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Stop the *Stop the Beach* Plurality!

J. Peter Byrne*

The plurality opinion in Stop the Beach Renourishment v. Florida Department of Environmental Protection articulated a new doctrine of “judicial takings” and purported to justify it with arguments drawing on text, history, precedent, and “common sense.” This Article argues that the opinion makes a mockery of such forms of interpretation, represents raw pursuit of an ideological agenda, and indicates why the regulatory takings doctrine, more generally, should be abandoned or limited.

* * *

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, a four-justice plurality embraced a new doctrine of judicial takings that would constitutionally prohibit a state court from changing its own common law so as to eliminate “an established right of private property” without paying compensation.¹ The plurality opinion, authored by Justice Scalia, seems to exemplify many of the vices of the conservative wing’s regulatory takings activism: ideological purpose, disregard of precedent and history, hypocrisy about federalism, veneration of a mythical common law of private property, and inveterate hostility to property law reforms to address environmental concerns, which would reduce the scope of owner discretion.² This Article highlights the central failings in the *Stop the Beach* plurality’s analysis and argues that those failings illustrate why the entire regulatory takings doctrine should be curtailed or abandoned.

In 1961, Florida enacted its Beach and Shore Preservation Act, providing a legal mechanism for the state to restore eroded beaches at public expense

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1. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

2. See also Geoffrey Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1534 (2008) (“The current majority of the Supreme Court . . . are failing not only to preserve and protect fundamental constitutional values but also to fulfill their judicial responsibilities in a manner that is analytically rigorous, closely reasoned, and intellectually candid.”).

upon the request of local governments.³ Restoration involves pouring dry sand on the publicly-owned seabed, moving the tide line seaward. Not surprisingly, the statute provides that the public owns the newly-constructed portions of the beach. The statute replaces the traditional moveable boundary line of the mean high tide line between the private upland owner and the seaward public trust ownership with a fixed boundary based on the historic mean high tide line. The upland owner also receives several statutory protections, such as a guarantee of access to the water, a prohibition on the construction of structures on the newly built beach, and a reversion to the prior movable boundary should the state fail to maintain the widened sand beach.⁴

In *Stop the Beach*, several upland littoral property owners challenged the legality of a beach restoration project in their area, arguing among other things that the restoration deprived them of the right to future accretions and the right to have their property boundary line touch the water, thereby violating the Florida Takings Clause. In rejecting the takings claim, the Florida Supreme Court held that the property owners never had such rights under the common law of the state.⁵ The owners then sought certiorari, claiming that the Florida court's ruling changed the common law, effecting a judicial taking of their common law rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. Although the U.S. Supreme Court granted certiorari, no justice who participated found any constitutional infirmity in the Florida Supreme Court's ruling.⁶ Justice Scalia's unanimous opinion found no violation, but the four most predictably conservative Justices on property rights issues formed a plurality in support of Parts II and III of the opinion, which embraced an aggressive concept of judicial takings as an apparent beachhead for future activist expansion of constitutional property rights: the plurality claimed that any judicial decision that eliminated an "established" property right constituted a taking. "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."⁷

The plurality opinion presented itself as determined to forge new constitutional doctrine, despite precedential, logical, and policy complexities. Relatively little attempt was made to justify the new rule normatively or jurisprudentially; all was urgent prescription linked to some sort of faux formalism. The plurality opinion's chief argument seems to be that the Takings

3. Beach and Shore Preservation Act, 1961 Fla. Laws ch. 61-246 (codified as amended at FLA. STAT. §§ 161.011-.45 (2007)).

4. FLA. STAT. §§ 161.191-.201 (2007).

5. See *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1119 (Fla. 2008).

6. Justice Stevens did not participate, an important absence given his leadership of the effort to cabin constitutional property rights.

7. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

Clause⁸ limits judicial property decisions because the clause is phrased in the passive voice, thus implicitly applying to every branch of state government:

The Takings Clause (unlike, for instance, the Ex Post Facto Clauses, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor (“nor shall private property *be taken*” (emphasis added)). There is no textual justification for saying that the existence or the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.⁹

While some jurists take the view that the text of the Constitution is the best indication of its meaning, the plurality’s literalism lays excessive stress on the Fifth Amendment’s compact grammar. Textualism as a method of interpretation can be justified only as a means to capture the original public meaning of the constitution.¹⁰ But the Takings Clause by its terms—and in judicial interpretations for its first 135 years—applied only to eminent domain, a specific power essentially legislative in character.¹¹ Even the Supreme Court’s “originalist” justices have held that their expansive interpretation of the clause cannot find support in the original meaning of the Takings Clause. “Prior to Justice Holmes’s exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’”¹² Since the Takings Clause originally did not apply to legislative changes in property rules, its passive voice cannot logically be construed to extend its original application to judicial changes.

The plurality implicitly admitted the pointlessness of its textual argument by granting the premise of the criticism in Justice Kennedy’s concurring opinion—that no one, when the Takings Clause was adopted, entertained any

8. “[N]or shall private property be taken for public use without just compensation.” U.S. CONST. amend. V. The Supreme Court first applied the Takings Clause to the states, as incorporated into the Fourteenth Amendment, in *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

9. 130 S. Ct. at 2601.

10. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37–38 (1997); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 92–93 (2004). Professor Nicholas Rosenkranz has employed a more literal method of textual reading that makes little claim to gleaning the original public meaning but has yet to offer a theoretical justification. See Nicholas Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).

11. See, e.g., William Michael Treanor, *The Original Meaning of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). Justice Kennedy rejected reliance on the Takings Clause for troubling judicial changes in property rules because, “as a matter of custom and practice, these are matters for the political branches—the legislature and the executive—not the courts.” *Stop the Beach*, 130 S. Ct. at 2614. A stronger claim can be made: conceptually, eminent domain has long been considered an inherently legislative power, although one which the legislature can delegate to the executive. See, e.g., William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 568–69 (1972).

12. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citations omitted).

idea that it applied to the common law decisions of state judges.¹³ In response, the plurality makes two thoroughly unpersuasive arguments. First, it argues that the text of the Takings Clause is so clear that any question of intent or contemporary meaning is irrelevant.¹⁴ This is textualism ad absurdum. The text of the Takings Clause does not state that it applies to judicial decisions. It would be clear if it did, but it does not. Rather, it fails to identify to whom its command applies, which should prompt the conscientious interpreter to look outside its bare words. A judge cannot plausibly rely on such a textual silence to hold that the clause applies to every branch of government, especially when other traditional and widely accepted methods of interpretation plainly establish that no one intended or understood such a meaning.¹⁵ These are word games, not legal interpretations. Moreover, given that the Court has construed the key and clear word “take” metaphorically to create a flexible check against legal change,¹⁶ the plurality seems to use severe literalism opportunistically to reach a conclusion desired for ideological reasons.

The plurality’s second interpretative argument is even weaker. The plurality argued that the Framers did not worry about judicial takings because “the Constitution was adopted in an era when the courts had no power to ‘change’ the common law.”¹⁷ This is nonsense as a matter of legal history. English common law underwent dramatic modernization in the eighteenth century,¹⁸ and American courts after independence immediately adapted English common law to suit American circumstances.¹⁹ Property law, too, had

13. 130 S. Ct. at 2606 (“We do not grasp the relevance of Justice Kennedy’s speculation . . . that the Framers did not envision the Takings Clause would apply to judicial action. They doubtless did not, since the Constitution was adopted in an era when courts had no power to ‘change’ the common law.”).

14. *Id.* at 2606 (“Where the text they adopted is clear, however (‘nor shall private property be taken for public use’), what counts is not what they envisioned but what they wrote.”).

15. See *Girouard v. United States*, 328 U.S. 61, 69 (1946) (“It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.”). In applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to whether a statute is sufficiently clear to invalidate an agency’s contrary interpretation, the Court has repeatedly found that silence or other failure to address “the precise question” at issue defeats clarity. See *Mayo Found. v. United States*, 131 S. Ct. 704, 711 (2011).

16. See, e.g., *Lingle v. Chevron, Inc.*, 544 U.S. 528 (2005) (stating that the regulatory takings doctrine “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain”). It is instructive to recall that Justice O’Connor’s emphasis in *Lingle* on regulations that are functionally equivalent to expropriation rejected yet broader extensions of the doctrine. *Id.* at 543 (rejecting claim that regulations that fail to substantially advance a governmental interest can effect a taking).

17. 130 S. Ct. at 2606.

18. See, e.g., JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 13–14* (2004) (“Lord Mansfield was sworn in as Chief Justice of the Court of King’s bench on Monday, 8 November 1756. . . . Once on King’s Bench, Mansfield wasted no time in initiating change. The first steps were procedural, but his strong substantive imprimatur—especially on commercial themes—was soon to follow, and it was pervasive.”).

19. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 69 (3d ed. 2005) (1973) (“The country invited in only those English doctrines that were needed and wanted. Between 1776 and the middle of the nineteenth century, there were sweeping changes in American law.”).

undergone constant change;²⁰ one need only recall the development of the common law rule against perpetuities, which sharply reduced the ability of owners to settle family property for indefinite periods.²¹ Indeed, the modern idea of *stare decisis* did not even evolve until the middle of the nineteenth century.²² In any event, given that the issue primarily involves federal court review of a state court decision interpreting state law, surely the correct historical reference point here is the year 1868, when the Fourteenth Amendment was adopted, by when, the plurality admits, state courts undoubtedly changed the common law.²³

Plainly, the plurality's textual argument is so much lipstick on a pig. The essence of the plurality's judgment is contained in its brief nugget of "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."²⁴ This statement merely provides a conclusion to the central question in the case without offering any analysis. The key and only citation here is to Justice Scalia's 1994 dissent from the denial of certiorari in *Stevens v. Cannon Beach*, which has no precedential value.²⁵ *Stevens* implemented the Oregon Supreme Court's controversial holding under a novel reading of the doctrine of custom that the dry sand beaches of Oregon are open to the public.²⁶ Whether such a large and sudden change in the common law raises constitutional problems is a valid question. Professor Thompson's classic article, *Judicial Takings*, focused on Oregon and similar decisions in the 1960s and 1970s, which greatly expanded public rights

20. See, e.g., RICHARD R. POWELL, POWELL ON REAL PROPERTY, § 2.06 (Michael Allan Wolf, ed. 2007) ("At any stage in human history the prevailing institution of property is chiefly an inheritance from the past. This inheritance, however, is subject to constant change. These changes represent efforts to work out adaptations to the new problems presented by new ingredients in the political, economic, and philosophical atmosphere of the moment. The fact of change is an ever-present phenomenon in society.").

21. *Id.* at § 19.06[3].

22. See J. H. BAKER, AN INTRODUCTION TO THE HISTORY OF THE COMMON LAW 199 (4th ed. 2002).

23. *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) ("In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."). See Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 731 (2008) ("While the federal government is restricted by the Takings Clause of the Fifth Amendment, the states are restricted by the Takings Clause as it is incorporated under the Fourteenth Amendment. Although it is regularly, if not uniformly, assumed that the Fifth Amendment Takings Clause has the same original meaning as the incorporated Fourteenth Amendment Takings Clause, that may not be true. These enactments were passed at different times, under different circumstances, and with different purposes.").

24. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601 (2010).

25. *Stevens v. Cannon Beach*, 510 U.S. 1207, 1211–12 (1994) (Scalia, J., dissenting from denial of certiorari).

26. *Oregon ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969).

to beaches.²⁷ His nuanced and painstaking analysis considered numerous issues, including comparative institutional competencies and pressures, before concluding in favor of a limited form of judicial takings doctrine.²⁸

The *Stop the Beach* plurality undertakes no such consideration of the similarities and differences between legislatures and courts.²⁹ But the rhetoric of their “common sense” nugget strongly implies an equivalence between the function and practice of courts and legislatures. Courts issue “decrees,” and legislatures issue “fiats.” One must be struck not only by the normative equivalence of these descriptions, but also by how they denigrate both institutions being compared. The plurality acknowledges nothing about the constraints of law, reason, or tenure on judicial decision making, nor of democratic voice and deliberation on that of legislatures.³⁰ More sadly, the entire course of the plurality opinion bears out their disbelief in the efficacy of judicial reasoning because the opinion itself proceeds as an exercise of will rather than as a reasoned decision honoring its own institutional constraints.

The plurality’s treatment of its precedents is fundamentally dishonest. It stated, “Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.”³¹ While the peculiarly tendentious phrasing may save this statement from being flatly wrong, it is still seriously misleading. In *Stop the Beach*, as in many earlier cases, the state court construed its precedents to hold that the plaintiff did not have the property right it claimed. The U.S. Supreme Court then reexamined Florida precedent to determine whether the Florida Supreme Court’s ruling was correct as a matter of Florida law, without any apparent deference to the state court’s decision. But the U.S. Supreme Court has repeatedly rejected such an intrusive review of state court decisions about state law in opinions by Justices Holmes, Brandeis, and Cardozo, perhaps the three justices of the twentieth century best versed in the common law. Brandeis wrote:

The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. 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

27. See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1507 (1990).

28. *Id.* at 1542–44.

29. Although Professor Thompson concluded that some federal constitutional limits on state court decisions were appropriate, the plurality never mentions his article, perhaps because he cautions restraint in the exercise of such federal review.

30. The classical tradition of constitutional interpretation begins with the distinction between judicial judgment and popular will, between law and politics, so it is startling to find justices so blithely denying its validity. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton).

31. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (2010).

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.³²

Some ignored precedents address facts difficult to distinguish from those in *Stop the Beach*. In *Sauer v. City of New York*,³³ a property owner claimed that the state court's decision took his property right in an easement of light, which he claimed had been clearly established in the court's prior decisions. The Supreme Court, following an earlier dissent by Justice Holmes, categorically rejected this claim:

Surely such questions [of state law] must be for the final determination of the state court. . . . Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the Fourteenth Amendment is shown.³⁴

Holmes had argued in the prior case that a state court's authority to craft a common law property rule necessarily included the right to change that rule.³⁵ He wrote: "I know of no constitutional principle to prevent the complete reversal of [the earlier precedent] tomorrow if it should seem proper to" the New York court.³⁶ Moreover, because the New York court in that case, like the Florida court in *Stop the Beach*, had distinguished its precedent rather than overruled it, he continued: "[I]f we are bound by local decisions as to local rights in real estate then we are equally bound by the distinctions and the limitations of those rights declared by the local courts."³⁷ In later cases, the Court suggested that state court interpretations of their own property doctrines might violate due process if they lacked a "fair and substantial basis" in precedent,³⁸ but never has a state court decision been found to violate that lenient standard. While the variety of factual settings of these cases do not yield a per se rule, these plainly relevant precedents strongly counsel against just the type of foray into state property law that the plurality would mandate.

The earlier opinion closest to that of the *Stop the Beach* plurality is Justice Stewart's 1967 concurring opinion in *Hughes v. Washington*, where the state court had held that beachfront accretions belong to the state, thereby overruling a twenty-year-old precedent.³⁹ Stewart's opinion, however, rests on a premise quite alien to the *Stop the Beach* plurality:

Surely it must be conceded as a general proposition that the law of real property is, under our constitution, left to the individual States to develop

32. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930); *see also* *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364–65 (1932).

33. *Sauer v. New York*, 206 U.S. 536, 542 (1907).

34. *Id.* at 548.

35. *Muhlker v. N.Y. & Harlem R.R.*, 197 U.S. 544, 572–76 (1905) (Holmes, J., dissenting).

36. *Id.* at 574.

37. *Id.* at 576.

38. *See, e.g.*, *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944).

39. *Hughes v. Washington*, 389 U.S. 290 (1967).

and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners.⁴⁰

He went on, nonetheless, to write:

To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.⁴¹

What Stewart's position shared with the earlier approach of the Court, as the Brandeis quote demonstrates, is an understanding that the common law changes and that the U.S. Constitution does not commit the states to a regime of static property rights. Stewart was concerned about upsetting reasonable expectations, the core of the regulatory takings regime later established in the *Penn Central* case, a decision he joined.⁴² He framed the issue in terms of due process limitations on retroactivity, a lenient standard concerned with unfairness in each case.

The plurality decision in *Stop the Beach* ignores these precedents. The plurality makes no mention at all of the opinions of Justices Holmes, Brandeis, or Cardozo. Stewart's suggestion is dismissed like that of a novice student: "[T]he predictability test covers too little, because a judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking."⁴³ The plurality thus categorically rejected any notion that common law property rules properly change to meet "changing ideas and conditions," without acknowledging that this has been the dominant understanding of property law for more than one hundred years.⁴⁴ No jurisprudential or normative justification was offered, just

40. *Id.* at 295.

41. *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967).

42. The view that the regulatory takings doctrine addresses harms inflicted on a property owner from unanticipated changes in property regulations originates in Frank Michelman's enduring *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967), and was adopted in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

43. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2610 (2010).

44. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 178 (1921) ("The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that old maps must be cast aside, and the ground charted anew."); Joseph L. Sax, *Property Rights and the Economy of Nature Understanding* *Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1446

a silly hypothetical based on the absurd premise that an American court would hold that no one can own more than one hundred acres of real estate.⁴⁵ The plurality seems to think that an entirely static system of property rights is essential for individual liberty and that this is mandated by the Takings Clause, but it fails to seriously address the implausibility and radicalism of this view.⁴⁶

The plurality thus embraces a per se rule that judicial elimination of an “established property right” constitutes a judicial taking. In rejecting Justice Kennedy’s more limited check on state common law property changes under the Due Process Clause,⁴⁷ the plurality praises the clarity of the rule it adopts as limiting its own discretion in individual cases. “The great attraction of Substantive Due Process as a substitute for more specific constitutional guarantees is that it never means never—because it never means anything precise.”⁴⁸ This restates Justice Scalia’s oft-expressed preference for clear rules, but it still seems to be a perverse notion of judicial restraint that an aggressive per se rule that displaces traditional state authority wholesale should be preferred to a flexible standard cautiously employed.⁴⁹

Moreover, per se rules notoriously can contain conceptual conundrums. The plurality’s approach contains significant ambiguities that would bedevil future application of its rule. These may be best considered in the context of an extended example. Recently, in *Proctor v. Huntington*, the Washington Supreme Court arguably departed from precedent by holding that a defendant who erroneously and innocently built a house on his neighbor’s adjacent land

(“Historically, property definitions have continuously adjusted to reflect new economic and social structures, often to the disadvantage of existing owners.”).

45. “If, for example, a state court held in one case, to which the complaining property owner was not a party, that it had the power to limit the acreage of privately owned real estate to 100 acres, and then, in a second case, applied that principle to declare the complainant’s 101st acre to be public property, the State would have taken an acre from the complainant even though the decision was predictable.” 130 S. Ct. at 2610. It seems characteristic of the plurality’s mindset that this hypothetical describes a ruling that no court ever has, or dare I say would, contemplate. Here’s a more intriguing example: what if a state court followed the lead of the European Court of Human Rights and held that the transfer of ownership to an adverse possessor without compensation to the record owner violates the state constitutional takings provision? See *J.A. Pye (Oxford) Ltd. v. United Kingdom* (Nov. 15, 2005, application no. 44302/02). Such a ruling would eliminate an established common law right of an adverse possessor, even if it was intended to secure the rights of the record owner.

46. This view has been forthrightly advocated by Professor Richard Epstein, who views any reduction in the scope of property rights without compensation as illegitimate. See RICHARD EPSTEIN, *TAKINGS* (1985).

47. Justice Kennedy, joined by Justice Sotomayor, more precisely wrote that there were substantial problems with adopting a judicial takings doctrine, which counseled against adopting the plurality’s position. *Stop the Beach*, 130 S. Ct. at 2613. But he also recognized that the Due Process Clause applies to courts, and argued for a greater flexibility in addressing property rights claims, consistent with his views in other cases. *Id.* at 2614–17.

48. 130 S. Ct. at 2608.

49. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 499, 500 (1965) (Harlan, J., concurring) (“Judicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.”).

would be liable only in damages for the plaintiff's loss of land, and would not be enjoined to tear down the house.⁵⁰ In doing so, the Washington court acted in accord with modern legal thinking in sanctioning as a remedy for trespass a "liability" rule rather than a "property" rule when such treatment would promote efficiency and fairness, even if it less-than-absolutely protects the plaintiff's right to exclude. But, the plaintiff might plausibly argue that the court has eliminated his property right and effected a judicial taking within the terms of the plurality's approach.⁵¹

Consideration of *Proctor* reveals at least three major problems with the approach of the *Stop the Beach* plurality. First, the plurality does not clarify whether it is essential for a judicial taking that the established right be transferred to the state, as presented by the facts in the *Stop the Beach*, or whether any adjustment of entitlements among private litigants also may trigger a requirement for public compensation.⁵² The plurality seems at points to focus on Florida's assertion of ownership of the reconstructed beach as crucial to a judicial taking, but at other points declares that judicial changes should be judged by the same constitutional criteria as legislative changes.⁵³ Legislative changes, such as restrictions on land use, can be takings even though they transfer no rights of possession or use to the state, although they still must create public benefits to satisfy the Due Process Clause.⁵⁴ If the judicial takings rule reaches common law changes that do not transfer property to the state, it would greatly extend the reach of the Court's grasp of state property law.⁵⁵ It

50. 238 P.3d 1117, 1123 (Wash. 2010).

51. Land use lawyer and author Robert H. Thomas argues on his blog that *Proctor* did effect a judicial taking. Robert H. Thomas, *Why Isn't This a "Judicial Taking?"* *Washington Supreme Court Orders Property Owner to Sell to Neighbor*, INVERSECONDEMNATION.COM (Aug. 20, 2010), <http://www.inversecondemnation.com/inversecondemnation/2010/08/why-isnt-this-a-judicial-taking-washington-supreme-court-orders-property-owner-to-sell-to-neighbor.html>. Even if a court concluded that the *Proctor* court had eliminated an established property right, there should be no constitutional violation because the court ordered the neighbor to compensate the injured land owner. One might state this as a general proposition that a court substituting a "liability" rule for a "property" rule, within the meaning of Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), cannot be found to have effected a judicial taking without just compensation.

52. On this issue, see D. Benjamin Barros, *The Complexities of Judicial Takings* 45 U. RICH. L. REV. 903 (2011).

53. The plurality relies largely on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), for the proposition that the state can neither by legislation nor by judicial decision declare property to be publicly rather than privately owned. 130 S. Ct. at 2601–02. But the plurality also states: "[T]he manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent." *Id.* at 2602. The plurality reads *Webb's* more aggressively than is fair. *Webb's* involved a legislative change, not a change in common law. Moreover, it did not create a per se rule: the court stressed, "No police power justification is offered for the deprivation. Neither the statute nor appellees suggest any reasonable basis to sustain the taking of the interest earned by the interpleader fund." 449 U.S. at 163.

54. See *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005).

55. See Timothy D. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247 (2011), <http://yalelawjournal.org/2011/2/18/mulvaney.html>.

also would threaten placing potentially massive liability on the state when its courts' bring old rules in compliance with modern approaches to liability. *Lucas*⁵⁶ had held that a federal court could review the state law basis for state court decisions upholding regulations against regulatory takings challenges because the regulations embodied state nuisance common law. The *Stop the Beach* plurality seems to claim the authority to review all changes in the state common law of property. Ominously, although *Lucas* explicitly recognized that nuisance law could change to adapt to new social conditions,⁵⁷ the *Stop the Beach* plurality expressly rejected legal evolution that would encroach on private property rights.⁵⁸

Second, the plurality's approach requires courts to decide what constitutes a property right for federal constitutional purposes. Regulatory takings law imposes baffling, metaphysical definitional questions upon property law that never arise within the practice of property law itself. Did the plaintiff in *Proctor* have a "property right" to an injunction requiring the defendant to remove his expensive structures from the plaintiff's land, or is that merely a remedy for violation of the plaintiff's right to exclude? In another case from Washington, is a landowner's right to armor the shore against erosion a distinct property right or just a self-help remedy incidental to a right of possession?⁵⁹ What about a landowner's traditional right to pump all the groundwater it wishes without regard to modern notions of reasonable use?⁶⁰ The petitioners in *Stop the Beach* claimed both "the rights to accretions, and the right to have littoral property touch the water"; the U.S. Supreme Court never questioned whether such interests had the status of "rights," only holding that they were not violated by avulsion.⁶¹ Yet, the Hawaii courts recently have held that a littoral owner's interest in future accretions is merely an expectation, which the state may extinguish prospectively through legislation.⁶² We have no tradition to guide courts in distinguishing between property "rights" and the multitude of legal interests and remedies that make up the law of property. Placing property "rights" at the center of regulatory takings analysis requires scholastic distinctions between sticks and bundles and invites ideological manipulation behind a mystifying shield.⁶³ Professor John Echeverria seems right that this

56. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031–32 (1992).

57. *Id.* at 1030–31 (citing the balancing test of the Restatement (Second) of Torts).

58. 130 S. Ct. at 2610 ("[J]udicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking").

59. *See, e.g., United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009).

60. *See, e.g., Hiday v. Nickolaus*, 469 S.W.2d 859 (Mo. Ct. App. 1971).

61. 130 S. Ct. at 2610. Accretion refers to the gradual or imperceptible movement of a rivercourse or seaside waterline boundary, where the legal boundary line follows the waterline. Avulsion refers to sudden movement of a waterline, where the legal boundary does not move. *See, e.g., Nebraska v. Iowa*, 143 U.S. 359 (1892).

62. *Maunaloa Bay Beach Ohana 28 v. Hawaii*, 222 P.3d 441 (Haw. Ct. App. 2009), *cert. denied*, 131 S. Ct. 529 (2010).

63. The plurality itself also noted that it now would need to decide whether a right is established under state law. It straight-facedly commended itself for deference to state courts because it would not

abstract approach threatens a “breathtaking” general expansion of the regulatory takings doctrine beyond the fact-sensitive, fairness-based approach canonized in *Penn Central*.⁶⁴

Third, assuming that one can identify property “rights,” how would the U.S. Supreme Court determine whether a state supreme court has “eliminated” an “established” right? Whether property rights are established or eliminated are novel legal inquiries likely to be shaped by the ideological inclinations of the Supreme Court justices. In these cases, as in *Stop the Beach*, the state court will have denied that it has acted beyond its authority or changed the law. Common law judges have long interpreted their precedents to create space for adaptation to new circumstances.⁶⁵ The *Proctor* court, for example, extensively reviewed conflicting precedents on when a plaintiff would be entitled to an injunction for an encroachment, grounding its approach in a long tradition of equitable weighing of the propriety of an injunction. It recognized “the evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach.”⁶⁶ The court concluded: “Nothing in our holding today undermines fundamental property rights: it remains true that a landowner may generally obtain an injunction to eject trespassers.”⁶⁷ Four justices dissented, however, feeling that the majority had overruled a key precedent, “dissolving [that decision’s] strong protection of private property rights.”⁶⁸

What justification could there be for the U.S. Supreme Court to reinterpret the state court’s own precedents after nine state justices chosen by that state’s political process have argued over the proper meaning of state law to determine both the contours of existing law and the permissible freedom of interpretation? Surely good-faith differences of legal interpretation by judges trained in their state’s common law and charged by their state constitutions with its preservation and adaptation do not give rise to federal constitutional objections. The *Stop the Beach* plurality may be concerned about bad faith, such as deceptive decisions that do not employ ordinary legal reasoning (“judicial decree”) that other state institutions cannot remedy. But such concerns sound in due process because judicial decisions of that nature depart from the rule of law and work an injustice regardless of the interests deprived. The Court has long

make an independent determination about what the state rule is when there is doubt about its existence. *Id.* at 2608, n.9.

64. John D. Echeverria, *Stop the Beach Renourishment Why the Judiciary Is Different*, 35 VT. L. REV. 475, 479-81 (2010).

65. See, e.g., Karl Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* 5 (1960) (“[T]he range for *different* kinds of action which is open to an appellate court while it ‘stands’ on ‘the things decided’ is a vast range, and that the most careful ‘standing’ is therefore not only over the long haul, but continuously, daily, a process of creative choice and of reshaping doctrine and result.”).

66. 238 P.3d at 1123. Recall that the *Stop the Beach* plurality expressly rejected slow evolution as a justification for legal change. See *supra* note 61 and accompanying text.

67. *Proctor*, 238 P.3d at 1123.

68. *Id.* at 1129.

addressed bad-faith evasions of federal rights through Due Process Clause decisions⁶⁹ and in occasional refusals to find limitation on federal jurisdiction from state court decisions lacking adequate and independent state grounds.⁷⁰ These approaches have necessarily been highly deferential to state court decisions, because they seek only to reach decisions about state law whose purpose is to evade federal rights. The *Stop the Beach* plaintiffs did not even raise a federal claim in the state courts. The plurality's judicial takings rule conflates state property rules with federal constitutional rights. But the Takings Clause only prohibits states from taking property; it does not prohibit states from adapting their own property rules to new circumstances.

The more aggressive judicial takings approach necessarily implies systemic distrust of state courts' regard for private property. As it did in *Stop the Beach* itself, the U.S. Supreme Court, consisting of federal judges unschooled in state law, would review state law independently to assure itself that state precedents provide a foundation for the current decision. This disciplinary threat repeats the admonition in the *Lucas* case that the Supreme Court will review state court interpretations of state nuisance law in order to protect its aggressive regulatory takings limit on environmental legislation.⁷¹ But if state courts cannot be trusted to deal responsibly with the tension between law and politics, neither can the U.S. Supreme Court.

We have seen this before. In *Bush v. Gore*, the Court set aside the Florida Supreme Court's interpretation of state election law ostensibly to secure an obscure Equal Protection right never otherwise invoked, while incidentally settling the 2000 presidential election in favor of the candidate of the party in which all five of the majority justices had been prominent members.⁷² Dissenting in that case, Justice Stevens wrote:

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges

69. See, e.g., *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); *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 non-federal 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.").

70. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (ruling by state court that federal constitutional challenge to contempt citation against civil rights group could not be heard because of procedural flaw did not defeat subsequent U.S. Supreme Court review of federal question because ruling conflicted with past "unambiguous holdings" of that court and thus lacked a fair and substantial basis in state law).

71. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

72. *Bush v. Gore*, 531 U.S. 98 (2000). Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* invoked *Lucas* as support for its authority to set aside state court interpretations of state law. 531 U.S. at 115 n.1.

throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. . . . Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.⁷³

Such concerns apply to the *Stop the Beach* plurality's judicial takings formulation as well. In arguing the need for it to oversee state court property decisions, the U.S. Supreme Court necessarily denigrates the "impartiality and capacity" of state courts and undermines public respect for courts and law.

But not just state courts. Whatever damage *Bush v. Gore* did to perceptions of state courts, it certainly seriously eroded the confidence of many close observers in the institutional "impartiality and capacity" of the U.S. Supreme Court, which was seen to sacrifice an oft-proclaimed devotion to federalism in order to reverse a state law decision based upon a constitutional theory having no precedential support.⁷⁴ *Bush v. Gore* at least had the virtue of resolving promptly what some feared could become a constitutional crisis.⁷⁵ There is no such excuse for *Stop the Beach*; indeed, the Supreme Court does not, and could not, argue that there is any deficit, let alone a crisis, in state court respect for private property. The U.S. Supreme Court's assertion of a right to review state property decisions only makes sense if the Court's decisions inspire greater confidence as more principled than those of state courts. But the truncated, almost cynical arguments of the plurality in *Stop the Beach*, like the partisan tilt of *Bush v. Gore*, undermine any such confidence.⁷⁶ The erosion of respect for judicial decisionmaking has no logical stopping place.⁷⁷

73. 531 U.S. at 128–29.

74. See, e.g., Michael J. Klarman, *Bush v. Gore Through the Lens of Legal History*, 89 CALIF. L. REV. 1721, 1723 (2001) ("[I]t will be difficult to find neutral and detached lawyers who believe that *Bush v. Gore* was 'grounded truly in principle' or 'in the language or design of the Constitution,' rather than in the conservative Justices' partisan preference for George W. Bush in the 2000 presidential election."); Cass Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 759 (2001) ("From the standpoint of legal reasoning, the Court's decision was very bad."). *Bush v. Gore* is worse than *Stop the Beach* in that, as Michael Klarman stated, "It is one thing to say that a judge's political ideology influences her constitutional interpretations. It is quite another to say that her partisan political preferences do." 89 CALIF. L. REV. at 1725. The *Stop the Beach* opinion, however, does create a one-way constitutional ratchet, attacking judicial decisions that weaken private property rights but not questioning decisions that expand private rights at the expense of the environment or other public interest.

75. See, e.g., RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001).

76. At oral argument, Chief Justice Roberts pursued a line of questions concerning political pressures on candidates for an elected judgeship to change a property rule. Transcript of Oral Argument at 35, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08–1151). While such pressures raise concerns about judicial independence, the highly politicized, partisan maneuverings around U.S. Supreme Court appointments, as well as the predictable ideological tilt of some justices, preclude any naïve belief that members of the Court lack an ideological agenda.

77. See Echeverria, *supra* note 64 at 486 ("[T]here is no reason to conclude that judicial takings, if they can occur at all, could not be committed by federal courts.").

The corrosive nature of the plurality's judicial takings formulation is illustrated by a complaint recently filed in the Court of Federal Claims, *Petro-Hunt, L.L.C. v. United States*.⁷⁸ The plaintiff oil company argues that the U.S. Court of Appeals for the Fifth Circuit effected a judicial taking of its mineral interests in a National Forest.⁷⁹ It claims that the court's 2007 decision overturns a 1951 precedent dealing with nearly identical facts.⁸⁰ In the most recent decision, the Fifth Circuit held that federal rather than state law applied, that under federal law the plaintiff's interests were subject to prescription for non-use, and that they had been extinguished.⁸¹ The court explained that an intervening decision of the U.S. Supreme Court made it clear that federal law must apply in the circumstances of the case.⁸² Plaintiffs claim in their complaint that the Fifth Circuit has "removed an 'established right of private property.'"⁸³ While there are numerous arguments against the plaintiff, their allegations are sufficiently colorable to show that judicial takings claims may be brought, under the *Stop the Beach* formulation, against Article III courts. Moreover, but for the barrier of the statute of limitations, the plaintiff might also have brought its judicial takings claim against the U.S. Supreme Court itself, whose 1973 decision necessitated the Fifth Circuit's change of law.⁸⁴ Speculating about who would adjudicate such a claim against the U.S. Supreme Court suggests a reformulation of Justice Jackson's famous aphorism: The Supreme Court is not final because it cannot take property; it cannot be held to take property because it is final.⁸⁵

78. Restated Second Amended Complaint, *Petro-Hunt, LLC v. United States*, No. 00-512L (Fed. Cl. filed Sept. 16, 2010). I am grateful to Mr. James Gette, a lawyer with the U.S. Department of Justice, for informing me about this case.

79. *Id.* at ¶¶ 5–9.

80. *Id.* at ¶¶ 57–60.

81. The decision claimed to work a judicial taking is *Petro-Hunt, LLC v. United States*, 2007 U.S. App. LEXIS 5233 (5th Cir. 2007), cert. denied 552 U.S. 1242 (2008). That decision clarified an earlier decision in the same case, *Petro-Hunt, LLC v. United States*, 365 F.3d 385 (5th Cir. 2004). The earlier decision holding that the law of prescription did not apply to related interests is *United States v. Nebo Oil Co.*, 190 F.2d 1003 (5th Cir. 1951).

82. 365 F.3d at 390–95, discussing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

83. Complaint, supra note 78, at ¶ 77, (quoting *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Protection*, 130 S. Ct. 2592, 2602 (2010)).

84. That the Supreme Court's decisions about whether state or federal law applies to a property dispute can eliminate established property rights can be seen even in their treatment of riparian rights. Compare *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) (federal law governs ownership of riverbed exposed from migrating navigable river), with *Oregon ex rel. State Land Board v. Corvallis*, 429 U.S. 363 (1977) (overruling *Bonelli*, state law applies).

85. *Brown v. Allen*, 344 U.S. 443, 533 (1953) ("We are not final because we are infallible, we are infallible because we are final.")

There are enormous problems with imagining how litigation to remedy judicial takings would progress other than through direct review by the U.S. Supreme Court. Although the plurality makes some suggestions, they seem contorted and dubious. In any event, however logical, it is hard to imagine a Federal Claims Court judge actually holding that the Supreme Court has effected a judicial taking.

One might argue that I protest too much against the *Stop the Beach* plurality opinion, given that it found no judicial taking on the facts of the case.⁸⁶ It is true that the plurality, indeed all the Justices, upheld the judgment of the Florida Supreme Court that the fixing of the petitioners' property boundaries did not deprive them of any established right under Florida law. But the Court's reasoning pushes regulatory takings law in an alarming direction. The plurality holds that beach reconstruction constitutes "avulsion" under Florida common law, so that an upland owner's boundary does not move with changes in the shoreline; if the shoreline had moved imperceptibly rather than visibly, the growth of the beach would have been classified as "accretion," and the property line would have had to move with the high tide line. The U.S. Supreme Court did not find any distinction in Florida law between natural and state-constructed avulsions. Thus, the consequences of the statute duplicate the effects of the common law: the Florida court's decision was found "consistent with . . . background principles of state property law."⁸⁷ States employing beach-rebuilding strategies, of course, welcome this because it provides a fortuitous doctrinal path to rebuild beaches and maintain public ownership.⁸⁸ But what solves a specific problem creates an undesirable reliance on common-law concepts to frame the general approach to novel resource questions.

Stop the Beach should never have been treated as problem of a judicial taking because it was the Florida Beach and Shore Protection Act that governed the scope of the littoral owners' property. The Act has been in effect for fifty years and surely predates the acquisition of property by some or all of the petitioners. It always has provided that a beach rebuilt according to its procedures belongs to the public. This rule seems eminently fair because the public paid to save the beach, which protects the landowner from further erosion, and because the Act safeguards the other valuable legal rights of the upland owners. But the Florida court argued that the Act did not effect a taking because it was consistent with its common law, and the U.S. Supreme Court reviewed the state precedents to make sure that Florida did not change the common law in its interpretation. The justice and propriety of the Act's allocation of rights should have been found constitutionally unexceptionable without regard to the common law. The emphasis on the common law as a

86. The Court may also develop such a narrow interpretation of elimination of an established property right that there are few or no cases to which it applies. This is what has happened to the *Lucas* per se rule that regulations that deprive an owner of all economic valuable use effects a taking. The Court later came to hold that "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002). Since regulation virtually never deprives land of all economic value, *Lucas* has been rendered toothless, at least until a future property-rights majority chooses to resurrect it.

87. 130 S. Ct. at 2612 (citing *Lucas v. S.C. Coastal Council*, *supra*, 505 U.S. at 1028–29).

88. The New Jersey Supreme Court quickly relied on *Stop the Beach* to hold that state beach replenishment gave ownership of the new beach to the state because it was an avulsion. *Long Branch v. Liu*, 4 A.3d 342 (N.J. 2010).

baseline in a regulatory takings case where a long-established statute governs the situation continues a worrisome trend of giving normative precedence to the common law.⁸⁹

Two problems with relying on avulsion in this case illustrate general problems with using the common law as a normative baseline for assessing the takings effect of a statute. First, the traditional common law rules of accretion and avulsion presuppose the unpredictability and randomness of the natural events causing sudden movements of sand and water. A principal argument for the justice of an accretion rule is that the respective owners sometimes will gain and sometimes will lose land with shifting waterlines.⁹⁰ But the Court here applies the doctrine to an intricately planned, publicly financed public works project, undertaken with the knowledge that it would create property for the public. The legal effects of the construction were both foreseen and calculated by the very entity that would gain property from the project. Moreover, beach reconstruction projects will always move the waterline in the same direction.

Second, the normative justification for the public's ownership of the new beach has nothing to do with whether the shoreline moved quickly or slowly, resulting in an avulsion or accretion. Holding a modern statute to an ancient common law baseline precludes beneficial reform. Professor Sax has cogently argued that the accretion/avulsion distinction generally has lost the reasons for its existence and should be limited or abandoned (which could create more judicial takings).⁹¹ Courts following the distinction struggle to explain why it should matter.⁹² The distinction arose at a time when the recreational value of beaches was slight and the technology and social organization to replenish sand on an eroded beach did not exist. A common-law rule that would treat the boundary effects of deliberate public construction differently depending on whether it would be classified as accretion or avulsion would be entirely unmoored from any rationale in justice or policy. In this case, the Florida legislature made a considered, sensible, and fair judgment that such a project should create public ownership of the new beach, because the project enhances the public welfare at public expense with minor harm, if any, to the littoral

89. See J. Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 VT. J. ENVTL. L. 625 (2010).

90. See, e.g., *St. Clair v. Lovingson*, 90 U.S. 46, 69 (1874) (“The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.”).

91. Joseph L. Sax, *The Accretion / Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J. 305 (2010). Sax also points out how American courts, including the U.S. Supreme Court, have manipulated the distinction to reach results that seemed right. *Id.* at 343–49.

92. Thus in the recent case of *Severance v. Patterson*, 2010 Tex. LEXIS 854; 41 ELR 20016 (Tex. 2010), the court repeatedly insisted that the distinction was crucial but could offer no coherent reason why. The court conceded that a public easement would “roll” onto former upland as the result of a storm or erosion if movement was slow and imperceptible but not if it were sudden. The court warned that recognizing the movement of the easement onto private land would be taking if the movement was found to be an avulsion because it would be a new easement, but there would be no taking if it was an accretion. The court recently scheduled the case for rehearing.

owner. But if the *Stop the Beach* plurality had found that the Florida court had made such a change in the common law while upholding the Act, it presumably would have declared a judicial taking. Under the plurality's approach, it never would need to confront the reasonableness of the normative judgment about ownership inherent in the Florida statute.

This leads to this Article's final point: the kind of rigid per se regulatory takings rule favored by the *Stop the Beach* plurality should not apply to either legislative or judicial decisions. It should not matter at all whether the accretion rule for government beach reconstructions was "eliminated" by statute or judicial decision. Either branch can adapt law to new circumstances, although each branch presents certain advantages and dangers. Courts must change the common law so it remains useful and just for our society and economy. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."⁹³ The plurality's approach leaves no room for consideration whether a judicial change in a common law rule that eliminates an established right replaces a stupid rule with one creating broad public benefits and imposing little or no harm on private owners. Thus, it inhibits welfare-enhancing changes in property law.⁹⁴

In his path-blazing article, Professor Thompson took existing regulatory takings law as a given and concluded that "there is no justification for exempting the judiciary from those property protections that are necessary where other branches of the government are concerned."⁹⁵ But the comparison can lead one to question Professor Thompson's premise. Consideration of the flaws in the *Stop the Beach* plurality's approach to judicial takings highlights serious problems in the regulatory takings doctrine as applied to legislation. Legislation provides the chief means of regulating property use in order to protect our common interests, such as in environmental protection, against the externalities of private decision making. Legislation enjoys several advantages over the common law, including prospectivity, flexibility, comprehensiveness, and democratic legitimacy.⁹⁶ The Supreme Court has fashioned per se rules to find regulatory takings without weighing the public benefits of the challenged legislation. Our discomfort with applying such a machete to judicial decisions

93. Oliver Wendell Holmes, *Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

94. In *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980), upon which the plurality relies for insisting that rule changes constitute takings, the Court carefully noted, "No police power justification is offered for the deprivation. Neither the statute nor appellees suggest any reasonable basis to sustain the taking of the interest earned by the interpleader fund." I would argue that the Oregon Supreme Court's still-controversial decision, *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), using the obscure doctrine of custom to hold that the public cannot be excluded from the state's beaches represents an entirely defensible adaption of beach ownership to account for the modern public interest in seashore recreation, the inability to cultivate or build on sand, and the limited interest of private owners in securing the purely economic advantages of exclusion.

95. Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1541 (1990).

96. See J. Peter Byrne, *The Public Nature of Property Rights and the Property Nature of Public Law*, in *THE PUBLIC NATURE OF PRIVATE PROPERTY* (Michael Diamond & Robin Malloy, eds., forthcoming 2011).

should sensitize us to the harms of applying it to legislation. If we cannot do without the regulatory takings idea in its entirety,⁹⁷ then we should cabin it within fact-sensitive, multi-factor precincts of the *Penn Central* test.

* * *

There are several good sides to the plurality opinion in *Stop the Beach*. It did not secure a majority and was so insulting to Justice Kennedy that it likely never will.⁹⁸ The reasoning is so thin that it embarrasses thoughtful lawyers sympathetic to some form of judicial takings. The rule it announces overreaches to such an extent that many will understand more clearly that the conservative bloc's regulatory takings arguments amount to a naked power grab.

More fundamentally, the opinion highlights deep and pervasive problems with the regulatory takings doctrine generally. It has no root in the language or history of the Takings Clause. It lacks a persuasive normative rationale. It extends a standing invitation to reactionary frustration of necessary environmental reform. The *Stop the Beach* plurality's incompetent explanation for expanding the doctrine's reach ironically provides a case study of why it should be pared back or eliminated altogether.

97. See J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89 (1995).

98. See Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 *HASTINGS L.J.* 759 (2006).

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