

[220] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

[221] *See id.* at 358, 358 n.1.

[222] *See id.* at 363.

to ensure reasonable enjoyment of the beach.[223] In so holding, the Court arguably deprived New Jersey's private littoral owners of the biggest stick in their bundle of property rights: the right to exclude.[224]

The outcome of *Matthews* certainly might have been different if the New Jersey Supreme Court felt threatened by the prospect of committing a judicial taking. Consequently, if an established judicial takings doctrine were in place, the New Jersey public might not be permitted to enjoy the beaches (adjoining private land) that it does today. Although private littoral property rights would be preserved in this instance, legitimate utilitarian questions would arise. Public beaches serve as a socializing institution with scale returns.[225] Thus, private owners hinder a community's development by keeping the public from civilizing and socializing at perceived, customary recreational sites (e.g., beaches).[226] Whereas in *Matthews*, the public demand for access to a recreational site increases,[227] the state has a duty to explore accommodating this demand. The *Matthews* court met this duty by effectively *balancing* the public and private property interests at stake: Public use of privately-owned dry sand is restricted to that which is *reasonably necessary* and remains subject to the littoral rights of private owners.[228] A judicial takings doctrine

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[223] *Id.* at 365 (quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972)).

[224] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (describing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

[225] Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 644 (1989) (citing Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 779 (1986)).

[226] *See* Rose, *supra* note 225, at 779–80.

[227] *Matthews*, 471 at 364–65.

[228] *Id.* The *Matthews* Court clarified that the public's right to access/use depends on the beach at issue. *See id.* Pertinent circumstances include the proximity of the contested area to the foreshore, any publicly owned beach in the area, the nature and extent of public demand, and the upland usage of the private owner. *Id.* The Court also suggested that the public's right to reasonable access is grounded in the law of nuisance. *See id.* at 364 ("Judge Best would have held on

would frustrate such compromises between public and private interests, espousing private property rights at the public's expense.

Background principles give courts an easy out, but they also promote the public welfare. The Supreme Court ought to remind state courts that *Lucas* does not give them a green light to reinvent property law. A judicial takings doctrine, however, is not the way to go about this. The plurality's judicial takings doctrine threatens courts' ability to advance "customary [public property] rights[,] [which] promote strong economic and social utilities."[229] Public property interests must conform to private property interests, but they should not yield to them outright.

D. *Prospective Views of Takings Scholars on a Judicial Takings Doctrine*

With such little authority (and commentary) available on judicial takings, it is helpful to speculate how some leading takings scholars would receive the doctrine announced in *Stop the Beach*. One such scholar is Joseph Sax. Sax proposes a rule where a taking only occurs when the government acts as an "enterprise" or acquires resources for its own accord.[230] When the government acts as an "arbiter" or mediates disputes between different citizens or groups in society, no compensation should be required.[231] Although Sax reasons that the Takings Clause does not apply to the courts anyway,[232] it is hard to discern a clearer instance of the government acting as an arbiter than when it acts through the judiciary. A judge does not act with the objective of gaining anything; rather, a judge balances the interests between two sides.[233] Even when the judiciary radically

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principles of public policy 'that the interruption of free access to the sea is a public nuisance.'" (quoting Blundell v. Catterall, 5 B. & Ald. 268, 287 (K.B. 1821))). For an interesting discussion on how nuisance law protects public beach access, see Finnell, *supra* note 225, at 646–50.

229 Bederman, *supra* note 216, at 1454.

230 *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63 (1964).

231 *See id.*

232 *See id.* at 51 ("[W]hatever it is that the compensation clause is preventing, it is something other than the destruction of established economic values. Changes in the common law are frequently made . . . yet we invariably deny compensation on the ground that there was no property interest . . . .").

233 *See* MODEL CODE OF JUD. CONDUCT preamble (AM. BAR ASS'N 2010).

alters property law to rule for the state, it does not "create[] and define[] the [resources] need[ed]"[234] for the state objective—the legislature does.

Consider *Stop the Beach*. The local governments of the City of Destin and Walton County decided they needed to restore their beaches and acted.[235] The local governments—not the Court—determined the commodity needed (beach), where it was needed (along the shore of the City and the County), what amounts it needed (the total amount of sand deposited from the ebb shoal borrow in Okaloosa County), and what times it needed it (after Hurricane Opal hit in 1995).[236] As in any other takings case, the Court simply decided whether the State could lawfully carry out this initiative without providing compensation.[237]

Of course, by serving as the arbiter in takings disputes, society relies on the judiciary to honor its proprietary expectations. When people disapprove of the *process* by which the government interferes with these expectations, demoralization costs are incurred.[238] Famous takings critic Frank Michelman postulates that a taking occurs when these demoralizations costs exceed the settlement costs of paying compensation.[239] Reasoning that U.S. takings jurisprudence is inherently flawed,[240] Michelman advocates for a self-

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[234] *See* Sax, *supra* note 230, at 64.

[235] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 711 (2010). As a side note, it does not appear that the local governments acted as an "enterprise" in *Stop the Beach*. *See supra* note 230 and accompanying text. The Project was ordered as a remedial measure in the wake of Hurricane Opal. *See Stop the Beach*, 560 U.S. at 711. The State did not actually acquire land from the property owners but used sand dredged elsewhere to restore its own submerged land for the public's benefit. *Id.* One can argue that the local governments acted as an "arbiter" between the property owners and the public. *See supra* note 231 and accompanying text.

[236] *See Stop the Beach*, 560 U.S. at 711; Save Our Beaches, Inc. v. Fla. Dep't of Env't Prot., 27 So. 3d 48, 50–51 (Fla. Dist. Ct. App. 2006), *rev'd sub nom.* Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), *aff'd sub nom*. *Stop the Beach*, 560 U.S. 702.

[237] *See Stop the Beach*, 560 U.S. at 733.

[238] *See* Thompson, *supra* note 61, at 1480–81.

[239] Michelman, *supra* note 54, at 1214–15.

[240] *See id.* at 1250 ("It is rather to suggest the abandonment of any idea that courts can or will decide each compensability case directly in accordance with the precept of fairness.").

regulatory system whereby the aforementioned takings formula is "built directly into the system of *political* decision making" (as opposed to a judicial doctrine).[241] Thus, Michelman would appear to reject a judicial takings doctrine by default.

Moreover, Michelman probably would not deem the demoralization costs arising from judicial takings worthy of compensation anyway. After all, Americans trust the judicial process.[242] The courthouse is a beacon of fairness in a community; judges are the nation's greatest advocates of justice.[243] The judiciary is sequestered from many of the political pressures facing other branches of government, particularly ex parte lobbying.[244] By nature, a trial is a public operation[245] restricted by the dispute at-hand.[246] The outcome of the trial, of course, is subject to an appellate process that should in theory amend any fallacious decisions.[247] It follows that people do not tend to question the process by which judges arrive at their conclusions—at least from the outside looking in. Consequently, *judicial decisions* do not generally give rise to significant demoralization costs.

Again, consider *Stop the Beach*. Presumably, most littoral property owners in Florida trust the Florida Supreme Court's judgment.

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[241] *Id.* at 1245 (emphasis added).

[242] *See* Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx ("Americans place the greatest faith in the judicial branch and the least in the legislative branch."); Thomas J. Leeper, *Do you Trust the Supreme Court?*, PSYCH. TODAY (Mar. 30, 2012), https://www.psychologytoday.com/us/blog/polarized/201203/do-you-trust-the-supreme-court (discussing why Americans trust the U.S. Supreme Court).

[243] *See* William K. Weisenberg, *Why Our Judges and Courts Are Important*, ABA J. (Feb. 1, 2018, 8:30 AM), https://www.abajournal.com/news/article/why_our_judges_and_courts_are_important.

[244] *See* MODEL CODE OF JUD. CONDUCT r. 2.9 (AM. BAR ASS'N 2010).

[245] *See* Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) ("It is desirable that the trial of causes should take place under the public eye . . . because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.").

[246] *See How Courts Work: Steps in a Trial, Civil and Criminal Cases*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases/.

[247] *See How Courts Work: Steps in a Trial, Appeals*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/appeals/.

Most likely, the majority of these property owners did not go to law school and feel unqualified to question the Court's logic. Perhaps some property owners thought they had an absolute right to have their property abut the water *before* the decision, but now, they just feel misinformed. To be clear, the pertinent question is not whether the property owners are disappointed with the judgment itself. Rather, it is whether the property owners are satisfied with the *process* by which the judgment was reached. Surely, any remaining doubts the property owners had regarding the fairness of the legal process were assuaged when the U.S. Supreme Court granted certiorari and unanimously affirmed the judgment.

This is not to say that the public's trust in the judiciary is absolute. To the contrary, the backlash to the U.S. Supreme Court's controversial decision in *Kelo v. City of New London*[248] illustrates the disdain people may have for courts that facilitate radical exercises of eminent domain.[249] Indeed, the U.S. House of Representatives actually passed a resolution formally condemning the decision in *Kelo*.[250] One outraged citizen even went so far as to formally propose that a hotel be built on the property of Justice Souter, who joined in the majority opinion.[251]

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[248] Kelo v. City of New London, 545 U.S. 469 (2005). In *Kelo*, the Court approved a condemnation of private residential property so that the land could be transferred to Pfizer pharmaceutical corporation to further economic development in the area. *See id.* at 473–475, 489.

[249] *See, e.g.*, Carol L. Zeiner, *Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made More Treacherous by* Kelo, 56 CATH. U. L. REV. 503, 509, 544–545 (2007); Charles E. Cohen*, Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 495–98 (2006); Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of* Kelo v. City of New London, 54 DRAKE L. REV. 171, 227–28 (2005); Peter M. Agnetti, Comment, *Are You Still Master of Your Domain? Abuses of Economic Development Takings, and Michigan's Return to "Public Use" in* County of Wayne v. Hathcock, 79 ST. JOHN'S L. REV. 1259, 1266 (2005).

[250] *See* H.R. Res. 340, 109th Cong. (2005) (enacted); *see also* Alex Hornaday, Note, *Imminently Eminent: A Game Theoretic Analysis of Takings Since* Kelo v. City of New London, 64 WASH. & LEE L. REV. 1619, 1632–38 (discussing various state legislatures' reactions to *Kelo*).

[251] Opinion, *They Paved Paradise*, WALL ST. J. (June 30, 2005, 12:01 AM), https://www.wsj.com/articles/SB112008935423373523. The outraged citizen

Kelo illustrates how an unpopular decision can spark immediate public outcry, but less publicized cases also generate more subtle demoralization costs over time. As one commentator points out, "broad" shifts in property law may portray the judiciary as a systematic threat to property rights.[252] Take a relatively recent case, *Fancher v. Fagella*,[253] where the Virginia Supreme Court overturned seventy years of precedent in holding that property owners may sue their neighbors to cut down invasive trees/roots under nuisance theory.[254] The decision was grounded in policy recognizing Virginia's transformation from a more rural state to a suburban one.[255] While this decision may have appeased suburban owners, it probably did not sit well with many rural owners. Such rural owners now must now worry whether their seemingly innocuous flora susceptible them to legal liability. This psychological trepidation may linger for years and ultimately manifest as tangible losses (e.g., surveying land, hiring counsel, and even lowering home prices). Perhaps most significantly, rural owners may fear that *Fancher* represents a systematic judicial trend towards facilitating suburban development at the expense of their own private property rights.

The motivations of the judiciary are also subject to skepticism at a much more troubling level. It is not uncommon for a judge to have a personal stake in the outcome of a case to which they are appointed;[256] judicial collusion with interested parties—government or otherwise—is a plausible concern. Internal policing mechanisms, however, prevent these concerns from translating into heavy

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claimed that the New Hampshire city where Justice Souter resides "will certainly gain greater tax revenue and economic benefits with a hotel on [the land] than allowing Mr. Souter to own the land." *Id.* The proposed project—the "Lost Liberty Hotel"—was eventually defeated at the polls. Sara Morrison, *The Supreme Court Decision that Threatened Justices' Own Homes*, BOSTON.COM (June 29, 2015), https://www.boston.com/news/national-news/2015/06/29/the-supreme-court-decision-that-threatened-justices-own-homes.

252 Thompson, *supra* note 61, at 1479–1480.

253 Fancher v. Fagella, 650 S.E.2d 519 (Va. 2007).

254 *See id*. at 520, 523.

255 *See id.* at 521.

256 *See, e.g.*, Kimberly Strawbridge Robinson & Madison Alder, *It's Barret's Call Which Cases She'd Sit out: Recusal Explained (2)*, BLOOMBERG (Oct. 13, 2020, 4:01 AM), https://news.bloomberglaw.com/class-action/its-barretts-call-which-cases-shed-sit-out-recusal-explained (discussing the process for recusal in U.S. Supreme Court Cases).

demoralization costs.[257] Before a judge is elected or appointed, his character and background is closely scrutinized.[258] Moreover, judges regularly undergo meritocratic examinations and are only promoted if their decisions conform to standard practice.[259] A judge whose impartiality may be compromised is bound by the Due Process Clause to recuse himself.[260] Indeed, if a judge is caught self-dealing, he faces impeachment or even ex-post criminal prosecution.[261] For an example of these internal mechanisms at work, one need look no further than *Stop the Beach*, where Justice Stevens recused himself because he owned oceanfront property in Florida.[262] Venerable actions like this keep the demoralization costs arising from judicial decision-making relatively low—certainly below whatever the settlement costs of incorporating a judicial takings doctrine (e.g., assessing, negotiating and issuing appropriate compensation) would be.

Unlike Michelman, fellow takings scholar Bruce Ackerman proposes a rule that focuses on how the *result* of the judgment is perceived. Ackerman offers a simple solution to the takings conundrum: Would an ordinary layman consider it a "bad joke" to say that his property is left with something of value in light of government regulation?[263] Ackerman does not clarify the threshold for a "bad joke," but common sense dictates that the remaining property value ought to be negligible. A judicial taking could conceivably result in such extensive property loss, but *Stop the Beach* and the other

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[257] *See, e.g.*, MODEL CODE OF JUD. CONDUCT r. 2.2 (AM. BAR ASS'N 2010) ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.").

[258] *See* DENIS STEVEN RUTKUS, CONG. RSCH. SERV., R43762, THE APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN OVERVIEW 13–14 (2016), https://fas.org/sgp/crs/misc/R43762.pdf.

[259] BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 186 (1977).

[260] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009); Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 617 (1993) ("[D]ue process requires a neutral and detached judge in the first instance." (quoting Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972))).

[261] *See* Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 329 (2012) (discussing judicial self-dealing and providing accordant background sources).

[262] *See supra* note 137.

[263] ACKERMAN, *supra* note 259, at 142.

preeminent judicial takings cases do not proffer such a circumstance.

The affected littoral property owners in *Stop the Beach*, *Hughes*, *Stevens*, and *Matthews* all retained their homes and right to enjoy the adjacent beach.[264] Although property values *might* have decreased from increased public presence along the beach, the properties were certainly not relegated to a "bad joke." Indeed, in the case of *Stop the Beach*, the completed Project could actually make the community a more attractive place to live.[265] Therefore, littoral property values in Destin and Walton County may actually increase over time.[266] *Pruneyard* offers a different context to measure the dichotomy between judicial takings and Ackerman's test. Although the California shopping mall owners lost the right to exclude petitioners, the value of their shopping malls was not substantially impaired at all.[267] Considering his test's poor bearing with these cases, and his support for a judiciary that is innovative and policy-driven,[268] Ackerman—like Sax and Michelman—would likely dispute the utility of the plurality's judicial takings doctrine.

E. *In Favor of Due Process*

As the preceding analysis demonstrates, the judicial takings doctrine offered by the *Stop the Beach* plurality presents many practical and policy concerns. Fortunately, the doctrine did not receive a majority endorsement.[269] Moreover, Scalia did not explain the intricacies and scope of the doctrine in any depth.[270] It follows that the

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[264] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 730, 732–33 (2010); Hughes v. Washington, 389 U.S. 290, 293–94 (1967); Stevens v. City of Cannon Beach, 854 P.2d 449, 460 (Ore. 1993); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 369 (N.J. 1984).

[265] In addition to increased recreational and aesthetic value, beach restoration helps protect littoral property from beach erosion. *Why Beach Restoration*, FLA. DEP'T ENV'T PROT. (Sept. 18, 2020, 2:24 PM), https://floridadep.gov/rcp/beaches-funding-program/content/why-beach-restoration.

[266] *See* Louis Jacobson, *Beach Ruling Cheers Locals*, TAMPA BAY TIMES (Jun. 18, 2010), https://www.tampabay.com/archive/2010/06/18/beach-ruling-cheers-locals/.

[267] Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 83 (1980).

[268] *See* ACKERMAN, *supra* note 259, at 38, 188–89.

[269] *See Stop the Beach*, 560 U.S. at 707.

[270] *See supra* Part II.C.1.

Court should face continued pressure to address the judicial takings conundrum. Accordingly, the Court should have plenty of opportunities to revisit *Stop the Beach* and explore alternatives to a judicial takings doctrine—the most sensible of which is the Due Process Clause.

As Justice Kennedy attests in his concurrence, invalidating property regulation under the Due Process Clause is not a foreign concept.[271] Scalia, however, expresses skepticism over how the Due Process Clause can be construed to limit the power of courts to alter or eliminate established property rights.[272] Contending that Kennedy's proposal "places no constraints whatever upon *this* Court," Scalia implies that the Due Process Clause's application to judicial takings would essentially be illusory.[273] Scalia's utter disdain for due process in the judicial takings context is puzzling, as determining whether a judicial decision abruptly eliminated property rights requires similar deductions to deciding whether a judicial decision is arbitrary or irrational. Both tests require a court to consider what constitutes a clearly established property right in order to gauge proprietary expectations.[274] Courts then must view judicial interference with these expectations in the context of that state's property law.

Although federalism concerns are raised whenever federal courts make judgments affecting state property law, the Due Process Clause maintains the status quo. The Due Process Clause—which is inherently broader than the Takings Clause—requires all branches of government to follow basic standards of reasonableness and fairness.[275] It follows that courts already understand that due process

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[271] *Stop the Beach*, 560 U.S. at 735 (Kennedy, J., concurring) ("[T]his Court has long recognized that property regulations can be invalidated under the Due Process Clause."). In addition to the examples Kennedy cites here, see *supra* notes 21–23; *see also* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 223 (1985) (finding that continued enrollment in college is a protected property interest); Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199 (1979) (employment contract is a protected property interest). *But cf.* Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 957 (7th Cir. 1988) (refusing to apply substantive due process to expropriation); Holloway v. Walker, 784 F.2d 1287, 1293–94 (5th Cir. 1986) (refusing to apply substantive due process to a biased tribunal).

[272] *See Stop the Beach*, 560 U.S. at 719 (plurality opinion).

[273] *Id.* at 724 ("[E]ven a firm commitment to apply [substantive due process] would be a firm commitment to nothing in particular.").

[274] *See id*. at 715; *id*. at 737 (Kennedy, J., concurring).

[275] Walston, *supra* note 33, at 435.

prevents them from abandoning settled principles.[276] Because it is universally understood that state courts interpret the law to adapt to social norms and realities,[277] state courts only abandon settled principles when they make truly irrational or arbitrary decisions.[278] This is a much higher standard than the plurality's judicial takings doctrine.[279] Take the example above where a court "adapts" the UPC provision barring divorcee non-probate inheritance.[280] The court may have terminated a property right, but it also made a prudent decision that surely is not arbitrary or irrational. Consequently, due process challenges to the decision would be fruitless. The take-away here is that much fewer judicial takings claims would have merit under the Due Process Clause than the Takings Clause. Thus, under due process analysis, federal courts would not be asked to interpret and define state property law nearly as often.

In addition to filtering frivolous claims, the Due Process Clause bypasses the procedural issues associated with takings claims.[281] As discussed above, forum availability for takings claims has historically vexed the U.S. Supreme Court.[282] Even following *Knick*, the story of where takings claims are filed and how they are resolved under this new jurisprudence is yet to be written. A judicial takings doctrine would "invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles."[283] Due process claims—which may generally be brought in state or federal court and offer the sole remedy of

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[276] *Stop the Beach*, 560 U.S. at 738 (Kennedy, J., concurring).

[277] *See* Martinez, *supra* note 197, at 332–33; Walston, *supra* note 33, at 429 ("The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law."); Joseph L. Sax, *Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion, and Property Rights*, 11 VT. J. ENV'T L. 641, 645 (2010) ("Traditional common law rules do not fit contemporary circumstances.").

[278] *See Stop the Beach*, 560 U.S. at 736–37 (Kennedy, J., concurring).

[279] *See id.* at 715 (majority opinion).

[280] *See supra* notes 203–207 and accompanying text.

[281] *See supra* Part III.A.; *see also* Ronald Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 738 (2002) (commenting on indeterminate nature of regulatory takings); Barros, *supra* note 137, at 945 (discussing procedural obstacles to takings claims).

[282] *See supra* Part I.C.

[283] *Stop the Beach*, 560 U.S. at 743 (Breyer, J., concurring).

injunctive relief—offer a simpler, more operative avenue to redress that requires no doctrinal reconstruction.[284]

As discussed above, the obstacles to facilitating a judicial takings doctrine are not limited to getting such claims heard; resolving them is equally problematic.[285] Unlike other branches of government, courts do not budget expenses between different public goals.[286] The judiciary's role is strictly adjudicatory; courts are not positioned to evaluate the utility of transferring public funds (compensating) to achieve a taking.[287] Accordingly, reviewing courts, particularly at the federal level, may be reluctant to expend public funds to compensate for judicial takings.

Scalia rebuts this concern by maintaining that the legislature would still ultimately decide whether to carry out a judicial taking or restore the affected property rights.[288] Although appealing at first glance, this approach weakens the institutional barrier between the judiciary and legislature. The judiciary could essentially *force* the legislature to act on an issue the legislature has either neglected or not considered—not to mention deal with the scrutiny and pressure that come with it.[289] Standoffs between discordant legislative officials are conceivable. If the legislature could not procure the requisite votes to statutorily override the judicial taking, it might feel compelled to pay compensation to avert damaging the government's credibility.[290] As one commentator explains, "legislative unwillingness to pay compensation in the face of a court order would seem a willful ducking of a constitutional imperative."[291] Regardless of how the legislature responds, the ruling court has stepped outside its

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[284] *See* Krotoszynski, *supra* note 281, at 738 ("Lower court judges and government officials have a very good idea of what substantive due process requires and can identify and apply the appropriate tests with relative ease.").

[285] *See supra* Part III.A.

[286] *See* Walston, *supra* note 33, at 436.

[287] *See id.*

[288] *See Stop the Beach*, 560 U.S. at 723–24 (majority opinion).

[289] *See* Thompson, *supra* note 61, at 1485 (discussing how legislature is more susceptible to external political pressures than judiciary).

[290] *Id*. at 1517–19. Contrast the affirmative act of paying compensation (and its accordant externalities) with inaction, the typical legislative course when a requisite number of votes cannot be obtained.

[291] *Id*. at 1518.

adjudicatory role into an administrative one, compromising traditional separation-of-powers principles.

Of course, like any other legislative process, reviewing a judicial taking would take time. Meanwhile, aggrieved property owners would have to wait an indeterminate length of time before receiving compensation or having their property rights restored. Externalities from the delayed review of other legislation would also be incurred. Alternatively, under the Due Process Clause, aggrieved property owners enjoy immediate restitution in the form of injunctive relief.[292] The judiciary would remain within its adjudicatory role and the legislature need not get involved. Contrary to Scalia's assertions, the Due Process Clause would not simply "do the work" of the Takings Clause in this scenario[293]—it would do it much better.

IV. COMMENT ON PEÑALVER & STRAHILEVITZ'S ARTICLE: "JUDICIAL TAKINGS OR DUE PROCESS?"

A. *The Four-Factors Approach*

Perhaps a middle ground exists that would satiate both critics and proponents of a judicial takings doctrine. Legal scholars Eduardo M. Peñalver and Lior Strahilevitz—Professors at Cornell Law School and University of Chicago Law School, respectively[294]—offer an intriguing, conciliatory proposal.[295] Peñalver purports that four factors warrant application of the Takings Clause to a judicial taking: (1) intent to appropriate private property for public use ("appropriatory intent"); (2) repeat player litigants (typically the government); (3) state retention of property for public use; and (4) coordination between the judiciary and another body of government.[296] Alternatively, the absence of factors (1) through (3), in conjunction with self-dealing by the judiciary (as opposed to coordination with

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[292] *See* Patrick T. Gillen, *Preliminary Injunctive Relief Against Governmental Defendants: Trustworthy Shield or Sword of Damocles?*, 8 DREXEL L. REV. 269, 275–76 (2016).

[293] *Stop the Beach*, 560 U.S. at 720.

[294] For the sake of brevity, both authors are referred to collectively as "Peñalver".

[295] *See generally* Peñalver & Strahilevitz, *supra* note 261, at 305.

[296] *Id.* at 354–55, 355 tbl.1.

another branch of government), favors due process.[297] "[E]xpect[ing] the factors to correlate strongly in the majority of cases, with the intent element providing much of the connective tissue," Peñalver does not clarify whether appropriatory intent—or any other factor—is dispositive.[298] This Part establishes that the potential for divergent factors is much higher than Peñalver suggests and raises concerns about the efficacy of the "four-factors" approach in practice.

At first glance, "[judicial] intent to appropriate property for public use"[299] seems like a fair benchmark for use of the Takings Clause. After all, the Takings Clause entitles the state to take private property for public use, so long as it provides just compensation.[300] The problem is that it is not always clear when a judge intends to take private property for public use. For example, suppose a judge demands the surrender of property to satisfy an outstanding tax obligation. Arguably, the judge has "taken" the property for public use—or at the very least, a public purpose (to retrieve tax dollars that ultimately benefit the public). The targeted property owner's loss is by itself a means to achieving a public end, which is Peñalver's chief criterion for gauging appropriatory intent.[301] It seems odd, however, to categorize this type of seizure as a taking. The government has no real interest in the functional value of the property, just its monetary value. Indeed, the third factor of Peñalver's test—state retention of the property for public use—is absent, as the government would presumably just auction off the property to another private owner.

The famous U.S. Supreme Court takings case *United States v. Causby*[302] offers another useful hypothetical. In *Causby*, the Court held that the invasion of a farm owner's airspace via low-flying military aircraft could be a taking.[303] Although *Causby* did not arise in the judicial takings context, it illustrates the difficulty in gauging when land has been intentionally appropriated. Peñalver does wisely

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297 *Id.* at 355 tbl.1.
298 *Id.* (discussing four factors warranting judicial takings).
299 *Id*. at 355.
300 U.S. CONST. amend. V.
301 *See* Peñalver & Strahilevitz, *supra* note 261, at 326.
302 United States v. Causby, 328 U.S. 256 (1946).
303 *Id*. at 266–67.

equate the intent to appropriate with the more flexible intent to regulate.[304] In *Causby*, however, the United States assumed that the Air Commerce Act granted its military aircraft clearance to traverse the skies at will; it did not target or otherwise *intend* to regulate the farm owner's land at all.[305] It follows that an appropriatory intent benchmark is not foolproof and would place judicial takings at odds with traditional takings. To be clear, the intention here is not to nitpick at Peñalver's logic—which really is quite sound—but rather to shed light on the incongruities presented by a categorical approach to judicial takings. Although limiting the cases that warrant compensation would allay the net impact of the *Stop the Beach* plurality's judicial takings doctrine, it would equally muddle the nation's notoriously perplexing takings jurisprudence.[306]

The assumption behind Peñalver's appropriatory intent standard is that the state will almost always be a party to the action.[307] It is easy to hypothesize, however, disputes between private parties where a judge could act with appropriatory intent. *Matthews*[308] and its offspring *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*[309] illustrate the most prevalent setting for such private disputes: beaches. Additionally, private altercations over traditional public forums may elicit rulings fueled by appropriatory intent. In

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304 Peñalver & Strahilevitz, *supra* note 261, at 321 n.66 (citing Krotoszynski, *supra* note 281, at 718).

305 *See Causby*, 328 U.S. at 260 (relying on the Air Commerce Act to operate the overhead aircraft, not eminent domain or any sort of other proceedings directed at the parcel in question).

306 *See, e.g.*, Steven J. Eagle*, Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1026 (2000) (equating regulatory takings law to a "murky sea"); D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 345 (2005) (denoting takings jurisprudence as "a mass of contradictory caselaw"); Amy C. Brandt, Comment, *Sedona's Sustainable Growth Ordinance: Testing the Parameters of* Dolan v. City of Tigard, 28 ARIZ. ST. L.J. 1297, 1313 (1996) ("Unfortunately, case law on the Takings Clause is both voluminous and confusing."); *see also* Peñalver & Strahilevitz, *supra* note 261, at 321 n.64 (listing cases).

307 Peñalver & Strahilevitz, *supra* note 261, at 354.

308 Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

309 Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, 851 A.2d 19, 22 (N.J. 2006) (holding that a Beach Club cannot charge public for intermittent recreational beach use).

Pruneyard, for instance, the U.S. Supreme Court explicitly endorsed public petitioning in a shopping mall despite no state advocate.[310] Other courts hearing private disputes have sanctioned public distribution of controversial political literature at a private university[311] and picketing along the sidewalk outside of a privately-owned casino.[312] Once again, in these scenarios, a lack of correlation among the four factors is apparent: appropriatory intent is present; the presence of a "repeat-player" litigant (the state) is not; state retention of the property is debatable (the state is not taking ownership of private property but is nevertheless affirming the public's indefinite right to access and utilize it); and coordination is presumably absent without more evidence.[313]

Peñalver's distinction between private and public litigants touches on a more fundamental problem with his approach: The line between traditional regulatory takings and disputes allocating property among private parties has been blurred considerably by cases like *Berman*,[314] *Midkiff,*[315] and *Kelo*[316] that stand for the proposition that a private-to-private transfer of land can still further a public purpose (and thus constitute a valid exercise of eminent domain). While these cases stretch the ambit of the Takings Clause to reach a broader set of public ends (specifically, economic redevelopment), they discount reliance on appropriatory intent. After all, private-to-private transfers of land necessarily reflect state intent to do just that—not appropriate land for public use.[317] Peñalver does advocate

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[310] *See supra* notes 88–91 and accompanying text.

[311] *See* State v. Schmid, 423 A.2d 615, 633 (N.J. 1980) (finding that state constitution permits distribution of political literature at Princeton University).

[312] *See* Venetian Casino Resort, LLC v. Loc. Joint Exec. Bd., 257 F.3d 937, 948 (9th Cir. 2001) (holding that a privately-owned sidewalk outside Casino constitutes public forum subject to First Amendment protections).

[313] The difficulties in establishing the coordination factor are discussed in *infa* notes 322–28 and accompanying text.

[314] Berman v. Parker, 348 U.S. 26, 35–36 (1954).

[315] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

[316] Kelo v. City of New London, 545 U.S. 469, 489–90 (2005).

[317] Ironically, Peñalver actually cites *Kelo* to support the use of intent to classify takings. *See* Peñalver & Strahilevitz, *supra* note 261, at 321–22. He interprets the dicta in *Kelo* casting eminent domain where it serves as a pretext for private gain to seemingly mandate an ad hoc assessment of a condemning body's "actual intent." Peñalver & Strahilevitz, *supra* note 261, at 322 ("In *Kelo*, however, the

for an extremely broad interpretation of "appropriatory intent" that borders on illusory.[318] But it is hard to envision how, under any rational standard, a judge intends to "appropriate" or "regulate" land for the public when the court *transfers* the land to a new private owner. Such transfers do not facilitate public access, enjoyment, or even expression;[319] they offer only intangible benefits to the public through future economic redevelopment, at least in the traditional private-to-private takings context.[320]

Despite the major questions raised by an appropriatory intent standard, Peñalver does offer some constructive support for its use.[321] Not so for the fourth factor of his approach: coordination between the judiciary and another branch.[322] In short, this factor appears to be an outlier from the other three factors, which are all typical—although certainly not dispositive—hallmarks of takings.[323] Contrarily, calculated coordination to facilitate a judicial taking is

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Court seemed to go farther [than relying on the explicit language of the Takings Clause], emphasizing that for an explicit use of eminent domain power the condemnor's actual intent must be to foster a 'public use' . . . .").

[318] Peñalver & Strahilevitz, *supra* note 261, at 322. Peñalver proposes than an intent to regulate or appropriate be inferred where a "regulation deprives an owner of a property right that he previously possessed in order to accomplish some valid public end." *Id*. at 321 n.66. Significantly, nothing in this language distinguishes traditional takings from disputes between private litigants where a judge is indifferent to the winners and losers of the case (e.g., the prototypical due process cases discussed in Peñalver's article. *See id.* at 355). In fact, this standard is very similar to the all-encompassing judicial takings doctrine proffered in *Stop the Beach*. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 715 (2010).

[319] Indeed, in *Berman*, public access to the property was presumably hindered—if not abrogated completely—when the plaintiff's department store was condemned. *See Berman*, 348 U.S. at 31, 33–36.

[320] *See id.* at 34–36.

[321] *See generally* Peñalver & Strahilevitz, *supra* note 261, at 319–335 (exploring, *inter alia*, questions of intent, coordination, retroactivity, and regulatory takings).

[322] *See id*. at 328–31 (discussing coordination).

[323] *See id.* at 328 ("[T]he Takings Clause addresses situations in which the government intentionally diminishes a private owner's property rights to achieve a legitimate public end, permitting the government to exercise this power but potentially requiring the payment of just compensation."); *id* at 329 (noting that coordination is a factor that "acts as a proxy for intent").

only present in rare circumstances.[324] That's not to say that coordination isn't plausible in most cases—another governmental branch will almost always have some sort of interest in a potential change in property law.[325] It just isn't clear why coordination should give rise to takings liability over due process.

A coordinated judicial change in property law still navigates the proper legislative channels—so the argument to treat it like an ordinary legislative taking falls short. Moreover, the focus should be on deterring such coordination, not compensating for it. Under Peñalver's four-factors approach, a colluding judge need not fear their decision being overturned or any apparent sanctions; the only material consequence of coordination would be an aggrieved party's compensation.[326] Peñalver alternatively argues—effectively—that judicial self-dealing should violate the Due Process Clause and trigger criminal prosecution in egregious cases.[327] His focus on the different incentives behind coordination and self-dealing, however, misses the point. Both acts of judicial misconduct compromise the justice system and—more importantly—place private property rights at risk.

Establishing coordination among the judiciary and another branch is not a rudimentary process. The reviewing judge is placed in a very difficult position; accusing another judge of self-dealing is one thing but accusing multiple governmental entities of conspiring with one another requires a good deal of circumstantial evidence and guesswork.[328]

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[324] *See id.* at 332–33 ([J]udges have relatively little incentive to deprive a private property owner of property because it is more difficult for those judge to capture the benefits associated with the deprivations . . . . [J]udges are less likely to engage in self-dealing . . . .").

[325] As a cursory example, perhaps a few zealous government officials realize they cannot garner the votes to officially adopt the UPC provision discussed in *supra* Part III.B. Consequently, they approach the judges sitting on the state supreme court to garner sympathy for their cause. One can plausibly envision the judges colluding with the officials to adopt the UPC provision. A coordinated agreement to change property law could be in effect for months—if not years—in advance of an opportunity to capitalize on a private dispute; it does not have to arise when the state becomes an interested party in the litigation.

[326] *See* Peñalver & Strahilevitz, *supra* note 261, at 328–29.

[327] *See id.* at 329–31.

[328] *See* Krotoszynski, *supra* note 281, at 766.

B. *The Underinvestment Problem*

Peñalver's primary concern with judicial takings is consequent underinvestment in legal representation: Property owners who know they may be compensated for a judicial taking in the future may underinvest in legal counsel at the outset of litigation.[329] Consequently, plaintiff property owners are less likely to present state court judges with proper precedent off which to base sound decisions.[330] Of course, this leads to a host of externalities, most notably being that other property owners not parties to the suit may be deprived of their own property rights while the erroneous precedent stands (e.g., the right to accretions).[331] Presumably, these affected property owners would all have a valid judicial takings claim.

Although Peñalver's underinvestment concerns certainly have merit, some counterarguments are worth noting. First, a few hours of any lawyer's service are still expensive to the average American.[332] The tangible present benefits of reduced legal fees may offset the intangible future costs of underinvestment. Additionally, Peñalver fears that "lower priced, lower quality law firms will be able to outcompete higher priced, higher quality law firms,"[333] but is that really a bad thing? Lower priced does not always equal lower quality. Many lawyers have low rates simply because they aren't experienced or well-connected—they might still have excellent legal minds.[334] Indeed, younger, cheaper lawyers looking to establish themselves may work harder for their clients than their senior counterparts. It follows that, in addition to saving their clients' money, underinvestment may help young lawyers secure precious business

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329 Peñalver & Strahilevitz, *supra* note 261, at 337.

330 *See id.*

331 *Id.* at 337–38.

332 *See* Michael Zuckerman, *Is There Such Thing as an Affordable Lawer?* ATLANTIC (May 30, 2014) https://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/.

333 *Id.* at 341–42.

334 In fact, "[h]istorically, most attorneys in the United States have created their own jobs by establishing solo and small law firms . . . . Attorney demographics confirm that the majority of lawyers in private practice are self-employed." Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 889 (2012).

opportunities.[335] Again, the premise behind Peñalver's underinvestment argument is sound—but there are some counterbalancing policy considerations.

To mitigate the underinvestment problem, Peñalver proposes that comparative and contributory fault be introduced into the compensation scheme for judicial takings: A client that fails to bring relevant precedent to a court's attention would "suffer some percentage reduction" from the compensation to which he is entitled under the Takings Clause.[336] Under due process, such a client would be denied a remedy altogether—similar to a contributory negligence standard.[337] There are several glaring problems with this remedial approach. For one, it seems arbitrary to ascribe a "percentage of fault" for omission of some particular precedent.[338] The relevancy of precedent is unique to the case-at-hand, and a judge's subjective disposition towards the precedent could cost a client thousands of dollars. Additionally, clients should not be punished for the negligence of counsel. Even highly qualified lawyers who put in long hours of research may fail to uncover important precedent at times. Thus, even where a client *does* make a substantial investment in counsel, the remedy to which he is justly entitled could still be abated or—under due process—abrogated completely. It follows that fear of comparative/contributory fault might ironically encourage *over*investment in legal representation. Lawyers (and law students) would welcome these extra billable hours, but clients certainly wouldn't.

Peñalver himself proffers another notable aversion to using comparative/contributory fault: It could spread into traditional takings. More specifically, "[comparative/contributory fault] might be expanded to cover ordinary takings cases where a well-connected constituent had failed to mount any political resistance against a regulation."[339] If this were to occur, landowners would be galvanized to resist new property law as a preemptive strike against a future unsatisfactory takings verdict.[340] Although citizen involvement in the

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[335] *See id.* at 897–98 (discussing benefits of providing smaller low-cost services).

[336] Peñalver & Strahilevitz, *supra* note 261, at 363.

[337] *See id*. at 364.

[338] *See id.* at 363.

[339] *Id.* at 363.

[340] *See id.*

legislative process should generally be encouraged, a "scorched earth"[341] approach from fearful property owners could inhibit utilitarian legislation. This foreboding, while speculative, should not be discounted; a new remedial modus operandi that is "a concept is quite foreign to takings jurisprudence"[342] naturally carries substantial risk.

Peñalver illustrates the underinvestment problem by hypothesizing the outcome of *Stop the Beach* had the U.S. Supreme Court not been presented with the binding state precedent from *Martin v. Busch*.[343] If the Solicitor General (or the Court's clerks) had not brought *Martin* to the Court's attention, the Court might have overlooked the State's right to artificial avulsions and (wrongly) ruled for the property owners.[344] In this instance, the plurality may very well have charged the Florida Supreme Court with committing a judicial taking.[345] Moreover, by "taking" the restored beach from the State (or the public), the U.S. Supreme Court would have conceivably "committed a judicial taking of its own"![346] This is a frightening yet very plausible scenario that adds a new twist to the procedural judicial takings conundrum. Should the U.S. Supreme Court not grant a rehearing in light of *Martin*, how would the Court's judicial taking be reviewed? As Peñalver avers, "[w]ho is to police judicial takings by the highest judicial body?"[347]

Equally disconcerting, the State would have no apparent remedy under the Takings Clause in Peñalver's *Stop the Beach/Martin* hypothetical.[348] Damages would not restitute the public's loss of access to the beaches. The only proper remedy would be invalidation of the decision, which of course sounds like a job for the Due Process Clause. This remedial issue captures one of the most disconcerting aspects of a judicial takings doctrine: If a court rules that private property rights do not exist, the private property owners may seek compensation; if, however, the court rules for the private property

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341 *See id.*
342 *Id.*
343 *See id.* at 349–50.
344 *Id.* at 349.
345 *Id.*
346 *Id.*
347 *Id.*
348 *See id.* at 349–50.

owners—abrogating public property rights in the process—the public has no apparent recourse. In essence, federal judges are protecting private property owners from renegade state judges but are not protecting the public from those same judges.

C. *Underlying Criticisms of Peñalver & Strahilevitz's Article*

Peñalver segues from his *Stop the Beach/Martin* hypothetical to a proposed procedural due process test that would purportedly frustrate underinvestment in legal counsel.[349] In so doing, Peñalver toys with the idea of invalidating the claims of non-party property owners that fail to intervene or file an amicus brief in the original suit.[350] Such a radical measure entails serious constitutional and fairness concerns that are beyond the scope of this Article. There is no question, however, that extending contributory fault to *non-party* claimants would open a pandora's box of new issues. For one thing, it is naive to assume that at-risk property owners are closely following court dockets. Particularly in larger jurisdictions, there are too many cases today for property owners to sift through, let alone consult with counsel about. More importantly, placing an affirmative burden on non-party property owners to intercede in an outside case would greatly lower the bar for what constitutes a "reasonable opportunity to be heard"—or satisfactory due process.[351] Such a burden would contravene the popular conviction that "everyone deserves their fair day in court."

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[349] *See id.* at 350 ("[T]here [is] an alternative to this possibility of merry-go-round litigation . . . . Due process provides a sensible framework for considering these issues."). The reasoning behind the procedural due process test offered by Peñalver is difficult to grasp. The gist of Peñalver's argument appears to be that a *Matthews v. Elridge*, 424 U.S. 319 (1976) test balancing a property owner's investment in counsel with the value of the interests at stake would promote efficiency and mitigate the underinvestment problem. *See id.* at 350–51. Peñalver, however, does not clarify the scope of this test or how it should be implemented in conjunction with his four-factors approach. Indeed, it is not clear exactly what Peñalver is proposing here at all.

[350] *See id.* at 351–52.

[351] Peñalver actually bolsters this point with his own policy arguments. *See id.* at 352. ("Because property law is designed to promote secure investments, the law hesitates to impose on owners an affirmative burden to remain constantly vigilant about shifting legal doctrines that may affect their rights.").

Despite detailing how his proposed remedial safeguards could accommodate non-party property owners, Peñalver glosses over the more fundamental procedural obstacles that non-party judicial taking claims must overcome.[352] Peñalver (accurately) prognosticates that *Williamson County* shouldn't keep non-party judicial takings claims from *reaching* state court but does not explain how state courts would *handle* these claims.[353] As established above, state court systems are not designed to facilitate judicial takings; fortunately, the U.S. Supreme Court recently opened the door to federal judicial taking claims by overruling the state-litigation requirement of *Williamson County*.[354] Federal jurisdiction over judicial takings claims, however, poses its own practical and federalism concerns.[355] When viewed in context with these broader, more palpable issues, underinvestment in legal representation seems like a somewhat trivial problem for Peñalver to dwell on. The appeal of his four-factor approach would be stronger if he spent more time addressing how it would mitigate the procedural challenges and political impacts of judicial takings.

Peñalver deserves credit for proposing such a unique compromise between the Takings Clause and due process; his effort to harmonize private and public property interests is certainly admirable. In this author's opinion, however, Peñalver tries too hard to appease advocates for private property rights. For example, one of the key "implications" of Peñalver's four-factor approach is that takings claimants will enjoy a much higher success rate than due process claimants.[356] Accordingly, Peñalver takes a notably defensive stance towards the odds of prevailing on due process grounds,[357] when he should be accentuating the positives of a low-success rate for due process claims.

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[352] *See id.* at 361–62.

[353] *See id*. (citing Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).

[354] *See supra* Part III.A.

[355] *See supra* Parts III.A, III.B.

[356] Peñalver & Strahilevitz, *supra* note 261, at 355–56.

[357] *See id.* at 360 ("Although the argument that a state action is arbitrary under the rational basis test is usually thought to be virtually impossible for a claimant to win, there are a number of reasons to think it would not be a futile argument to make . . . .").

Consider the consequences of a high success rate for judicial takings claims. Proponents warn that courts manipulate the system to abrogate private property rights,[358] but an easy path to compensation could actually lead property owners to manipulate the judiciary. Abundant judicial takings claims would exhaust court resources and present numerous externalities. Most significantly, fear of committing a taking would discourage judges from modifying property law to meet societal demands. Peñalver gets so caught up in the nuances of his proposal that he loses sight of these great social costs. Phrased differently, Peñalver fails to convince this author that the benefits a compensatory judicial takings remedy offers private property owners outweighs the costs it imposes on the public.

Peñalver equates judicial takings to "a car [ ] careening off the road."[359] The tense, nebulous opinion issued in *Stop the Beach* certainly lends credence to this metaphor. While, however, Peñalver purports that his conciliatory approach would crash the car "into the bushes [rather] than into a crowded café,"[360] this author believes that it's not too late to navigate the car back onto the road. A firm commitment from the U.S. Supreme Court to regulate judicial takings under the Due Process Clause would go a long way towards steering the car in the right direction. Hopefully, the *Stop the Beach* plurality will read this Article and react accordingly.

CONCLUSION

Stop the Beach was supposed to shed some light over the perplexing issue of judicial takings. Instead, the divided, inchoate opinion offers more questions than answers. How the plurality's judicial takings doctrine would function in practice is not entirely clear, but some of its consequences are. Due process offers a practical alternative for courts to employ that nullifies or mitigates these

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358 *See, e.g.*, Thompson, *supra* note 61, at 1544 ("By exempting courts from taking protections, we create an imbalance that invites the state to attempt to accomplish through the judiciary what it cannot accomplish through other branches of government . . . . By applying the takings protections to the judiciary, we encourage courts to be more sensitive to the impact that their decisions have on property holders and thereby protect the values embedded in the takings protections.").

359 *Id*. at 368.

360 *Id.*

consequences. The familiar, inherently broad Due Process Clause already plays a pivotal role in takings jurisprudence, and the Supreme Court would be well grounded in adapting it in lieu of the judicial takings doctrine proposed in *Stop the Beach*.