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# More Questions Than Answers: Situating Judicial Takings Within Existing Regulatory Takings Doctrine

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ARTICLE

MORE QUESTIONS THAN ANSWERS:  
SITUATING JUDICIAL TAKINGS WITHIN EXISTING  
REGULATORY TAKINGS DOCTRINE

*Michael B. Kent, Jr.\**

ABSTRACT

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, a four-member plurality of the Supreme Court endorsed the idea that certain judicial action, as well as action by other branches of government, might effect a taking of private property. In explaining its theory of judicial takings, however, the plurality did little to explain how such takings fit within the larger doctrinal and analytical framework for regulatory takings. This Article evaluates whether the plurality's discussion of judicial takings is consistent with the preexisting takings framework and how it might impact takings cases in the future. Ultimately, the plurality's discussion of judicial takings raises more questions than answers and backtracks on the promises of clarity made in the Court's most recent prior takings decision.

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## INTRODUCTION

Much of the discussion surrounding the Supreme Court's 2009-2010 term has centered on the First and Second Amendments to the United States Constitution.<sup>1</sup> For those of us who follow takings doctrine, however, the Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*<sup>2</sup> was equally as interesting and, perhaps, just as significant as the developments in those other constitutional areas. In *Stop the Beach*, a four-member plurality endorsed the idea that actions of the judicial branch, no less than those of the legislative and executive branches, can effect an uncompensated taking of property in violation of the Fifth and Fourteenth Amendments.<sup>3</sup> In the words of Justice Scalia, writing for the plurality, "the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking."<sup>4</sup>

The plurality's doctrine of judicial takings presents a host of interesting questions.<sup>5</sup> As an initial matter, given that only four Justices explicitly endorsed the doctrine, threshold inquiries

<sup>1</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3021-23 (2010) (holding that the Second Amendment right to keep and bear arms is applicable to states); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010) (holding that the First Amendment prohibits government from suppressing political speech by corporations); see also Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243 (2010) (discussing the shift in direction in campaign finance); Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws?* 104 NW. U. L. REV. COLLOQUY 85 (2010) (finding that although *McDonald* makes clear that the Second Amendment applies to the states through the Fourteenth Amendment, there is still significant debate about what standard of scrutiny applies to gun laws by state and local governments).

<sup>2</sup> 130 S. Ct. 2592 (2010) (plurality opinion).

<sup>3</sup> See *id.* at 7-10.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> Some Supreme Court precedent prior to *Stop the Beach* supports the theory of judicial takings. Nonetheless, the Court's previous pronouncements related to this issue were by no means clear, and *Stop the Beach* rightly may be considered the most authoritative statement on the subject from the modern Court. See *infra* notes 51-62 and accompanying text.

include both its durability and the precise analytical standards for evaluating future claims.<sup>6</sup> Another important issue concerns the proper role of federal courts in evaluating the property-related rulings of state tribunals, along with the federalism implications necessarily wrapped up in such a task.<sup>7</sup> By not providing clear, majority answers to these questions, the decision in *Stop the Beach* does little to alleviate the famous murkiness of takings law.<sup>8</sup>

This lack of clarity, while not entirely unexpected, is nonetheless disappointing given the Court's recent movements in this area. In *Lingle v. Chevron U.S.A., Inc.*,<sup>9</sup> issued just five years before *Stop the Beach*, the Court made what many commentators (myself included) considered to be great strides toward shoring up the confusion surrounding regulatory takings.<sup>10</sup> In light of that progress, the unanswered questions about judicial takings seem to present something of a setback. So, too, does the plurality's sparse discussion of how judicial takings fit within the framework established by *Lingle*. Indeed, the meager references to the *Lingle* framework in *Stop the Beach* have led one knowledgeable commenter to query whether Justice Scalia's plurality opinion "indicat[es] his personal preference for jettisoning most of established precedent" or, instead, whether "judicial takings are different and should be subjected to a different and higher standard."<sup>11</sup> Put differently, do judicial takings as explained by the plurality in *Stop the Beach* fit

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<sup>6</sup> See D. Benjamin Barros, *Supreme Court Rules in Stop the Beach*, PROPERTYPROF BLOG, June 17, 2010, <http://lawprofessors.typepad.com/property/2010/06/supreme-court-rules-in-stop-the-beach.html>.

<sup>7</sup> Compare, e.g., *Stop the Beach*, 130 S. Ct. at 2597 ("Generally speaking, state law defines property interests.") with *id.* at 2609 (acknowledging that federal courts must "have the power to decide what property rights exist under state law"); see also *id.* at 2608 n.9 (indicating that federal courts should make independent judgment concerning existence of constitutional violation but show deference to state court determination of property rights at issue).

<sup>8</sup> See Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVTL. L.J. 63, 63 (2008) (collecting quotes that describe regulatory takings law as "'muddled,' 'confused,' and 'a constitutional quagmire'").

<sup>9</sup> 544 U.S. 528 (2005).

<sup>10</sup> See, e.g., Kent, *supra* note 8, at 107 (positing that *Lingle* "begins the long overdue process of bringing clarity to the confused realm of regulatory takings"); see also 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, 344 (2005) (suggesting that *Lingle* "has tremendous potential to clarify takings doctrine"); Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 372 (2006) ("*Lingle* brings a remarkable coherence to the Court's confused regulatory takings doctrine.>").

<sup>11</sup> Posting of John Echeverria to PropertyProf Blog, <http://lawprofessors.typepad.com/property/2010/06/supreme-court-rules-in-stop-the-beach.html> (June 21, 2010, 10:00 EST).

within the larger understanding of takings endorsed by *Lingle*, and if so, how?

This Article explores these latter questions and, in the process, raises several subordinate issues implicated by the *Stop the Beach* plurality. It should be stated at the outset that my aim is not to critique the doctrine of judicial takings *per se* – that is, I do not address whether the plurality is right or wrong that certain types of judicial action may effect a taking of private property. Rather, assuming that judicial takings are viable, it is my aim to evaluate how the plurality's discussion of such takings might impact the existing framework for regulatory takings established in *Lingle*. To that end, Part I, drawing heavily from my observations in prior work, reviews the existing doctrine of regulatory takings as developed in *Lingle*. Part II then examines the plurality's decision in *Stop the Beach* and its theory of the doctrine of judicial takings. Part III attempts to fit *Stop the Beach* within the *Lingle* framework, while simultaneously drawing attention to potential inconsistencies between that framework and the plurality's explanation of judicial takings. I conclude that the theory of judicial takings endorsed by the *Stop the Beach* plurality raises more questions than it helps to answer and, in the process, has backtracked on the promises of clarity made in *Lingle*.

## I. LINGLE AND EXISTING REGULATORY TAKINGS DOCTRINE<sup>12</sup>

As suggested above, for several decades, the Supreme Court's regulatory takings jurisprudence was an amalgam of confusion and conflict. Beginning in 1978, with its decision in *Penn Central Transportation Co. v. City of New York*,<sup>13</sup> the Court spent the better part of three decades formulating a variety of analytical tests by which to judge takings claims, and in so doing, it provided a number of seemingly incompatible explanations about how subordinate issues within those tests should be resolved.<sup>14</sup> Additionally, throughout its decisions, the Court utilized language, principles, and precedents that seemed to incorporate elements of substantive due process into the law of takings.<sup>15</sup> The result of this conflation with due

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<sup>12</sup> The following discussion is based on Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1841-44 (2010) and Kent, *supra* note 8, at 78-109.

<sup>13</sup> 438 U.S. 104 (1978).

<sup>14</sup> See generally Kent, *supra* note 8, at 66-84 (discussing pre-*Lingle* takings cases).

<sup>15</sup> See *id.* at 68-69; see also Barros, *supra* note 10, at 349-50, 351 (noting that "older cases . . . have problematic substantive due process baggage" and that "many of the Court's

process was a misplaced emphasis on the purposes for which a challenged regulation had been enacted, as well as a lack of predictability as to the likely outcome of any particular case.<sup>16</sup> In 2005, however, the Court brought some welcome clarity to this area of constitutional inquiry with its unanimous decision in *Lingle v. Chevron U.S.A., Inc.*<sup>17</sup>

#### A. *The Litigation in Lingle*

*Lingle* concerned a challenge to a Hawaii statute that limited the amount of rent an oil company could charge to independent lessees of company-owned gasoline stations.<sup>18</sup> The law was ostensibly enacted to protect lessees from the effects of market concentration and, concomitantly, allow the lessees to lower the retail prices they charged for gasoline.<sup>19</sup> Pointing to evidence that the rent control measure would not serve its stated purpose, and indeed would actually result in higher retail gasoline prices,<sup>20</sup> Chevron challenged the law as an uncompensated taking of its property.<sup>21</sup>

The Supreme Court rejected Chevron's claim on the grounds that the basis for its challenge – i.e., that the statute did not serve its stated purpose – was not a cognizable argument under the Takings Clause. Noting that Chevron's challenge really was about the underlying legitimacy of the rent cap, and not about the cap's effect on its property interests, the Court indicated that the claim was grounded more in substantive due process than in the law of takings.<sup>22</sup> The former properly is concerned with the purposes and validity of government action, and a law that is sufficiently arbitrary or irrational will be held invalid.<sup>23</sup>

The Takings Clause, by contrast, is not concerned with the underlying validity of the government action, but rather “presupposes that the government has acted in pursuit of a valid public purpose.”<sup>24</sup> Instead, the Takings Clause is primarily concerned

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more recent regulatory takings precedents . . . have [also] been infected with substantive due process analysis”).

<sup>16</sup> See Kent, *supra* note 8, at 77.

<sup>17</sup> 544 U.S. 528 (2005).

<sup>18</sup> *Id.* at 533.

<sup>19</sup> *Id.* at 533-34.

<sup>20</sup> *Id.* at 535.

<sup>21</sup> *Id.* at 533.

<sup>22</sup> *Id.* at 540-45.

<sup>23</sup> *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 543 (2005); see also *id.* at 548-49 (Kennedy, J., concurring).

<sup>24</sup> *Id.* at 543.

with the idea of fair burden distribution – in other words, whether the government is “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>25</sup> The paradigmatic case of such unfair distribution is where the government directly appropriates private property via eminent domain.<sup>26</sup> Because such property is seized for the public good, it is only fitting that the government (as representative of the public) compensate the owner for the property that was seized.<sup>27</sup> Similarly, government actions short of direct appropriation, but that are “functionally equivalent” to it, also require the payment of compensation.<sup>28</sup> Ultimately, then, the Takings Clause focuses not on the purposes or validity of the government action, but “upon the severity of the burden that [such action] imposes upon private property rights.”<sup>29</sup>

### B. *The Lingle Analytical Framework*

After explaining the differences between due process and takings, and overruling some prior precedent that overtly confused the two, the Court then put its imprimatur on five of its prior regulatory takings decisions<sup>30</sup> – *Penn Central Transportation Co. v. City of New York*,<sup>31</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>32</sup> *Lucas v. South Carolina Coastal Council*,<sup>33</sup> *Nollan v. California Coastal Commission*,<sup>34</sup> and *Dolan v. City of Tigard*.<sup>35</sup> I have argued elsewhere that these decisions, along with *Lingle* itself, should be considered uniquely authoritative in the area of regulatory takings.<sup>36</sup> Reading these six decisions together, as if they formed a single, unified text, a strong case can be made that there are two basic analyses for evaluating takings claims. Each analysis, at its essence, is designed to determine whether a government action so onerously burdens the owner’s core property rights of

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<sup>25</sup> *Id.* at 537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 539.

<sup>29</sup> *Lingle*, 544 U.S. at 543.

<sup>30</sup> *Id.* at 548.

<sup>31</sup> 438 U.S. 104 (1978).

<sup>32</sup> 458 U.S. 419 (1982).

<sup>33</sup> 505 U.S. 1003 (1992).

<sup>34</sup> 483 U.S. 825 (1987).

<sup>35</sup> 512 U.S. 374 (1994).

<sup>36</sup> *See Kent*, *supra* note 8, at 65, 84.

exclusion, use, possession, and disposition that it should be deemed the functional equivalent of a direct appropriation or ouster.<sup>37</sup>

The first analysis, which I have labeled the “standard analysis,” involves three primary steps. “First, this framework asks whether the challenger can prove that the regulation at issue required a permanent physical invasion or occupation of his property.”<sup>38</sup> If the answer to this question is “yes,” then the regulation results in a taking, regardless of the size of the invasion, the regulation’s economic impact, or the public purposes for which the regulation was promulgated.<sup>39</sup> If the answer to this question is “no,” however, then the analysis moves to a second inquiry – i.e., “whether the challenger can prove that the regulation deprived him of all beneficial or productive economic use of his property.”<sup>40</sup> Where the challenger can prove such a deprivation, then the regulation is presumed to constitute a taking, and the burden is shifted to the government to demonstrate that the regulation does no more than what could be accomplished under the law of nuisance or other “background principles” of property law.<sup>41</sup> If the government fails to make this showing, the presumption of taking stands. On the other hand, where the government rebuts the presumption, the analysis moves to a final step, which examines how closely the regulation resembles both a permanent physical invasion and a total economic deprivation.<sup>42</sup> This examination is conducted by considering two factors: “(1) the economic impact of the regulation in light of the owner’s distinct, investment-backed expectations; and (2) the character of the governmental action.”<sup>43</sup>

The “standard analysis” applies to the majority of takings claims. A second analysis, however, applies to the unique context of land use exactions. This “exactions analysis” also involves three primary steps, and like the “standard analysis,” is designed to ferret out those government actions that are functionally equivalent to a direct appropriation but for which no compensation has been provided. The initial step in the analysis is to identify the government interest at issue and ask whether it would be sufficient to deny the challenger’s proposed land use altogether.<sup>44</sup> In reality, this step

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<sup>37</sup> *Id.* at 89-94.

<sup>38</sup> Kent, *supra* note 12, at 1842.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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

<sup>42</sup> *Id.* at 1843.

<sup>43</sup> Kent, *supra* note 12, at 1843.

<sup>44</sup> *Id.*



appears to be nothing more than an analytical placeholder designed to force the government to name *some* interest; in both of its two exaction decisions, the Court has simply assumed that the interest offered by the government is sufficient.<sup>45</sup> Once the interest is identified, the next step is to determine whether there is an “essential nexus” between that interest and the exaction being demanded of the property owner.<sup>46</sup> Where no such nexus exists, a compensable taking has occurred. Where the required nexus is established, however, the analysis moves to the final step, which tests whether the demanded exaction bears a “rough proportionality” to the impact that the proposed land use project is expected to have on the interest identified by the government.<sup>47</sup> To be roughly proportional, the exaction must help alleviate the public harm expected to result from the proposed land use in an individualized and quantifiable way.<sup>48</sup>

These two analyses – along with *Lingle*’s focus on “functional equivalence,” its emphasis on core property rights, and its disconnection of due process principles from the takings inquiry – did much to bring clarity and certainty to regulatory takings doctrine. Although *Lingle* did not answer all of the questions about regulatory takings,<sup>49</sup> it provided some much needed guidance and, for this reason, has been hailed as a watershed event in takings law.<sup>50</sup>

## II. STOP THE BEACH AND THE THEORY OF JUDICIAL TAKINGS

All of the cases endorsed by *Lingle*, as well as *Lingle* itself, involved actions by the executive or legislative branches of govern-

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1843-44.

<sup>47</sup> *Id.* at 1844.

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., Kent, *supra* note 8, at 107-09 (discussing some unresolved issues); Kent, *supra* note 12, at 1891-93 (same).

<sup>50</sup> In addition to my own work cited above, see, e.g., Barros, *supra* note 10, at 356 (suggesting that “*Lingle* has tremendous potential to clarify regulatory takings law”); J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 *ECOLOGY L.Q.* 471, 471 (2007) (describing *Lingle* as having “greatly clarified” the “constitutional law of land use regulation”); Andrew W. Schwartz, *How The Government Can Avoid Property Rights Litigation*, SM040 ALI-ABA 497, 500 (2007) (describing *Lingle* as “the most significant regulatory takings case, and perhaps one of the most important court decisions of the modern era”). This praise has not been universal, however, with some commentators expressly disavowing that *Lingle* did much to clarify the law of takings. See, e.g., Steven J. Eagle, 2007 *BYU L. REV.* 899, 899-900 (suggesting that *Lingle* “both exemplified and exacerbated” the incoherence of takings law); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 *STAN. ENVTL. L.J.* 525, 528-29 (2009) (arguing that elements of *Lingle* framework, specifically the “character factor,” threaten *Lingle*’s “stability” and “conceptual neatness”).

ment. There was no suggestion, one way or the other, as to whether the actions of judicial officers might also be subject to the Takings Clause. Nonetheless, the question is not a new one.

A. *A Brief History of Judicial Takings*<sup>51</sup>

As early as 1897, the Supreme Court indicated that the Takings Clause applies “to all the instrumentalities of the state – to its legislative, executive, and judicial authorities,”<sup>52</sup> and therefore, the judgment of a state court whereby property is taken is deemed to be the act of the state for purposes of triggering those protections.<sup>53</sup> Nonetheless, the case in which these statements were made did not present the issue of whether judicial changes in the common law of property could result in a taking.

That issue was taken up eight years later, with nebulous results. A plurality of four Justices, in an opinion that relied heavily on Contract Clause principles, suggested that a state court could not overrule or distinguish prior decisions in a way that eradicated vested property rights.<sup>54</sup> Of the remaining members of the Court, one concurred in the result only,<sup>55</sup> and four dissented on the grounds that the plurality’s approach amounted to a gross interference with the power of state courts over state property law.<sup>56</sup> Several decisions from the New Deal era seemed to agree with these dissenters, and the Court’s adventures with the theory of judicial takings seemed to be over.<sup>57</sup> Then, in 1967, Justice Stewart resurrected the theory in a concurring opinion, declaring that “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 [through a judicial decision] that the property it has taken never existed at all.”<sup>58</sup>

In 1973, a majority of the Court cited with approval Justice Stewart’s concurrence for the proposition that the Constitution prohib-

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<sup>51</sup> See Barton H. Thompson, *Judicial Takings*, 76 V.A. L. REV. 1449, 1463-72 (1990) and Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 425-33, for fuller accounts of the Court’s history with the theory of judicial takings.

<sup>52</sup> *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897).

<sup>53</sup> *Id.* at 235.

<sup>54</sup> *Muhlker v. N.Y. & Harlem R.*, 197 U.S. 544, 570-71 (1905) (plurality opinion).

<sup>55</sup> *Id.* at 571 (Brown, J., concurring in result).

<sup>56</sup> *Id.* at 571-76 (Holmes, J., joined by Fuller, C.J., White and Peckham, JJ., dissenting).

<sup>57</sup> See Thompson, *supra* note 51, at 1465-67 (discussing cases and commenting that “by the end of the New Deal, the concept of judicial takings was dead”).

<sup>58</sup> *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

its “confiscation by a State, no less through its courts than through its legislature.”<sup>59</sup> But the case making that endorsement was overruled four years later.<sup>60</sup>

In 1980, the Court decided two cases that, on their facts, seemed to involve judicial takings, but in neither case did the Court explicitly confront the issue, instead treating both situations like ordinary takings claims.<sup>61</sup> Finally, in 1994, Justices Scalia and O’Connor again cited Justice Stewart’s concurrence for the proposition that “[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.”<sup>62</sup>

### B. *The Stop the Beach Litigation*

As a result, the status of judicial takings doctrine was unclear when the Supreme Court granted certiorari in *Stop the Beach*. The case arose from government efforts to restore eroded beaches in Walton County, Florida by dredging sand from offshore areas and depositing it onto the eroded areas.<sup>63</sup> The restoration proceeded under a state statute that, among other things, fixed the boundary line between privately-owned beachfront lots and publicly-owned restored beaches at an administratively-determined erosion control line.<sup>64</sup> Under the statute, this new boundary replaced the ordinary boundary established by the common law.<sup>65</sup>

Under Florida common law, the boundary between private and state land is the mean high water line (“MHWL”), which represents “the average reach of high tide over the preceding 19 years.”<sup>66</sup> Normally, the state owns submerged land seaward of the MHWL, while the private owner holds title to the dry property landward of the MHWL.<sup>67</sup> But this boundary might change as a result of accretions – i.e., gradual additions of sand and other

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<sup>59</sup> *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 331 (1973) (citing *Hughes*, 389 U.S. at 443 (Stewart, J., concurring)).

<sup>60</sup> See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 368-72 (1977).

<sup>61</sup> See *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-64 (1980); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84 (1980).

<sup>62</sup> *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting from denial of certiorari).

<sup>63</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Protection*, 130 S.Ct. 2592, 2600 (2010).

<sup>64</sup> *Id.* at 2599.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 2598.

<sup>67</sup> *Id.*

deposits that, over time, increase the amount of waterfront land.<sup>68</sup> Under Florida decisional law, the private beachfront owner takes title to land added to the shoreline by accretion.<sup>69</sup> On the other hand, land added as a result of avulsion – i.e., sudden and immediately perceptible additions – remain titled in the state even though no longer submerged.<sup>70</sup> The beach restoration statute seemingly altered these common law principles by effectively doing away with the private owner’s rights of accretion.<sup>71</sup>

A nonprofit corporation established by several beachfront owners objected to the Walton County restoration project, arguing that the project effected a taking of their properties in two ways.<sup>72</sup> First, the owners argued that the restoration statute deprived them of their common law rights to gain accreted land in the future.<sup>73</sup> Second, they argued that it also eliminated their additional common law right to contact with the water.<sup>74</sup> Although initially successful, the owners’ challenge ultimately was rejected by the Florida Supreme Court. In its opinion, a majority of that court held: (1) that the restoration statute allowed the government to do nothing more than what was already permitted under the common law of avulsion; (2) that the doctrine of accretion did not apply to the context of restored beaches; and (3) that Florida common law did not recognize any independent right of contact with the water.<sup>75</sup>

Contending that prior precedent required upholding the owners’ claims, an impassioned dissent accused the majority of having “butchered” and “simply erased well-established Florida law” in these areas.<sup>76</sup> In light of these statements, the owners petitioned the United States Supreme Court for a writ of certiorari on the

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<sup>68</sup> *Id.* at 2598-99.

<sup>69</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2599.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 2599-60; *see also* Fla. Stat. Ann. § 161.191(2) (“Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of [the restoration statute], the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process, except as provided in [the restoration statute].”).

<sup>72</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2560.

<sup>73</sup> *Id.* Because the erosion control line had been fixed at the MHWL, the replacement of the common law boundary with the new statutory boundary did not in itself effect a taking. *See id.* at 2599 n.2.

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

<sup>75</sup> *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1116-20 (Fla. 2008).

<sup>76</sup> *Id.* at 1121 (Lewis, J., dissenting).

ground that the state court had ignored and redefined established precedent to eliminate their property rights, thereby working a judicial taking.<sup>77</sup>

### C. Justice Scalia's Opinion

A plurality of the Court, led by Justice Scalia, gave the owners a split decision.<sup>78</sup> As an initial matter, the plurality opinion expressly endorsed the theory of judicial takings, noting that “[t]he Takings Clause . . . is not addressed to the action of a specific branch or branches” of government.<sup>79</sup> Thus, whether an uncompensated taking results from executive, legislative, or judicial action, it violates the Constitution.<sup>80</sup> For the plurality, this conclusion rested not only on the constitutional text and prior precedent, but also on common sense: “It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”<sup>81</sup> In other words, no matter which branch is acting, those actions are attributable to the state for purposes of the takings protections.<sup>82</sup>

Nonetheless, the plurality conceded that the manner of state action was not completely irrelevant. The overt use of eminent domain, for example, always qualifies as a taking, whereas restrictions of property occasioned without an outright condemnation may or may not.<sup>83</sup> And given that courts rarely (if ever) can be said to possess the affirmative power to initiate condemnation via eminent domain,<sup>84</sup> the real question in the context of an alleged

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<sup>77</sup> Petition for Writ of Certiorari at 15-33, *Stop the Beach Renourishment v. Fla. Dep't of Env'tl. Protection*, 130 S.Ct. 2592 (2010) (No. 08-1151), 2009 WL 698518.

<sup>78</sup> On the issue of whether judicial takings presented a viable theory, the Court divided into three camps. First, as discussed below, was the plurality of Justice Scalia, Chief Justice Roberts, and Justices Thomas and Alito. See *Stop the Beach Renourishment*, 130 S. Ct. at 2560 (Scalia, J., plurality opinion). Second was the concurring opinion of Justice Kennedy, joined by Justice Sotomayor, which preferred to handle judicial decisions that eliminate or significantly alter preexisting property rights as a violation of the Due Process Clause. See *id.* at 2613 (Kennedy, J., concurring). Finally, Justices Breyer and Ginsburg would simply have held that the state court decision did not amount to a judicial taking if the theory were viable, without deciding the threshold question. See *id.* at 2618 (Breyer, J., concurring). Justice Stevens did not participate in the case.

<sup>79</sup> *Stop the Beach Renourishment*, 130 S. Ct. at 2601.

<sup>80</sup> See *id.* at 2601-02.

<sup>81</sup> *Id.* at 2601.

<sup>82</sup> *Id.* at 2602.

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

<sup>84</sup> See, e.g., *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987); *Hoffman Family, LLC v. City of Alexandria*, 634 S.E.2d 722, 728 (Va. 2006).

judicial taking is how to determine when judicial action that restricts property becomes unconstitutional.

The plurality answered this question, in the first instance anyway, by referring to some familiar concepts. Reiterating that the direct appropriation or transfer of property is the classic example of a taking, the plurality noted that other actions would also qualify where they “achieve the same thing” as a direct appropriation or transfer.<sup>85</sup> Here, the plurality cited *Lingle* for the proposition that “our doctrine of regulatory takings ‘aims to identify regulatory actions that are functionally equivalent to the classic taking.’”<sup>86</sup> The opinion then mentioned the two categorical examples of the *Lingle* analytical framework – i.e., permanent physical occupations and total economic deprivations.<sup>87</sup> But according to the plurality, the present case more closely resembled a different type of prohibited action: “States effect a taking if they recharacterize as public property what was previously private property.”<sup>88</sup> And in determining whether a judicial decision falls within this prohibited conduct, “[w]hat counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established” by prior law.<sup>89</sup>

Having acknowledged that judicial action can violate the takings protections, the opinion then considered whether the decision of the Florida Supreme Court actually had done so. At this point, Justice Scalia was no longer speaking for a mere plurality, but for a unanimous Court.<sup>90</sup> Focusing on the two rights directly at issue, the Court held that, to prevail on their claim, the owners must demonstrate “that, before the Florida Supreme Court’s decision, littoral property owners had rights to future accretions and contact with the water superior to the State’s right to fill in its submerged land.”<sup>91</sup> This they could not do. The Court began its analysis by examining prior Florida law and concluding that the owners’ rights to accretions had not been infringed. This was because previous decisions of the Florida Supreme Court allowed the state to fill in its own submerged lands and declared the resulting addition of

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<sup>85</sup> *Stop the Beach*, 130 S.Ct. at 2601.

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

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2596.

<sup>90</sup> All members of the Court that heard the case joined Parts IV and V of Justice Scalia’s opinion, which addressed the issue of whether a judicial taking in fact had occurred. *Stop the Beach*, 130 S.Ct. at 2610-13.

<sup>91</sup> *Id.* at 2611.

land to be an avulsion, not an accretion.<sup>92</sup> As a result, any new land produced by the state's infill efforts would remain titled in the state, not in the adjacent owner. Once the adjacent owner's land was removed from contact with the water (a right that the Court agreed was not independently established by Florida precedent),<sup>93</sup> there could be no further accretions because there would be no further fluctuations between dry and submerged land.<sup>94</sup>

In sum, Justice Scalia's opinion indicated that the theory of judicial takings was viable and that a state judicial decision would violate the Takings Clause where it eliminated property rights previously established under state law.<sup>95</sup> In the present case, however, prior law had not established the owners' rights beyond doubt, and, therefore, no taking had occurred.

### III. *LINGLE*, *STOP THE BEACH*, AND THE FUTURE OF TAKINGS LAW

Among the noteworthy characteristics of Justice Scalia's opinion in *Stop the Beach*, and one that is of particular significance to this Article, is its lack of attention to the *Lingle* framework. The plurality opinion cites *Lingle* only one time, in reference to the doctrine of "functional equivalence."<sup>96</sup> Moreover, of the five "special" opinions endorsed by *Lingle*, only two are mentioned by the plurality in reference to *Lingle's* analytical system — *Loretto v. Telepromptor Manhattan CATV Corp.* (regarding permanent physical invasions) and *Lucas v. South Carolina Coastal Council* (regarding total economic deprivations).<sup>97</sup> Remarkably, the only

<sup>92</sup> *Id.* at 2611-12. The Court noted that this result "may seem counterintuitive" and "there might be different interpretations of . . . Florida property-law cases that would prevent this arguably odd result." *Id.* at 2612. Nonetheless, the Court was not free to adopt such alternative interpretations where the state court's own interpretations did not contravene previously established rights. *Id.* See also *id.* at 2609 n.9 ("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.").

<sup>93</sup> *Stop the Beach*, 130 S.Ct. at 2612-13.

<sup>94</sup> See *id.* at 2611 ("[T]here can be no accretions to land that no longer abuts the water.").

<sup>95</sup> See *id.* at 2612-13.

<sup>96</sup> *Id.* at 2601.

<sup>97</sup> *Id.* Justice Scalia also cited *Lucas* later in the opinion in finding that the Florida Supreme Court had acted consistently with "background principles of state property law." See *id.* at 2612. The opinion cites *Dolan v. City of Tigard*, 512 U.S. 374 (1994) for the well-established proposition that the Takings Clause applies to the states via the Fourteenth Amendment. See *id.* at 2597. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) is not cited, although one would not necessarily expect a reference to *Nollan* in a case not involving exactions.

mention made of *Penn Central Transportation Co. v. City of New York*, arguably the decision most directly implicated by the judicial takings question (as I hope to demonstrate below), was in a footnote.<sup>98</sup> As noted earlier, this failure fully to grapple with the *Lingle* framework for regulatory takings raises several questions about the theory of judicial takings endorsed by the plurality. In considering these questions, the following discussion focuses on three primary areas: (1) the relationship between judicial takings and regulatory takings; (2) how judicial takings might fit within the *Lingle* system; and (3) questions raised by the plurality's opinion that will need to be addressed in future litigation.

#### A. *The Relationship Between Judicial and Regulatory Takings*

A preliminary topic of consideration is how the plurality's theory of judicial takings relates to *Lingle*'s doctrine of regulatory takings. Put simply, is a judicial taking a species of regulatory taking or is it a different animal? Although *Stop the Beach* does not give a definitive answer to this question, it strongly suggests that a judicial taking is either a type of regulatory taking or something very much akin to it.

The evidence for this conclusion is in Justice Scalia's discussion of what government actions qualify as takings. As explained above, the plurality opinion agreed with *Lingle* that "the classic taking is a transfer of property to the State or another private party by eminent domain."<sup>99</sup> The opinion next explained that, in addition to eminent domain, "the Takings Clause applies to other state actions that achieve the same thing."<sup>100</sup> As an initial matter, the plurality seems to have set up two broad categories of conduct that will trigger the takings protections, the first being an affirmative exercise of eminent domain, and the second being the exercise of governmental powers other than eminent domain that nonetheless have results similar to it.

In this second category, Justice Scalia provided three basic examples of confiscatory action: (1) "when the government uses its own property in such a way that it destroys private property"; (2) when it engages in "regulatory actions that are functionally equivalent to the classic taking," specifically permanent physical occupations and total economic deprivations; and (3) when it "recharacterize[s] as

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<sup>98</sup> *Stop the Beach*, 130 S.Ct. at 2603 n.6.

<sup>99</sup> *Id.* at 2601.

<sup>100</sup> *Id.*



public property what was previously private property.”<sup>101</sup> Although these examples might represent three distinct subcategories of government action, they nonetheless bear clear similarities to each other.

First, and most obvious, they constitute something other than the overt condemnation of property via eminent domain. Second, the categories of government action underlying these examples – i.e., the government’s use of its own property, the government’s regulatory activity under the police power, and the government’s recharacterization of property interests – do not necessarily result in a taking of private property every time they occur. A cursory review of the Court’s own precedent reveals that the government undoubtedly has the ability to use its own property, engage in regulatory activity, and redefine certain property interests without always having to pay compensation as a result. By contrast, compensation is required in every instance in which the government exercises its eminent domain power.

A final point of similarity is that the cases cited by Justice Scalia for the first and third examples readily fit within *Lingle’s* analyses for regulatory takings. For the first example – i.e., government using its own property in a way that takes property from another – the plurality cited *United States v. Causby* and *Pumpelly v. Green Bay Co.*<sup>102</sup> In *Causby*, the Court held that the government had effected a taking by its use of nearby land for an airport, which resulted in regular air flights over the plaintiff’s parcel at significantly low altitudes.<sup>103</sup> Explaining that a “landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land,”<sup>104</sup> the Court held that the government’s “continuous invasions” of airspace at such low altitudes were equivalent to invasions of the surface itself.<sup>105</sup> Similarly, in *Pumpelly*, the Court held that the flooding of the plaintiff’s land in connection with building a dam qualified as a sufficient invasion to amount to a taking of property.<sup>106</sup> Thus, both cases can be classified as involving a permanent physical invasion or occupation of private property, falling within the *Loretto* category of the *Lingle* analytical framework. Indeed, they have been understood this way

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (citing *United States v. Causby*, 328 U.S. 256 (1946) and *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872)).

<sup>103</sup> *Causby*, 328 U.S. at 258.

<sup>104</sup> *Id.* at 264.

<sup>105</sup> *Id.* at 265.

<sup>106</sup> *Pumpelly*, 80 U.S. at 181.

by the Court itself.<sup>107</sup> Additionally, *Pumpelly* might be viewed as involving a *Lucas*-style total taking inasmuch as the Court emphasized that the flooding “effectively destroy[ed]” the economic usefulness of the parcel.<sup>108</sup>

For its third example – i.e., government recharacterization of private property as belonging to the public – the plurality cited *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*.<sup>109</sup> That case involved the ownership of interest that accrued on an interpleaded fund paid into a state court’s registry. Construing a state statute, the state court held that the interest belonged to the government. The Supreme Court concluded that the statute, so construed, amounted to a taking because it broke with the ordinary rule that the owners of the principal also own the interest that accrues on that principal.<sup>110</sup> Changing that rule so that the interest now belonged to the public, whether the change was accomplished legislatively by the statute or judicially by the state court’s interpretation of the statute, amounted to an uncompensated taking.<sup>111</sup> Clearly, the same result could have been reached under the *Lingle* analyses. As with *Causby* and *Pumpelly*, *Beckwith* could be deemed to involve a permanent physical occupation of the property at issue – i.e., the interest. Normally, that property would be titled in the owner of the principal, but now it was titled in (and physically appropriated by) the government. Indeed, the Court’s opinion suggested as much, explaining that the government’s “appropriation of the beneficial use of the fund [i.e., the interest earned] is analogous to the appropriation of the use of private property in *United States v. Causby*.”<sup>112</sup>

These similarities among the examples proffered by the plurality suggest that they all should be classified under a broad umbrella characterized by government conduct that is not itself condemnation by eminent domain, but is nonetheless functionally equivalent to condemnation by eminent domain. And “functional equivalence” seems to center on the *Lingle* framework, consisting princi-

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<sup>107</sup> The Court has described or cited to *Causby* as a physical invasion case on numerous occasions. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430-31 (1982); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 128 (1978). The Court has described *Pumpelly* in similar terms. See, e.g., *Loretto*, 458 at 427.

<sup>108</sup> *Pumpelly*, 80 U.S. at 181.

<sup>109</sup> *Stop the Beach*, 130 S. Ct. 2601-02. .

<sup>110</sup> *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-63 (1980).

<sup>111</sup> *Id.* at 164.

<sup>112</sup> *Id.* at 163-64.

pally of permanent physical invasions and total economic deprivations. Inasmuch as courts ordinarily do not possess the power to condemn property, judicial action that qualifies as a taking would equally fall under this umbrella. Moreover, the *Stop the Beach* plurality made clear that challenged judicial action was to be addressed on the same footing as challenged actions by the other two branches.<sup>113</sup> And it did so via an oblique reference to the *Lingle* framework: "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, *no less than if the State had physically appropriated it or destroyed its value by regulation.*"<sup>114</sup>

In sum, *Stop the Beach* appears to demarcate two broad categories of government conduct that might trigger the Takings Clause. Within the second category, the plurality's examples bear striking similarities to one another, and can all be analyzed using the *Lingle* framework. Judicial takings appear to fall within this second category, and the plurality suggested as much when it equated judicial takings with permanent physical occupations and total economic deprivations. For these reasons, it seems appropriate to analyze judicial takings as if they are a species of regulatory taking, meaning they are to be analyzed with reference to the doctrinal and analytical framework established by *Lingle*.

#### B. How Do Judicial Takings Fit Within the *Lingle* Analyses?

Having determined that judicial takings should fall in the same analytical camp as regulatory takings, the problem becomes how the former fit within *Lingle*'s system for the latter. The plurality paid no real attention to this problem, and its discussion of judicial takings provides little guidance. Indeed, in this regard, Justice Scalia's opinion seems to raise more questions than it answers.

We should begin with what the plurality did say. According to Justice Scalia, the ultimate measure of whether a taking occurred was whether the Florida Supreme Court deprived the beachfront owners of an established property right.<sup>115</sup> At the end of day, the Court concluded that no such deprivation occurred because the rights at issue were not clearly established by prior Florida precedent.<sup>116</sup> But consider an alternative hypothetical. With all other facts staying the same as those in *Save the Beach*, suppose that a

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<sup>113</sup> *Stop the Beach*, 130 S. Ct. at 2601.

<sup>114</sup> *Id.* at 2602 (second emphasis added).

<sup>115</sup> *See id.* at 2608 n.9, 2612-13.

<sup>116</sup> *Id.* at 2611-13.

prior decision of the Florida Supreme Court unambiguously held that sudden changes in the shoreline caused by the government should be treated as accretions rather than avulsions, so that both the newly deposited land and any future accretions would be titled in the private beachfront owner. Then, suppose that in *Stop the Beach* itself, the Florida Supreme Court overruled this prior decision and held that these types of changes are more properly considered to be avulsions, so that title to the newly deposited land remains in the state. According to the plurality, this hypothetical situation would have qualified as a taking.

But what part of the *Lingle* analyses would recommend that result? Because neither our hypothetical nor the real case involved an exaction, *Lingle*'s standard analysis seemingly would apply. The first step in that analysis, as explained earlier, is to ascertain whether the government's conduct resulted in a permanent physical invasion or occupation. The *Stop the Beach* owners argued that this was indeed the case,<sup>117</sup> but the argument is not very convincing. Although the restoration statute ostensibly changed the boundary between the public beach and the private lots from the MHWL to the erosion control line, it was undisputed that the erosion control line (i.e., the new boundary) was fixed at the MHWL (i.e., the old boundary).<sup>118</sup> Thus, the physical boundaries of the owners' lots after the restoration project and litigation were identical to the physical boundaries before the restoration project and litigation. Moreover, neither the restoration project nor the state court's decision (either in the actual litigation or in our hypothetical) opened those lots to governmental or third-party access in any way different from the pre-existing relationships. In short, the physical land itself remained the same, and the owners seemed to concede as much. Their real complaint was not that they held less dirt than they did previously, but that they no longer held waterfront property with the contingent possibility of obtaining more dirt in the future.<sup>119</sup> Thus, the government did not invade or

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<sup>117</sup> Brief for Petitioner at 51-58, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151), 2009 WL 2509219.

<sup>118</sup> *Stop the Beach*, 130 S. Ct. at 2600 n.2.

<sup>119</sup> See Brief for Petitioner at 18, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (No. 08-1151) (complaining that owners no longer held *littoral* or *waterfront* property, but not that they owned less physical property); cf. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1112 (Fla. 2008) ("The right to accretion . . . is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion . . .").

occupy their parcels; rather, it “invaded” and “occupied” one of the intangible property rights appurtenant to those parcels.

On the other hand, one might argue that the appropriation of these intangible rights is essentially the same as a physical occupation. Inasmuch as both situations involve the government appropriating rights that formerly were private, perhaps they should be equated. But this argument seems to lie outside the bounds of existing takings doctrine. The two categories of “*per se*” takings endorsed by *Lingle* – permanent physical invasions and total economic deprivations – are given that status because of their severe effects on the core property rights of exclusion, possession, use, and disposition.<sup>120</sup> The same cannot be said for the appropriation in our hypothetical. Although the state judicial decision (which recharacterized what were accretions to now be avulsions) appropriates something that previously was private, the core property rights in the parcel nonetheless remain largely intact. It is no answer that the recharacterization destroyed the individual right at issue because, as will be explained more fully below, the Court has repeatedly indicated that the test for whether a taking occurred is to evaluate the government’s effect on the entire “bundle of sticks” held by the owner, and not just the individual “stick” that is most directly impacted. For these reasons, even in our hypothetical situation, the first step in the *Lingle* framework favors the government.

*Lingle*’s standard analysis next asks whether the government has deprived the private owner of all economically beneficial use of his property. The answer to this question, of course, depends on how one defines the “property” at issue. In the context of our hypothetical, the “property” theoretically could be either the entire parcel held by each owner or each owner’s distinct rights to accreted land. If the former definition prevailed, the owners would be hard pressed to claim a total economic deprivation because their lots would retain substantial economic value. If the rights to accretion could be segmented, however, the owners’ would have a viable claim because those rights, now eliminated, would be worth nothing. But the *Lingle* framework strongly indicates that this type of

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<sup>120</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) (stating that total economic deprivation “is, from the landowner’s point of view, the equivalent of a physical appropriation”) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) (explaining how a permanent physical occupation “destroys each of these rights”); see also *Kent*, *supra* note 8, at 89-92 (discussing how core property rights are affected by these actions).

segmentation is not allowed.<sup>121</sup> Although the Court has made some remarks that might favor segmentation,<sup>122</sup> the only authoritative statement on the issue to be found in *Lingle* or the five decisions it uniquely affirms specifically rejects such segmentation:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .<sup>123</sup>

Statements from other decisions are in agreement.<sup>124</sup> Accordingly, the relevant “property” in our hypothetical would be the owners’ lots in their entirety, and not just the rights to the accreted land. As a result, this category, would also favor the government and counsel against a finding that the owners’ property had been taken.<sup>125</sup>

That leaves the final step in *Lingle*’s standard analysis – i.e., balancing the economic impact of the state court decision against the character of the governmental action. Here, too, it is doubtful that our hypothetical would result in a taking, unless *Stop the Beach* implicitly disagrees with prior understandings of the test. Looking first at economic impact, I have elsewhere explained that this factor seeks to discover the severity of the economic harm suffered by the property owner as measured through the owner’s own investment-backed expectations.<sup>126</sup> To qualify as a taking, the economic harm ordinarily must be “substantial . . . and not just mere diminution in value.”<sup>127</sup> Again, the impact must be assessed with regard to the parcel as a whole – that is, with regard to the entire bundle

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<sup>121</sup> See *Kent*, *supra* note 8, at 97 (interpreting *Lingle*’s analytical system to require assessment of economic impact with regard to entire parcel).

<sup>122</sup> See, e.g., *Lucas*, 505 U.S. at 1016 n.7 (1992) (indicating lack of clarity over how to define “property” against which economic loss is to be measured); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (admitting “past discomfort” with parcel as whole doctrine).

<sup>123</sup> *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978).

<sup>124</sup> See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 327 (2002).

<sup>125</sup> This seems typical of most judicial takings in that most court decisions are unlikely to devalue an entire parcel completely. Rather, as in our hypothetical, they are more likely to eliminate, alter, or redefine certain component rights that affect some percentage of the parcel’s value.

<sup>126</sup> *Kent*, *supra* note 8, at 97-99.

<sup>127</sup> *Id.* at 96-97; John D. Echeverria, *Making Sense of Penn Central*, 23 U.C.L.A. J. ENVTL. L. & POL’Y 171, 178 (2005); accord *Barros*, *supra* note 10, at 350 n.44; Mark W.

of property rights held by the owner and not simply the property rights most directly affected.<sup>128</sup> Applying this standard to our hypothetical, it is doubtful that the elimination of the rights to accreted land would qualify as a sufficiently severe economic impact when viewed against the remaining value of the parcel.

This is true even if the owners' individual expectations may have been thwarted. Although the Court has not thoroughly explained the expectations component of the analysis, it seems comparable to the common law doctrine of vested rights.<sup>129</sup> That doctrine generally "prohibits the government from imposing new regulations if the owner has made substantial investment in reliance on the old ones."<sup>130</sup> Certainly, in our hypothetical situation, the owners would have expected to receive accreted lands, and once the state court changed the rule, those expectations would be frustrated. But given the volatile nature of accretions and the uncertainty that any additional land would be deposited either naturally or by the government, it seems unlikely that any individual owner would have relied heavily on these rights in making his or her investment. Of course, each case is different and, conceivably, such reliance could be proved. On the whole, however, that the state court would have frustrated expectations to contingent accretions probably is insufficient to transform an otherwise minimal economic impact into something of constitutional magnitude (at least on the aforementioned understanding of the expectations component).

Similarly, it is uncertain that the owners in our hypothetical situation would fare well under the character factor. This is true primarily because it remains uncertain exactly what the character factor seeks to measure. I previously have posited that the character factor should be viewed primarily in terms of physical invasion.<sup>131</sup> Under this view, the more the government's action resembles a physical invasion of the parcel, even if that invasion is temporary or incomplete, the closer it will be to a taking.<sup>132</sup> Other scholars have made the case that the character factor, even after *Lingle*, continues to evaluate in some measure whether the government has acted legitimately in pursuit of an important public pur-

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Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RES. & ENVTL. L. 1, 35 (2006).

<sup>128</sup> *Penn Central*, 438 U.S. at 130-31.

<sup>129</sup> See *Kent*, *supra* note 8, at 98; see also Cordes, *supra* note 128, at 38.

<sup>130</sup> *Kent*, *supra* note 8, at 98.

<sup>131</sup> *Id.* at 99-100.

<sup>132</sup> *Id.* at 100.

pose.<sup>133</sup> Neither of these views would provide much help to the owners in our hypothetical. As explained above, there does not seem to be anything approaching a physical invasion of the owners' parcels. Nor would it appear that the state court was acting illegitimately or for an invalid purpose in recharacterizing the rights at issue. The state court would seem to be on firm footing in describing a sudden deposit of sediment, even if accomplished by the government, as an avulsion rather than an accretion because this better accords with the common law definitions. Moreover, it easily could be argued that the purpose underlying the state court's action would be to provide more flexibility to the government in dealing with the environmental consequences of eroded beaches, and it seems unlikely that this purpose would be deemed insubstantial or that the state court's decision was not legitimately related to it.

On the other hand, it might be contended that such policy considerations are more properly advanced by the legislatures than the courts, rendering the character of the judicial action suspect under a separation-of-powers theory. A similar argument was advanced by Justice Kennedy in his concurring opinion, and he thought the claim better analyzed under the Due Process Clause (which more directly concerns the legitimacy of government action).<sup>134</sup> The plurality rejected this idea on the grounds that it would "impose judicially crafted separation-of-powers limitations upon the States," which "have nothing whatever to do with the protection of individual rights that is the object of the Due Process Clause."<sup>135</sup> Whether the plurality would be more willing to impose such limitations under the character factor remains to be seen, although the outlook is doubtful in light of the plurality's statement that separation-of-powers principles do not constitutionally bind the states.<sup>136</sup> Rendering this possibility equally doubtful is the plurality's suggestion that due process simply does not protect economic liberties.<sup>137</sup>

We are left with the nagging impression that the judicial nature of the conduct matters in some unstated way. This impression results from the fact that, in our hypothetical, the plurality's rule would have resulted in a finding that the state court took the own-

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<sup>133</sup> See, e.g., Echeverria, *supra* note 128, at 205-07; Fenster, *supra* note 50, at 560-61; R.S. Radford, *Just a Flesh Wound? The Impact of Lingle v. Chevron on Regulatory Takings Law*, 38 URB. LAW. 437, 449-50 (2006).

<sup>134</sup> See *Stop the Beach*, 130 S. Ct. at 2605 (Kennedy, J., concurring).

<sup>135</sup> *Id.* at 2605.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 2606.



ers' property, even though that result cannot be explained through existing regulatory takings analysis as expressed by *Lingle*. Had the legislature or an administrative agency eliminated the right to accretions, *Lingle* would have governed the analysis and, as demonstrated, probably would have resulted in a decision for the government. Why the result should change when the judicial branch eliminates those rights is not explained in the plurality's opinion.

### C. *Implications for Future Cases*

The failure to offer this explanation raises a host of unanswered questions that diminish the clarity promised by *Lingle*. Depending on the answers, these questions have the potential to transform certain aspects of takings doctrine.

The first category of questions relates to the future stability of the analytical system endorsed by *Lingle*. One of *Lingle*'s strengths was that it offered a systematic (albeit imperfect) way of thinking about and classifying takings claims, promising more clarity and predictability in the process. As demonstrated, even many of the Court's older decisions, like *Pumpelly*, can fit within the *Lingle* system. By failing fully to engage that system in explaining its theory of judicial takings, the *Stop the Beach* plurality has cast doubt on whether *Lingle*'s full potential will be realized. Is the plurality suggesting that there are other categories of government action, aside from those identified and endorsed in *Lingle*, that will qualify as a taking of private property? If so, what are the exact parameters of these alternate categories, and how do they relate to the *Lingle* framework? Is there indeed something important about what branch of government is acting, despite the plurality's seeming insistence that all three branches stand equally before the Takings Clause? Does *Stop the Beach* signal a return to the "muddle," where every takings case potentially means the advancement of a new analytical test or the obscuring of previously-stated rules?

If we continue to assume that *Lingle* establishes the governing analyses and that the branch of government doing the acting remains irrelevant, then a second category of questions is presented. These questions revolve almost entirely around the meaning of the *Penn Central* balancing test because under the existing framework, that is the test under which the type of judicial taking theorized by the plurality most easily fits. The plurality expressed concern over a judicial decision that eliminates previously established property rights. It should be rare when a judicial

decision accomplishes this through a permanent physical invasion or the eradication of all economically beneficial use.<sup>138</sup> Rather, the more typical case will involve a judicial decision that abolishes or alters some lesser component of the property owner's bundle, such as the rights to accretion at issue in *Stop the Beach*. In such a context, at least under the current system, *Penn Central* balancing governs the analysis. In light of *Stop the Beach*, future cases may be forced to answer several outstanding questions about that balancing. For example, how much economic impact is sufficient to trigger a taking? Prior decisions suggest it must be near absolute, but *Stop the Beach* might suggest otherwise. How do we measure that impact? Prior decisions indicate that we measure it against the value of the entire parcel rather than segmenting out certain rights, but perhaps *Stop the Beach* signals a change here as well. What precise role is played by the property owner's investment-backed expectations? Existing doctrine suggests that it is similar to the common law doctrine of vested rights, but *Stop the Beach* may be suggesting something else. Does the branch of government accomplishing the alleged taking matter to these expectations? What about the character factor; what exactly is the subject of evaluation under that portion of the test? Several theories have been posited by commentators, but none of them seems adequately to explain the theory of judicial takings in *Stop the Beach*. Is the plurality indicating that "appropriative" actions are suspect, while "regulatory" actions are not? If so, what exactly is the difference between the two? Is this where the branch of government doing the acting comes into play? These are the types of questions invited by *Stop the Beach* and are likely to be raised in future litigation.

A final category of questions concerns the not-quite-settled relationship between takings doctrine and due process. *Lingle* suggested that the two were separate inquiries, with due process focused on the legitimacy of the government's action and takings focused on the burdens such action imposes on private property. Under *Lingle*'s economy, due process challenges to the government action are "logically prior to and distinct from" whether a taking has occurred,<sup>139</sup> and such challenges are to be evaluated by

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<sup>138</sup> Of course, if the plurality was implicitly signaling a change in the parcel as a whole doctrine, so that the measure of economic impact now is the discrete property rights affected by the state's action, *Lucas* might be relevant in that the discrete rights at issue might be totally destroyed by the state court's decision.

<sup>139</sup> *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 543 (2005).

giving “deference to legislative judgments.”<sup>140</sup> Thus, *Lingle* left open the possibility that a sufficiently arbitrary or ineffectual government action against property might be unconstitutional under principles of due process, whether that action ultimately effected a taking or not. And Justice Kennedy’s concurrence in *Lingle* – which explained that “[t]he failure of a regulation to accomplish a stated or obvious objective would be relevant” to a due process challenge – made that possibility slightly stronger.<sup>141</sup> The plurality opinion in *Stop the Beach*, however, seems to close the door on meaningful due process challenges by suggesting that economic liberties are not protected under the Due Process Clause.<sup>142</sup> Although the plurality indicated that such a result may not be entirely logical, it nonetheless seemed to adhere to that result, describing Justice Kennedy’s use of due process in the present case as “propel[ing] us back to what is referred to (usually deprecatingly) as ‘the *Lochner* era.’”<sup>143</sup> In light of these statements, it remains uncertain whether a property owner really has any chance of succeeding on a due process claim, regardless of which branch of government is acting and irrespective of the potential variations in deference that might be owed to the different branches. It may be that takings doctrine forms a property owner’s sole constitutional remedy against deprivations of her property rights, raising the stakes for the doctrinal questions posed above.<sup>144</sup> On the other hand, Justice Kennedy was alone in his concurrence in *Lingle*, while his concurrence in *Stop the Beach* was joined by Justice Sotomayor. Perhaps his view of due process as a protector of property rights is gaining ground. The ultimate resolution to this important question, like those above, will have to await future litigation.

#### CONCLUSION

The plurality’s opinion in *Stop the Beach*, which seeks to clarify the previously ambiguous theory of judicial takings, ultimately raises more questions than it answers. By failing to situate its the-

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<sup>140</sup> *Id.* at 545.

<sup>141</sup> *Id.* at 548-49 (Kennedy, J., concurring).

<sup>142</sup> *Stop the Beach*, 130 S. Ct. 2592 (“[W]e have held for many years (logically or not) that the ‘liberties’ protected by Substantive Due Process do not include economic liberties.”).

<sup>143</sup> *Id.*

<sup>144</sup> See James W. Ely, Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004-2005 CATO SUP. CT. REV. 39, 52 (2005) (commenting that “[f]ederal courts no longer provide even cursory property rights review under due process”).

ory of judicial takings into the larger doctrine of regulatory takings established in *Lingle*, the plurality potentially has undone much of the progress made by that earlier decision. To fit judicial takings as explained in *Stop the Beach* within the *Lingle* framework will necessitate the answering of several doctrinal and analytical questions, and until those questions are answered, the result promises to be a less clear takings doctrine and a more volatile environment for future litigation.