The New Judicial Takings Construct

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“[To] halt the law’s evolution . . . would be to sever property’s link to the culture that it serves. In time, a static property regime would inevitably become an anachronism and would gradually be perceived as an obstacle to progress.”

introduction

In Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, a four-Justice plurality endorsed a novel theory that would make the Takings Clause applicable to a wide collection of state court interpretations of state property law. Writing for the plurality, Justice Scalia declared that a state court’s opinion finding that an “established” property right “no longer exists” may amount to an unconstitutional taking. The opinion draws on two fundamental themes of Justice Scalia’s property jurisprudence: the first is the notion of property as a prepolitical, immutable partition between individual interests and permissible government action; the second is a general

2. 130 S. Ct. 2592 (2010).
3. Id. at 2602, 2608 (plurality opinion).
distrust of the state courts that are tasked with declaring these individual property rights.\(^5\) The joining of these themes in the *Stop the Beach Renourishment* plurality opinion sits in stark contrast to the concurring opinions of Justices Kennedy and Breyer. These concurrences—Justice Kennedy's rejection of the plurality's approach in light of the adequacy of due process protections and Justice Breyer's rejection of the plurality's approach in light of concerns with unnecessary federal judicial interference in traditionally state matters—reflect a conception of property that finds some state court alterations of individual interests appropriate when changes in economic circumstances and social attitudes demand it.

After briefly articulating in Part I the division within the splintered opinions of *Stop the Beach Renourishment*, this Essay has two primary purposes. Part II compares the judicial takings standard established by the plurality to previous discussions of federal constitutional review of state court property declarations, both in prior judicial decisions and in the academic literature. Part III considers whether the plurality's standard could be interpreted as applicable not only to state court decisions that allegedly result in a private-to-public reassignment of property, as the petitioners in *Stop the Beach Renourishment* claimed, but also to two additional instances: (1) adjudications of property disputes between two private parties or (2) any allegedly improper judicial change in nonproperty areas of law where damages would serve as the remedy. The Essay concludes that the plurality's judicial takings standard arguably is inclusive of more state court rulings than any standard presented by earlier courts and commentators. Depending upon the breadth of its reach, this standard could serve to chill the common law system's responsiveness to changing conditions.

### i. the facade of unanimity: dissonance on judicial takings at the supreme court

The dispute in *Stop the Beach Renourishment* emanated from Florida legislation that authorized publicly funded beach restoration. Most

\(^5\) See, e.g., Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from denial of certiorari); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (eschewing U.S. Supreme Court decisions that allow state courts to adjudicate disputes through ad hoc decisionmaking in favor of those requiring state courts to apply “clear, previously enunciated rule[s]”).
waterfront landowners welcomed this gratis protection from the erosive effects of hurricanes and other coastal storms, and for over forty years no one challenged the validity of the statute. However, in 2004, a small group sued the government, contending that they deserved compensation because the legislation took their antecedent right to retain exclusive access and proprietorship to the water’s edge. Moreover, they claimed that the law contradicted their entitlement to any future natural accretion.

The Florida Supreme Court determined that the landowners, despite their apparent assumption to the contrary, never had either of these alleged rights under Florida law. Therefore, the court held that the legislation implicated no property rights that could be taken in violation of the Takings Clause. The petitioners recast their challenge in front of the U.S. Supreme Court on the pioneering theory that the Florida Supreme Court so significantly reinterpreted state law that the Florida court’s decision, as a state act in and of itself, constituted a compensable taking.

Wading through a “jumbled mass of arcane [Floridian] waterfront law,” a unanimous U.S. Supreme Court explained that sudden “avulsive” events—landscape changes caused by both natural events, such as hurricanes, and artificial events, such as state beach restoration projects—do not change the property boundary. However, Chief Justice Roberts and Justices Thomas and Alito joined the separate opinion authored by Justice Scalia that is sympathetic to the petitioner’s argument that the judiciary is no less subject to the Takings Clause than are the other branches of government.

7. 130 S. Ct. at 2610.
8. Id.
11. In effect, the original mean high-water line that existed prior to the beach restoration continues to serve as the boundary between private and public property, though there is now dry land seaward of that line. See Stop the Beach Renourishment, 130 S. Ct. at 2611.
12. Id. at 2602 (asserting that, where a court declares that a well-established private property right no longer exists, “it has taken that property, no less than if the State had physically appropriated it or destroyed its value”).
Justice Kennedy, joined by Justice Sotomayor, wrote separately to suggest that only when the Constitution’s Due Process Clause proves “somehow inadequate” to protect landowners from the judicial elimination of their existing property rights should the questions surrounding the need for and scope of a judicial takings doctrine be addressed. However, Justice Kennedy also wrote that judicial takings claims are “inconsistent with historical practice” and laced with procedural complexities. He suggested, in the end, that formulating a judicial takings doctrine “might give more power to courts, not less.” That Justice Kennedy thoroughly denounced a judicial takings doctrine for lack of any historical, substantive, or theoretical backing makes it surprising that he left any door open to the creation of such a doctrine in the future.

Though generally expressing grave doubts about the plurality’s judicial takings standard, Justice Breyer, joined by Justice Ginsburg, concurred in the judgment but found the issue of judicial takings “better left for another day.” Justice Breyer wrote that the plurality’s failure “to set forth procedural limitations or canons of deference would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law.”

13. *Id.* at 2613-18 (Kennedy, J., concurring in part and concurring in the judgment).
14. *Id.* at 2616.
15. *Id.* at 2616-17 (“[I]t may be unclear in certain situations how a party should properly raise a judicial takings claim . . . [and] it is unclear what remedy a reviewing court could enter after finding a judicial taking.”).
16. *Id.* at 2615. Justice Kennedy asserted that a judge might sweepingly abandon settled property rules because he or she would be assured the legislature will pay compensation for the rulings’ effects. *Id.* at 2616.
17. This vacillation has led both proponents of reasonable regulation through the democratic process and proponents of strong private property protections to praise Justice Kennedy’s opinion. Compare John D. Echeverria, Stop the Beach Renourishment: Why the Judiciary is Different 5 (Vt. L. Sch., Research Paper No. 10-45, 2010), available at http://ssrn.com/abstract=1652351 (contending that Justice Kennedy suggests “that some judicial evolution of property rules is permissible”), with Shapiro & Burrus, *supra* note 10, at 428 (“Perhaps [Justice Kennedy is] more amenable than previously thought to the *Lochner*-era idea that some protection of property rights can be found in the Due Process Clause.”).
18. *Stop the Beach Renourishment*, 130 S. Ct. at 2618 (Breyer, J., concurring in part and concurring in the judgment).
19. *Id.* at 2619. Justice Scalia criticized Justices Ginsburg and Breyer for not “grappl[ing] with the artificial question of what would constitute a judicial taking if there were such a thing.” *Id.* at 2603 (plurality opinion). The fact that Justice Scalia called this question
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next Part of this Essay seeks to articulate the judicial takings standard set forth by the plurality and the due process tenets discussed in Justice Kennedy’s concurrence, and then to compare them with the standards previously proposed by courts and commentators.

ii. the scope of the new judicial takings construct

Analyzing the relationship between the Due Process Clause and the Takings Clause in the context of property rights protections has long been an arduous task for judges and legal scholars. This analysis is further complicated when, as the Justices encountered in Stop the Beach Renourishment, the governmental action at issue is that of the judicial branch. Over the course of the past century, the U.S. Supreme Court has sent mixed signals on, but has never definitively decided, the issue of whether state court decisions declaring or redefining property rights raise federal constitutional questions and, if they do, how due process and takings protections might apply or interact.20

The Due Process Clause requires that all levels of American government provide fair procedures and operate in a reasonable and nonarbitrary manner in pursuit of legitimate governmental purposes.21 The Takings Clause proscribes the government from taking private

“artificial” seems, ironically, to lend some support to Justices Ginsburg and Breyer’s position of restraint.

20. Compare Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932) (concluding that a state court can decide whether to grant retroactive effect to its reversal of a prior decision, such that it can decide that the “discredited declaration will be viewed as if it had never been, and the reconsidered declaration [will be viewed as the] law from the beginning”), Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) (deciding that, while procedural due process requirements apply to state courts, the Due Process Clause does not restrict state courts from declaring “what the law has been as well as what it is”), and Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) (holding that a redefinition of property rights to award possession of a disputed parcel to one alleged successor over another with whom the same court had previously sided does not raise due process concerns or otherwise unconstitutionally impair contract rights), with Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (obtaining jurisdiction by analogizing the free speech clause of the California Constitution to a statute, though arguably implying in dicta that the Takings Clause might apply to judicial redefinitions of property rights), Muhlker v. N.Y. & Harlem R.R., 197 U.S. 544 (1905) (holding that the Contracts Clause applies to redefinitions of contract rights, though leaving uncertain whether the property owner’s right had been impaired by legislative action or judicial interpretation), and Chi., Burlington & Quincy R.R. v. City of Chi., 166 U.S. 226 (1897) (declaring that the Court had jurisdiction to review the trial court’s jury instructions declaring the parties’ property rights).

property “for public use, without just compensation.”\textsuperscript{22} The prospect of invalidating, on substantive grounds, a lower court ruling that alters a property right is not concerned with whether the court’s alteration of that property right requires the takings remedy of “just compensation.” Rather, the Takings Clause might require compensation—depending on the severity of the burden on private property rights and the distribution of that burden—only “in the event of otherwise proper interference,”\textsuperscript{23} that is, in the event that the governmental act is related to a “public use.” In other words, takings review necessarily accepts that the governmental entity has acted in pursuit of a valid purpose; to impose an obligation on the public to pay just compensation for an invalid governmental act that must be rescinded is counterintuitive.

Therefore, assuming some type of federal constitutional review is appropriate, it evidently is sounder to analyze claims of improper judicial property declarations under a due process theory than under a takings theory.\textsuperscript{24} A takings theory (and thus a compensation remedy) seems inappropriate because, unlike the political branches, the judiciary lacks the power to pay for and employ private property for public use through formal condemnation; therefore, the judiciary does not have the power to make a decision on whether to condemn.\textsuperscript{25} Use of the Due Process

\textsuperscript{22} Id. amend. V.

\textsuperscript{23} Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005); see also id. (“[I]f a government action is found to be impermissible . . . that is the end of the inquiry. No amount of compensation can authorize such action.”); Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937) (“[O]ne person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.”); Mo. Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896) (explaining that an alleged taking for a private use does not violate the Takings Clause but instead violates the Due Process Clause). The \textit{Stop the Beach Renourishment} plurality stated that it saw “no reason why [compensation] would be the exclusive remedy” for a taking. \textit{Stop the Beach Renourishment}, 130 S. Ct. at 2607 (plurality opinion). This arguably runs counter to the unanimous opinion in \textit{Lingle}, where the Court seemingly resolved that injunctive relief is inappropriate in takings cases. Since \textit{Stop the Beach Renourishment}, the lone court to face the remedies question rejected as dictum the proposition in Justice Scalia’s plurality opinion that remedies beyond compensation exist for some successful takings claims. \textit{See} Sagarin v. City of Bloomington, 932 N.E.2d 739, 744 n.2 (Ind. Ct. App. 2010).

\textsuperscript{24} \textit{See}, e.g., Roderick E. Walston, \textit{The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings}, 2001 Utah L. Rev. 379. A successful due process challenge precludes a finding that a judicial decision amounted to a taking for “public use,” thereby barring a successful claim under the Takings Clause.

\textsuperscript{25} \textit{See}, e.g., First English Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304, 321 (1987) (“[T]he decision to exercise the power of eminent domain is a legislative function for Congress and Congress alone to determine.” (quoting Haw. Hous. Auth.
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Clause’s substantive criteria to decide such cases provides some semblance of stability to property owners—by requiring that courts act in a nonarbitrary and reasonable manner—without placing too great a constraint on state judicial powers.26

Justice Stewart arguably expressed a similar sentiment in his 1967 concurring opinion in *Hughes v. Washington*27 in asserting that the judiciary must be subject to some limits in redefining property laws. Though advocates of a judicial takings doctrine often cite favorably to Justice Stewart’s opinion in *Hughes*, it is not entirely clear whether Justice Stewart was relying upon due process canons, takings canons, or some hybrid of the two.28 He declared that a decision of the Washington Supreme Court represented such “a sudden change in state law, so unpredictable in terms of relevant precedents,” that the decision itself was unconstitutional.29

After Justice Stewart’s veiled concurrence, the U.S. Supreme Court did not officially broach the issue of judicial takings until *Stop the Beach Renourishment* v. Midkiff, 467 U.S. 229, 240 (1984)); Cox Cable San Diego, Inc. v. Brookspan, 195 Cal. App. 3d 22, 28 (App. Ct. 1984) (“It is for the Legislature, not the judiciary, to determine what public uses justify the exercise of the power of eminent domain . . . .”). Some scholars contend that state legislatures are intentionally shifting the placement of property rights restrictions to the “politically insulated courts.” See, e.g., Shapiro & Burrus, supra note 10, at 426 (“[I]n the absence of a judicial takings doctrine, legislators will use the path of least resistance—the courts—to accomplish policy goals that the Takings Clause would block through other channels.”). Shapiro and Burrus’s argument is difficult to understand when there is no private-use versus public-use-with-compensation choice for the judiciary to attempt to avoid. It is a particularly surprising assertion when made in the context of the *Stop the Beach Renourishment* facts, for the State of Florida includes one of the strongest pieces of property rights legislation in the country. See Fla. STAT. §§ 70.001-70.51 (2004).

26. While due process review affords great deference to the substance of rational government decisions, some scholars have suggested that federal courts generally are averse to any substantive review of local land use questions. See, e.g., Marc Poirier, *Federalism and Localism in Kelo and San Remo, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN* 105 (Robin Paul Malloy ed., 2008). This suggestion could forebode discomfort in the lower federal courts in applying the *Stop the Beach Renourishment* plurality’s judicial takings test.


28. See, e.g., id. at 296 (“For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.” (emphasis added)).

29. Id. Justice Stewart’s concurrence does not discuss whether the appropriate remedy is invalidation or compensation.
Renourishment in 2010. However, in the intervening forty-three years, support for judicial takings gained steam in the academic literature, where authors proposed a variety of judicial takings tests. Interestingly, few departed substantially from that espoused by Justice Stewart.

Some scholars advocate for a judicial takings standard that is quite deferential to lower courts—one that is triggered only in those instances where a state court reached its holding without any “fair or substantial basis” but rather for the very purpose of subverting a federal constitutional claim. Others—proponents of a judicial takings standard that provides more stringent constraints on state courts—point to the work of Professor Barton H. Thompson, a former law clerk to Chief Justice Rehnquist. Yet even Thompson, despite his unambiguous support for a judicial takings doctrine, does not set forth a standard for prospective application that is significantly more demanding than the “fair or substantial basis” test.

In response to Justice Stewart’s insistence that the federal courts “ferret out” “sudden” and “unpredictable” rulings, Thompson suggests

30. But see Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from denial of certiorari) (asserting that a decision of the Oregon Supreme Court may have “effected an uncompensated taking”).


32. See Walston, supra note 24, at 432-33 (contending that the “fair or substantial basis” test exhibits little difference from Justice Stewart’s Hughes concurrence in that it assures that state court decisions do not “evade constitutional guaranties”); see also Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930) (“[I]f there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court.” (internal citations omitted)); Fox River Paper Co. v. R.R. Comm’n, 274 U.S. 651 (1927) (declaring that redefinitions of property rules cannot evade federal constitutional guaranties but instead must rest on a “fair or substantial” basis).

33. See Thompson, supra note 31.

34. Further, Thompson acknowledged that establishing a judicial takings doctrine could lead to the detrimental result of courts resorting to “second-best,” “roundabout” rationales that reach similar or equivalent results without explicitly violating positive law. Id. at 1535 n.323.
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that they ask whether a state court decision “was neutral and fully considered its impact on property holders.” He then remarks that, for some, a more inclusive definition of judicial takings might be preferable—for instance, one that finds any change in the law that would “endanger the goal(s) of the takings protections” to be unconstitutional. However, he allows that any change that “seems to be a natural step in a slow but continuous evolution” should pass judicial takings muster. While Thompson may not have perfectly accomplished his stated goal of formulating a “relatively clear and high standard[] for prevailing on a judicial takings claim,” his article makes apparent his preference for a judicial takings test that is less inclusive than that presently applied to legislative or executive takings.

Justice Kennedy’s concurrence in Stop the Beach Renourishment—which perplexingly admits a possible need for a judicial takings doctrine if the Due Process Clause proves inadequate but then elaborates its dangers—suggests a due process test that, in assessing the state court decisions within its scope, seems akin to the moderate standards posed by Thompson. In a way, Justice Kennedy also echoes Justice Stewart’s Hughes concurrence by suggesting that the focus of constitutional review should be the extent to which a state court decision disturbs “settled principles.”

35. Id. at 1496-97.
36. Id. at 1500. This standard would be severely hampered by the many competing and conflicting goals offered for takings protections, which very generally can be classified into efficiency, process failure, and fairness justifications. See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 138 (1985); Bradley C. Karkkainen, The Police Power Revisited: Phantom Incorporation and the Roots of the “Takings” Muddle, 90 Minn. L. Rev. 826, 912 (2008); Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967).
37. See Thompson, supra note 31 at 1497.
38. Id. at 1512.
39. Id. at 1513 n.245. Thompson recently echoed this position in a presentation at UC Berkeley School of Law (Boalt Hall). He suggested that state courts should be afforded greater leeway than is afforded the legislative and executive branches when a reviewing federal court makes the threshold takings determination of whether an established property right has been altered. See Barton H. Thompson, Takings Law in the Era of Climate Change: Stop the Beach Renourishment, Remarks at the 13th Annual Litigating Regulatory Takings Conference at Berkeley School of Law (Nov. 5, 2010). Only if that threshold question is answered in the affirmative does Thompson assert that the traditional regulatory takings tests have any relevance to state court decisions that claimants allege amount to judicial takings. Id.
40. See Stop the Beach Renourishment, Inc. v. Fla. Dep’t Envtl. Prot., 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring in part and concurring in the judgment). While Justice Kennedy did not specify the level of scrutiny that would be appropriate under
Neither the standard articulated by Justice Kennedy nor those proposed by Thompson cast a shadow over state courts like the standard set forth by the Stop the Beach Renourishment plurality.

Writing for the plurality, Justice Scalia chastised Justice Kennedy for relying upon the “wonderfully malleable concept” of substantive due process.41 Yet beyond declaring that a judicial taking did not occur under the specific facts of Stop the Beach Renourishment, the plurality opinion falls prey to a similar malleability: it offers scant directives to future courts required to determine the bounds of “established” property rights that cannot be disturbed without implicating the Takings Clause.42 The

his “settled principles” test, he has, in the past, espoused a vision of due process analysis that is slightly more demanding than the traditional rational basis review. See, e.g., Kelo v. City of New London, 545 U.S. 469, 493 (2005) (asserting that his earlier opinion in Eastern Enterprises v. Apfel, 524 U.S. 498, 549-50 (1998) (Kennedy, J., concurring in judgment and dissenting in part), called for heightened scrutiny for retroactive legislation under the Due Process Clause). Though Justice Kennedy stated in Stop the Beach Renourishment that “owners may reasonably expect or anticipate courts to make certain changes in property law,” Stop the Beach Renourishment, 130 S. Ct. at 2615 (Kennedy, J., concurring in part and concurring in the judgment), one scholar has suggested that Justice Kennedy’s “settled principles” approach remains void of sufficient guidance on what considerations a reviewing court would utilize and “fail[s] to contemplate the ecological and social conditions and dynamics” of the object of the takings claim—here, coastal lands. See Craig Anthony Arnold, Legal Castles in the Sand: The Evolution of Property Law, Culture, and Ecology in Coastal Lands, 61 SYRACUSE L. REV. (forthcoming 2011) (manuscript at 1, 28-29), available at http://ssrn.com/abstract=1701626. Professor Arnold’s analysis is buttressed by Justice Scalia under the Takings Clause: Justice Kennedy suggested that due process review would “prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat.” Stop the Beach Renourishment, 130 S. Ct. at 2615 (Kennedy, J., concurring in part and concurring in the judgment) (internal quotations omitted).

41. Id. at 2608 (plurality opinion) (“[A] firm commitment to apply [substantive due process principles] would be a firm commitment to nothing in particular.”). Justice Scalia went on to say that the “great attraction [to] Substantive Due Process as a substitute for more specific constitutional guarantees is that it never means never—because it never means anything precise.” Id. Ironically, eleven days after the ruling in Stop the Beach Renourishment, Justice Scalia supported reliance on substantive due process to incorporate the Second Amendment’s right to bear arms against the states, voting to strike down a Chicago gun ordinance. See McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

42. The Court’s difficulty in determining those property rights that are “established” is akin to that which the Court faces in identifying the reasonable expectations of a landowner who purchases property that already is subject to regulations. See Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) (rejecting a bar on the filing of regulatory takings claims by those who purchase property that is already subject to the regulation at issue). In competing concurring opinions, Justice Scalia contended that regulations existing prepurchase ought to have no bearing on the takings determination—unless

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remainder of this Part offers three conceivable interpretations of the plurality’s standard.

In one sense, *Stop the Beach Renourishment* sounds of the “fair or substantial basis” test that is quite deferential to state courts. For example, a unanimous Court suggests that possibly “state-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned.” However, what it saw as an “odd result”—that the petitioners’ property could be “deprived of its [oceanfront] character”—did not lead the Court to regard application of the State’s avulsion rule as violative of the Federal Constitution. This conclusion could suggest that although the plurality acknowledged that a judicial takings standard theoretically exists, it will never be found to have been violated in practice. Such an interpretation would rebuff claims that recent cases eliciting considerable property rights fervor could return the judicial takings issue to the Supreme Court for a more precise definition of the plurality’s standard and a successful application of it.

In another sense, the plurality’s test could be interpreted to fall in the middle of the aforementioned tests. It might very well be considered more

they reflected background principles of state property or nuisance law—because there are some expectations that are so firmly grounded that they can never be disappointed without an obligation of compensation, *id.* at 636-37 (Scalia, J., concurring), Justice Stevens suggested that they are dispositive of a failed takings claim, *id.* at 641-42 (Stevens, J., concurring), and Justice O’Connor asserted that the regulatory regime in place at the time that a claimant acquired title helps shape, but does not definitely determine, the reasonableness of the claimant’s investment-backed expectations, which is relevant under the applicable regulatory takings balancing analysis, *id.* at 632-33 (O’Connor, J., concurring). On remand, the Rhode Island trial court rejected the takings claim, due in part to the fact that the claimant purchased the property subject to regulations existing pre-purchase. See *Palazzolo v. State*, No. WM-88-0297, slip op. at 30 n.78 (R.I. Super. Ct. July 5, 2005).

43. *Stop the Beach Renourishment*, 130 S. Ct. at 2612 (plurality opinion).
44. *Id.*
45. *See, e.g.*, Proctor v. Huntington, 238 P.3d 1117, 1129 (Wash. 2010) (Sanders, J., dissenting) (declaring that the 5-4 majority opinion holding that a landowner who constructed a house on his neighbor’s property due to a faulty survey did not have to remove the home but could instead pay compensation for the occupied land constituted “judicial eminent domain”); Petition for Writ of Certiorari, PPL Mont., LLC v. Montana, No. 10-218 (U.S. Aug. 12, 2010), 2010 WL 3236721 (suggesting that the Montana Supreme Court ruling that the entirety of the Missouri, Clark Fork, and Madison rivers were navigable at the time of Montana’s statehood violates well-established law on the reach of “navigable” waters). *But see* Anna Christensen, *Petitions To Watch: Conference of 10.29.10*, SCOTUSBLOG (Oct. 26, 2010, 11:30 AM), http://www.scotusblog.com/2010/10/petitions-to-watch-conference-of-10-29-10 (explaining that, on November 1, 2010, the U.S. Supreme Court requested the views of the Solicitor General on *PPL Montana*).
inclusive of state court rulings than the exceedingly deferential “fair or substantial basis” test. But at the same time, Justice Stewart’s “unpredictability” test, Justice Kennedy’s related “settled principles” test, and the myriad tests offered by Professor Thompson all may compel greater federal court restraints on state courts than does the plurality’s test. This is so because the plurality opinion can be read to suggest that even the alteration of explicit state court precedent is not always sufficient to meet the “establishment” test. For instance, a modern state supreme court’s overruling of an older opinion of the same court may not rise to the level of reversing an “established” principle if the older opinion is not considered to be entrenched in the state’s common law because it was either too recently decided to be entrenched or too rarely applied as to be clearly established. In this light, the very state court decision at issue in Hughes v. Washington, where Justice Stewart’s concurrence gave rise to the modern debate over judicial takings theory, may not have violated the Stop the Beach Renourishment plurality’s standard given the recency of the prior opinion from which it departed.

However, while these two interpretations are possible, it is more likely that Justice Scalia’s test would in fact extend the reach of judicial takings potentially to include every judicial change to any previously declared property principle. Indeed, the plurality asserted that a judicial takings claim could succeed even where a change in common law was predictable or otherwise could have been anticipated in light of prior cases. The per se quality of the plurality’s standard in Stop the Beach Renourishment—in

46. See Stop the Beach Renourishment, 130 S. Ct. at 2608-10 (plurality opinion).
47. In a majority opinion joined by two members of the Stop the Beach Renourishment plurality (Justices Scalia and Thomas), the Court described the “established” common law rules at issue as “firmly embedded,” “traditional property law principles” that have a long “historical pedigree.” Phillips v. Wash. Legal Found., 524 U.S. 156, 165-69 (1998).
48. See Hughes v. Washington, 389 U.S. 290 (1967) (addressing the Washington Supreme Court’s alleged departure from its decision just twenty years earlier, which held that Washington law applied to gradual accretions and vested them in the owner of the adjoining land).
49. See Stop the Beach Renourishment, 130 S. Ct. at 2610 (plurality opinion) (“[A] judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking.”). But see E. Enters. v. Apfel, 524 U.S. 498, 528 (1998) (plurality opinion) (suggesting in an opinion signed by Justices Scalia and Thomas—who also were in the plurality in Stop the Beach Renourishment—that it would have been relevant if the government had indicated a pattern of involvement in a particular industry in which it later passed legislation guaranteeing health benefits to retirees decades after their retirement).
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the words of Justice Scalia, its “definiteness”—is reminiscent of the
categorical rules for physical invasions and total economic wipeouts
that infiltrated takings jurisprudence two decades ago but have been
largely absent in more recent takings cases.

It is arguable that even recent landmark takings decisions by the U.S.
Supreme Court actually could be classified as judicial takings under the
Stop the Beach Renourishment plurality’s categorical standard. For
example, the Court unanimously displaced one of its prior decisions, which
had declared that whether a regulation “substantially advances” a
legitimate state interest is an appropriate takings test. In another
instance, the Court distinguished an eighty-year-old, factually similar
takings finding by stating “circumstances may so change in time . . . as to
clothe with such a [public] interest what at other times . . . would be a
matter of purely private concern.” Ironically, the Stop the Beach
Renourishment plurality’s standard may be so extreme that the standard
itself constitutes a judicial taking.

50. See Stop the Beach Renourishment, 130 S. Ct. at 2608 (plurality opinion).
unanimously that the balancing factors set forth in Penn Central Transportation Co. v.
City of New York, 438 U.S. 104 (1978), are “the principal guidelines for resolving
[traditional] regulatory takings claims”); Brown v. Legal Found. of Wash., 538 U.S.
216, 233-25 (2003) (“Our regulatory takings jurisprudence . . . is characterized by
‘essentially ad hoc, factual inquiries’ . . . .”) (citing Penn Cent. Transp. Co., 438 U.S. at
124); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302,
314 (2002) (same); Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) (same); see
also Poirier, supra note 26, at 109 (describing recent U.S. Supreme Court takings cases
as rejecting bright-line rules and deferring to state judicial and administrative fora);
Underkuffler, supra note 4, at 728 (suggesting that Palazzolo and Tahoe-Sierra signal “a
shift in the way property rights and their protection are viewed”). One could surmise
that Justice Scalia sees judicial takings as an avenue to reignite the conception of
property in the many formalistic takings decisions in which he stood in the majority in
the 1980s and 1990s, see supra note 4, only to see it slip away in the past decade,
beginning with the Court’s decision in Palazzolo.
54. See Lingle, 544 U.S. at 545.
Block v. Hirsh, 256 U.S. 135, 155 (1921)).
56. Cf. Thompson, supra note 31, at 1468-69 (suggesting a similar irony in Justice Stewart’s
concurrence in Hughes).
Justice Scalia stated that the plurality intends to give the judiciary no "special treatment" in comparison to the other branches of government.\textsuperscript{57} If this is so, then one could argue that the traditional balancing test applicable to most instances where claimants allege legislative or executive takings should apply to claims of judicial takings in lieu of any new per se rule.

\textbf{iii. the reach of the new judicial takings construct}

If constitutional review of state court property declarations is a takings issue as opposed to a due process one, it is not only the scope, but also the reach of the plurality's new judicial takings standard that has yet to be precisely defined. The plurality apparently concurs with the sentiment that without a judicial takings doctrine, judges are able to "totally rewrite the law to expand government" at private property owners' expense.\textsuperscript{58} But to what governmental expansions would the plurality's standard apply? The first Section below analyzes the plurality's implication that its standard may be applicable to cases that do not involve a reassignment of private property to the public. The second Section explores whether the plurality's standard might even apply in the absence of any assignment of property at all.

\textit{A. Non-Private-to-Public Reassignments}

The plurality first says that "[s]tates effect a taking if they recharacterize as public property what was previously private property."\textsuperscript{59} This passage suggests that the alleged expansion of government against which the judicial takings standard protects is confined to situations where a state government deprives a private person of his property by reassigning it to the public trust and then claims that the private person never had those property rights in the first place. For an example of such a reassignment, proponents often point to state court decisions holding that

\textsuperscript{57} Stop the Beach Renourishment v. Fla. Dep’t Envtl. Prot., 130 S. Ct. 2592, 2601 (2010) (plurality opinion).

\textsuperscript{58} Timothy Sandefur, Judicial Takings in Stop the Beach Renourishment, PAC. LEGAL FOUND. BLOG (June 17, 2010, 8:10 AM), http://plf.typepad.com/plf/2010/06/judicial-takings-in-stop-the-beach-renourishment.html.

\textsuperscript{59} Stop the Beach Renourishment, 130 S. Ct. at 2601 (plurality opinion).
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some portion of privately owned dry sand beaches are impressed with public trust rights.60

But the plurality later states that if “a court declares that what was once an established right of private property no longer exists, it has taken that property.”61 This passage raises the question of whether the plurality’s standard applies where a state court, in adjudicating an exclusively private dispute, clarifies a property rule in a manner that effectively results in a private-to-private reassignment.62 For instance, early common law prohibited the reservation of easements in favor of third-party beneficiaries because new rights could be held only by feudal lords. Would a declaration by a state supreme court that an easement can be reserved in favor of a third-party beneficiary—because the original purpose of the

60. One particularly oft-cited case is Matthews v. Bay Head Improvement Ass’n, 471 A.2d 355, 365 (N.J. 1984), cert. denied, 469 U.S. 821 (1984). Indeed, a hypothetical posed by Chief Justice Roberts at oral argument in Stop the Beach Renourishment echoed Matthews’s factual circumstances. See Transcript of Oral Argument at 34:18-35:6, Stop the Beach Renourishment, 130 S. Ct. 2592 (No. 08-1151). For a sampling of articles citing Matthews as an example of the need for a judicial takings doctrine, see W. David Sarratt, Judicial Takings and the Course Pursued, 90 Va. L. Rev. 1487, 1490 n.17 (2004); Thompson, supra, note 31, at 1480 n.126; and Mark Murakami, Tred Eyerly & Robert H. Thomas, Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches 17 n.56 (unpublished manuscript), available at http://ssrn.com/abstract=1655658. These scholars do not, however, address any judicial takings or other rights held by those community members impacted by a court’s moving a longstanding line delineating public and private beach in a seaward direction, say from the vegetation line to the mean high-water line. See, e.g., Severance v. Patterson, No. 09-0387, 2010 WL 4371438 (Tex. Nov. 5, 2010). This asymmetry—the lack of consideration for the interests of those whom the state is to represent—has plagued other areas of takings law that have diverged from the traditional balancing of public and private rights set forth in Penn Central. See, e.g., Underkuffler, supra note 4, at 749 (classifying Justice Scalia’s view of takings protections as “completely one-sided”); Timothy M. Mulvaney, Where the Wild Things Aren’t: Transposing Exaction Takings, Address to the Faculty of Gonzaga University School of Law (Sept. 30, 2010) (suggesting that it is anomalous that exaction takings law protects claimants alleging that exactions are too harsh when there are not corollary protections for those alleging that exactions are too lenient).

61. Stop the Beach Renourishment, 130 S. Ct. at 2602 (emphasis omitted); see also id. at 2601 (“[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing.” (emphasis added)).

62. A related question is whether the Stop the Beach Renourishment plurality opinion rejuvenates the debate surrounding whether judicial enforcement of a property right constitutes “state action.” Shelley v. Kraemer suggested so, thereby subjecting the judiciary to certain constitutional provisions. 334 U.S. 1 (1948). To date, Shelley has generally been confined to its facts involving an Equal Protection Clause challenge to state court enforcement of racially restrictive covenants.
common law prohibition is outdated—“take” property from a purchaser who presumed such a reservation in a deed was void? Or would a declaration by a state supreme court that a trespasser need no longer believe in good faith that he owns the parcel that he is occupying to establish adverse possession in effect “take” that property from the original true owner?

Normatively, it is easy enough to suggest that these holdings should not effect takings; otherwise, it freezes evolution of the common law of property absent compensation. Even common law missteps, however troubling, would be difficult to correct without payment. Yet, by focusing only on the asserted depreciation in the value of the landowner’s property and paying little heed to state courts’ institutional role in declaring property rights, the plurality implies such results could occur in the federal courts.

The Stop the Beach Renourishment plurality suggests that the judiciary should be treated no differently from the other branches of government. Legislative actions that result in the reassignment of property from one


65. See Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930) (“Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.”); Cent. Land Co. v. Laidley, 159 U.S. 103 (1895) (holding that, provided procedural due process is afforded, “an erroneous decision of a state court does not deprive the unsuccessful party of his property”); see also John D. Echeverria, Takings and Errors, 51 ALA. L. REV. 1047 (2000).
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private party to another are subject to the Takings Clause’s commands. Thus, to the extent that the plurality’s broad vision of a judicial takings doctrine is based on treatment of the branches as equivalent, the plurality’s standard may well be applicable to new rules announced in adjudications of disputes between private parties.

B. Nonproperty Disputes

It is also unclear whether the plurality’s “establishment” standard applies to reinterpretations of common law principles beyond the context of property law. The plurality noted that persons or entities that were not parties in the original state court case could challenge the decision in that case as a judicial taking in the lower federal courts. In such an instance, it seems that government intrusions, via any branch of government in any context, are to be constrained under the plurality’s judicial takings theory via third-party challenges.

This interpretation suggests that the plurality could extend this nonparty course to any state court rulings that involve an allegedly improper change in any area of law (including and in addition to property law) that retroactively provides a damages remedy. Again, normatively, it should not; otherwise, for instance, notorious changes in tort law, such as the decision of the New York Court of Appeals eliminating the privity requirement to allow tort suits against manufacturers or the New Jersey Supreme Court’s finding of landlord tort liability under the implied


67. Stop the Beach Renourishment v. Fla. Dep’t Envtl. Prot., 130 S. Ct. 2592, 2609-10 (2010) (plurality opinion). The plurality asserts that the parties in the original state supreme court case can seek relief only on certiorari to the U.S. Supreme Court. Id. at 2609. The ramifications of the plurality’s opinion for prior procedural holdings by the Court that had the effect of relegating most takings cases to the state court system—(1) the exhaustion and finality requirements of Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985); and (2) the proscription of direct lower federal court review of state court decisions without specific congressional authorization set forth in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)—certainly provide significant fodder for future scholarship.

warranty of habitability for third-party criminal acts against tenants, would amount to unconstitutional takings. In effect, this would mean that any manufacturer or landlord that was not liable under the prior interpretations of the rules but is subject to damages retroactively under the new interpretations (at least as to those claimants against whom the statute of limitations had not yet run) might have a viable judicial takings claim. Yet the plurality’s opinion does not definitively foreclose even this type of injudicious application.

As one scholar has noted, some retroactive overruling is “endemic to the judicial process and is obviously required in any legal system that seeks to avoid being forever locked into ancient doctrines.” However, the plurality suggests that the fear of its judicial takings standard “depriving common-law judging of needed flexibility” has “little appeal,” for the Takings Clause was adopted when the “courts had no power to ‘change’ the common law.” Yet the plurality’s position might suffer from an important historical inaccuracy. The modern, stricter notion of stare decisis is of nineteenth century origin; it was understood at the time of the drafting of the federal Constitution in the eighteenth century that the judiciary served an important, continuous role in articulating and developing the law.

Paired with a view previously espoused by Justices Scalia and Thomas (both members of the Stop the Beach Renourishment plurality), this

70. See Chang, supra note 31, at 67; see also Lawrence v. Texas, 539 U.S. 558, 577 (2003) (asserting that, in deciding whether to overrule earlier precedent, the U.S. Supreme Court looks to whether there has been individual or societal reliance “of the sort that could counsel against overturning its holding once there are compelling reasons to do so”).
71. See Stop the Beach Renourishment, 130 S. Ct. at 2609 (plurality opinion).
72. See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 350 (5th ed. 1956). Plucknett explains that the first evidence of a single case serving as precedent appeared in the seventeenth century. However, only those matters settled by the Exchequer Chamber were considered precedential, not those “decisions of either bench . . . [nor] those of the House of Lords.” Id. at 348. He suggests that William Blackstone concurred with the sentiment of Chief Justice Vaughan, who wrote in 1670 that “if a judge believes a previous case in another court to be erroneous he is not bound to follow it.” Id. at 349 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *69-72). The eighteenth century, as Plucknett describes, still found courts “tempted to find safety in numbers” in trying to package prior cases as demonstrative of a customary policy, as opposed to strict reliance on individual judicial decisions of the past. Id. And “Exchequer and Queen’s Bench held different views on the same point as late as 1842.” Id. at 350. Only later in the nineteenth century, many decades after the Founders authored the U.S. Constitution, did a rigid system of precedent establish itself, and even then some adaptability remained. See id.
aversion to judicial flexibility to meet changing times and conditions, despite its historical flaws, could have broad ramifications. In **Eastern Enterprises v. Apfel**, decided prior to the Roberts Court, the Justices addressed a constitutional claim against a federal law requiring coal operators to pay premiums toward pension plans based upon the number of miners whom they had previously employed. While five Justices found the legislation at issue unconstitutional, they did not agree on a rationale. Justice Kennedy, concurring, declared the legislation violative of only the Due Process Clause. Yet Justices Scalia and Thomas joined a plurality opinion asserting that any law that retroactively creates unanticipated and nonconsensual monetary liability does not implicate the Due Process Clause but rather takes “property” in violation of the Takings Clause. One scholar recently echoed this view of Justices Scalia and

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75. *See E. Enters.*, 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part).
76. *Id.* at 528 (plurality opinion). The four members of the *Stop the Beach Renourishment* plurality foreclosed the possibility of using the Due Process Clause to rein in what it views as inappropriate departures from state common law property principles. This could have considerable implications. In *Eastern Enterprises*, the divided opinion raised the question of whether a concurrence in part and dissent in part by Justice Kennedy on due process grounds, coupled with a four-Justice dissent also on due process grounds, resulted in a precedential rejection of the takings theory cited by a four-Justice plurality. *See, e.g.*, Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001) (“[F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. . . . [W]e are obligated to follow the views of that majority.”); *see also* John D. Echeverria, Lingle, Etc.: The U.S. Supreme Court’s 2005 Takings Trilogy, 35 ENVTL. L. REP. 10,577, 10,583 n.52 (2005) (“[A] majority of the Court (Justice Kennedy and the four dissenters) indicated that a monetary assessment should not be viewed as falling within the scope of the Takings Clause.”); Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 ECOLOGY L.Q. 327, 349 n.87 (1998) (“[T]he Supreme Court, by a vote of five to four, agreed that the Taking Clause applies only to interferences with specific assets . . . .”); Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895, 935 (2006) (“Breyer agreed with Kennedy that the Takings Clause did not apply because the Coal Act did not affect ‘an interest in physical or intellectual property, but [imposed] an ordinary liability to pay money.’” (quoting *E. Enters.*, 524 U.S. at 554 (Breyer, J., dissenting) (alteration in original)). *Eastern Enterprises* therefore counsels that the *Stop the Beach Renourishment* plurality’s rejection of an alternative theory could very well lead to its own theory’s demise.
Thomas in suggesting that even the right to sue warrants constitutional takings protection from governmental interference.  

Merging the plurality opinion in *Stop the Beach Renourishment*—which both Justices Scalia and Thomas signed—with the implications of the earlier plurality opinion adopted by these two Justices in *Eastern Enterprises* yields a rather exceptional result. A judicial modification in a tort rule (or, for that matter, a rule in any other area of law where monetary relief is available) might well be considered “property” and thereby trigger the new judicial takings standard.

**Conclusion**

The plurality opinion in *Stop the Beach Renourishment*, which extends the reach of takings protections beyond legislative and executive actions to decisions of the judiciary, claims that its judicial takings standard would continue to allow state court clarifications of existing state property law. However, the line between permitted clarifications and those reinterpretations of state law that amount to judicial takings is not readily discernible. The plurality’s novel theory—that a state court opinion finding that an “established” property right “no longer exists” may constitute a judicial taking—could prove to be dead on arrival, with future U.S. Supreme Court and lower federal court decisions continuing to allow state courts significant autonomy in declaring and redefining state property rights. Yet it is more likely that the plurality has set forth a new category of per se takings that may well send shivers through state courts. Justice Scalia’s opinion for the plurality exudes distrust for state court judgments on questions of state property law that arguably surpasses his

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77. See Blumenthal, supra note 66. If the views of both the *Stop the Beach Renourishment* plurality and Blumenthal are validated, the class of existing causes of action would be necessarily stagnant in perpetuity, at least without compensation for their alteration.

78. See *Stop the Beach Renourishment v. Fla. Dep’t Env’tl Prot.*, 130 S. Ct. 2592, 2609 n.9 (2010) (plurality opinion) (“The test we have adopted . . . contains within itself a considerable degree of deference to state courts. A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court.”). *But see id.* at 2606 (asserting that Justice Kennedy’s statement that the “common-law tradition . . . allows for incremental modifications to property law” so that “owners may reasonably expect or anticipate courts to make certain changes in property law” is “not true” (internal quotations and citations omitted)).
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previously espoused distrust for state legislative judgments on these same questions.\textsuperscript{79}

This suggestion emanating from the plurality’s opinion—that both new legislative restrictions and new common law restrictions are largely irrelevant to the definition of property—diverges significantly from the evolutionary view of the law asserted by the likes of Justices Holmes and Brandeis some eighty years ago.\textsuperscript{80} Further, if the plurality’s decision should, in the future, be applied to private-to-private reassignments, or, even more significantly, nonproperty disputes, \textit{Stop the Beach Renourishment} could stand as the foundation for revolutionary new powers that would allow almost any private individual to challenge almost any civil state court decision as a taking in the federal court system. Seen in this light, the new judicial takings construct may very well threaten the ability of the law to adapt and evolve in the face of changing economic, environmental, social, and technological developments.

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\textsuperscript{79}. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (requiring that governmental entities prove that their regulations are supported by “background” principles of the common law, as opposed to nuisances or other property principles as declared by the legislature); see also Poirier, \textit{supra} note 74, at 185 n.437 (describing Justice Scalia’s opinion in \textit{Lucas} as “expressing distrust of [the] legislature’s motives”). \textit{Lucas} left the scope of background principles unsettled. However, Justice Scalia soon after forecasted his opinion in \textit{Stop the Beach Renourishment} by suggesting in a dissent from the denial of certiorari in \textit{Stevens v. City of Cannon Beach} that states are not permitted to expand their definition of limits on title as a means of avoiding \textit{Lucas}'s per se rule for regulations that result in depriving property of all economic value. See \textit{Stevens v. City of Cannon Beach}, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from denial of certiorari) (“Our opinion in \textit{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.”).

\textsuperscript{80}. See Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930) (Brandeis, J.) (suggesting that modifications within the positively defined system of property rights are an intrinsic and expected function of the common law); \textit{Muhlker v. N.Y. & Harlem R.R.}, 197 U.S. 544, 572-76 (1905) (Holmes, J., dissenting) (rejecting the claim that a litigant “has a constitutional right not only that the state courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound”).
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