

LITTORAL RIGHTS UNDER THE TAKINGS DOCTRINE: THE CLASH BETWEEN THE *IUS NATURALE* AND *STOP THE BEACH RENOURISHMENT*

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The recent decision of the United States Supreme Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*¹ bristles with conceptual difficulties and practical ambiguities that cannot be easily avoided or easily answered. The major conceptual issue in *Stop the Beach Renourishment* is whether the Supreme Court should recognize “judicial takings” under the Takings Clause, which reads: “[N]or shall private property be taken for public use, without just compensation.”² The textual claim for recognizing judicial takings is that the Takings Clause does not differentiate between various branches of government and thus covers the actions of the judiciary as well as those of the legislative and executive branches.³

Opponents of this doctrine often deride it as a constitutional oxymoron. By definition, state courts cannot take the very property rights that their former decisions have established. Given that this tension exists within any unitary judicial system, the doctrine of judicial takings can, in practice, only arise in a federalist system. At

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

2. U.S. CONST. amend. V.

3. For a defense of this view, see Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL’Y 91, 94–96 (2011).

the state level, there is no reason to expect that any state court will strike down the common-law rights that it has just announced. Even if a court disagreed with its past decisions, the more modest way to approach the problem is to overturn the prior law as part of the evolution of common-law rights.⁴ Similarly, in the highly restrictive domain of federal common law,⁵ the Supreme Court cannot be expected to invalidate its judicial decisions under the Takings Clause. The problem, therefore, can only arise in practice as it did in *Stop the Beach Renourishment*—in a federal system, when a federal court invalidates the decision of the state supreme court, which is therefore rendered less than supreme in the articulation of its own doctrine. To many, this kind of interaction represents the antithesis to the divided system of rights under our federalist system.⁶

Notwithstanding these powerful objections, there is a sensible, albeit restricted, place for the doctrine of judicial takings under federal constitutional law. That approach makes little sense when property rights in a positivist tradition are thought to be manifestations of state power. It has far more attraction, however, within the natural law system, in which judges are rightly seen as custodians of a customary system of property rights that were created by common practice long before there were any courts to enforce the rules in question. Those conditions hold, as I shall show, in connection with water law where the so-called *ius naturale*⁷ was regarded by all courts as the traditional lodestone by which these questions were measured.⁸ Under that view, it is wrong to think of water law as if it were “judge-made” law when, historically, it was derived from a system of decentralized customary law whose basic norms had been firmly entrenched long before the appearance of a centralized judicial system.

It is therefore appropriate to hold courts responsible for keeping to the main contours of water law in making their judicial decisions. *Stop the Beach Renourishment* thus offered a much needed way to

4. For stress on this theme, see Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL’Y 107, 107–08 (2011).

5. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (holding that “[t]he rights and duties of the United States . . . are governed by federal rather than local law”).

6. See Dogan & Young, *supra* note 4, at 108–10.

7. See *infra* Part III.

8. Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, LINCOLN INSTITUTE (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719688 [hereinafter Epstein, *Playing by Different Rules*].

address the actions of state courts whose decisions have strayed too far—and for no good reason—from these customary standards. Ironically, the difficulties in *Stop the Beach Renourishment* did not lie with the particulars of the Beach and Shore Preservation Act (Preservation Act),⁹ which represents a surprisingly sensible environmental scheme. Instead, the target of judicial wrath should have been Florida’s earlier case law that twisted every known principle of water law by treating man-made diversions from a lake or a river as though they were “avulsions,” or major natural events that alter the flow of water without any human intervention.¹⁰ Put simply, the polar opposites in any system of tortious responsibility for individual action are acts of God and deliberate creations of harm by an individual. In a remarkable tour-de-force, Justice Scalia’s analysis of Florida’s statutory scheme failed to distinguish between these two kinds of acts. The weakness in his decision, consequently, did not relate to his general analysis of judicial takings, but to his uncritical treatment of the Florida case of *Martin v. Busch*¹¹ (which authorized the uncompensated diversion) as the legitimate starting point for the analysis, instead of treating that decision as the proper object of wrath in any judicial takings analysis. Once the law of littoral rights is correctly sorted out, the Preservation Act should be regarded, presumptively, as a taking of littoral rights. But these takings may not require any explicit cash compensation because the key provisions of the Preservation Act may provide full in-kind compensation in three separate forms: the protection of the beach on the landward side of the wall, the creation of the view easement, and the creation of the access easement, which together could easily exceed the value of any possible accretions on the seaward side of the wall.

In order to make out this case, I shall proceed as follows. In Part I, I shall outline the general features of Florida’s water law both before and after passage of the Preservation Act. In Part II, I shall put the rules of property law in context, dealing in turn with land, water, and the beach that lies between them as a matter of both common and customary law. In Part III, I shall examine the role of the *ius naturale* (the natural law) in the origin and formation of property law, under both the common and Roman law systems. In that section, I shall outline the historical distinction between alluvion, or gradual changes,

9. 1961 Fla. Laws ch. 61–246, amended by, FLA. STAT. §§ 161.011–161.45 (2007).

10. For discussion, see *infra* Part IV.B.

11. *Martin v. Busch*, 112 So. 274 (Fla. 1927).

and avulsion, or radical changes, and explain the strong efficiency characteristics of the classical rules as they apply to property owners of both riparian and littoral interests. In part IV, I turn to the question of judicial takings and defend that doctrine in order to explore how the basic rules were misapplied in connection with the Florida statutory scheme. In part V, I turn to the larger question of when the doctrine of judicial takings should be applied in other cases and conclude that its application should be limited to those circumstances in which the decided cases make a radical break from well-established common-law patterns that systematically work for the advantage of the state or some identifiable private faction. A short conclusion speculates on the reasons for the abject breakdown of private law conceptions of property rights in the Supreme Court.

I. THE SHAPE OF FLORIDA LAW

Traditionally, Florida law distinguishes between riparian rights, which govern those who own land adjacent to a river, and littoral rights, which govern those who own land bordering a lake or an ocean.¹² In general, both types of rights are generally established as a matter of common law—a proposition that is quickly freighted with much meaning. The littoral rights at issue in *Stop the Beach Renourishment* include the ability of individuals to gain access to the beach from their own property and to have the right of an unobstructed view over the beach to the water beyond.¹³ That delineation of rights necessarily limits the rights of the public and the state over the beach. As a common-law matter, neither the state nor any private party could build along the beach a wall that blocked off access to the water from abutting landowners.¹⁴ The situation only becomes more complicated because the interface between public and private rights necessarily varies as the beach itself moves in response to all sorts of natural elements. Left to its own devices, nature can wipe out some littoral property if the water level rises, or it can lead to a major expansion of beachfront property if the water level falls, so

12. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2598 n.1 (2010) (“Many cases and statutes use ‘riparian’ to mean abutting any body of water. The Florida Supreme Court, however, has adopted a more precise usage whereby ‘riparian’ means abutting a river or stream and ‘littoral’ means abutting an ocean, sea, or lake.”).

13. See *id.* at 2600 (“... (1) the right to receive accretions to their property; and (2) the right to have the contact of their property with the water remain intact.”).

14. See *id.* at 2594 (“Littoral land owners have, *inter alia*, rights to have access to the water . . .”).

that more land becomes fit for vegetation and other forms of use.

The movement of the beach is necessarily a source of uncertainty for the people who own adjacent property, and the question is what, if anything, the state should do to eliminate that uncertainty and the reduction in land value that it normally generates. In Florida's case, the solution was to pass the Preservation Act,¹⁵ the purpose of which was to fight nature and to stabilize the beachfront by adding sand and other support to the beach to prevent erosion. In effect, the statutory scheme established an "erosion control line" at the point where the private upland became a public beach.¹⁶ It then took efforts on the seaward side of that line to shore up the beach, while taking steps to preserve the littoral owner's access to the beach and views of the ocean.¹⁷ The decision to construct the needed barriers was, of necessity, a collective one because the investments in these erosion-control devices will work only if done on sections of the beach that are more extensive than the boundary lines of each individual plot of land. On beachfront sites, these lots tend to be narrow and deep in order to maximize the two elements of value that the Preservation Act strove to preserve. The collective good that is provided by erosion control, however, might not have equal value for all beach owners, some of whom may prefer to take the risk of erosion in order to preserve the option to acquire new lands as the beach goes out to sea.¹⁸

The constitutional challenges presented by the scheme of beachfront control are profound because they involve the intersection of two separate tasks. The first is to get a clear grasp of the property rights regime that operated in Florida prior to the advent of the Preservation Act.¹⁹ These rights were, for the most part, not defined by statute but by some system of common-law adjudication, the status of which is always hard to pin down. *Stop the Beach Renourishment* therefore spent a good deal of time sorting out the set of property rights to which the Takings Clause applied. That task is no mean feat given that the beach lies at the intersection of land and water, which are subject to radically different property rights regimes. The touchstone for the former tends to be exclusive rights in single

15. 1961 Fla. Laws ch. 61-246, *amended by*, FLA. STAT. §§ 161.011-161.45 (2007).

16. *See* FLA. STAT. § 161.191; *see also* § 161.151(3) (defining "erosion control line").

17. *See* FLA. STAT. § 161.141.

18. For discussion of the valuation questions, *see infra* Part IV.B.

19. FLA. STAT. §§ 161.011-161.45 (2007).

persons, while the touchstone for the latter is common and shared rights by large (and often different) groups of individuals.²⁰ Only if these common-law property rights have constitutional status does the takings inquiry make sense. If littoral rights were just a creature of the state, such that they could be created or cancelled at will, then the entire structure of littoral rights, indeed all property rights, would come tumbling down.²¹ No longer would the function of the state be to preserve and defend an independent set of property rights. Instead, it could create or displace any system of entitlements, whether on land or water, by a simple assertion of collective political will, thereby undermining one of the central features of any sound system of rights—the stability of expectations.²²

Once the definition of littoral rights is fixed, the next question is how the federal constitutional protection should apply to this form of private property. This inquiry is not one-dimensional and is typically understood in connection with other forms of government action, both federal and state, to involve at least four interlocking inquiries.²³ First, whether the state action has taken private property in light of the difficulty of defining beachfront rights to begin with. Second, whether that taking is for a public use. Third, whether just compensation has been provided for the property so taken. And fourth, whether there is some police power justification that allows the state to regulate without the payment of compensation. Justice Scalia thought that the entire case could be disposed of by accepting two related propositions, which had a Job-like quality.²⁴ In his view,

20. For a discussion of these points, see Epstein, *Playing by Different Rules*, *supra* note 8. For a comprehensive overview of the Roman and English origins of water law, see JOSHUA GETZLER, *A HISTORY OF WATER RIGHTS AT COMMON LAW* (2006).

21. See, e.g., *United States v. Fuller*, 409 U.S. 488, 493 (1973) (holding that the government did not owe compensation for grazing rights appurtenant to private land subject to condemnation when these rights were cancellable at will without cause). This issue is quite different from those raised in the companion case of *Almota Farmers Elev. & Whse. Co. v. United States*, 409 U.S. 470 (1973), in which the government owed compensation to a tenant whose improvements had value after the expiration of the current term of the lease. The interference with advantageous relations caused a loss of those residual values. It is one thing for the government to exercise its own right to terminate a relationship. It is quite another thing for it to disrupt the valuable relationships between two private parties and offer only meager compensation at best.

22. See Epstein, *Playing by Different Rules*, *supra* note 8, at 6–10 (discussing the status of collective property rights).

23. For an extended treatment of this issue, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter *TAKINGS*] (developing the comprehensive four-part test referred to in the text).

24. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2595

the law giveth by insisting that the Constitution applies to takings by the judiciary as much as it applies to takings by the legislature or the executive.²⁵ But thereafter, the law tooketh away when the supposed “avulsive” conduct of the state did not take away any rights that were part of the package of littoral rights involved in this case. I agree with him on the first point, but think that his analysis of both the underlying property rights and the Takings Clause is incorrect. Quite simply, in his view, the proposed state action was not a taking at all insofar as it did not interfere with prior expectations, so that there were no property rights to which the Takings Clause could attach.²⁶ I do not think the Florida cases that he cites are sufficient to support that contention, and believe that property rights were indeed taken. Because the Florida scheme, unlike so many others, supplies return compensation in the form of both erosion protection and the preservation of view and access, it is an open question of fact, best resolved on remand, as to whether the bundle of rights supplied is equal to or greater in value than the access and view rights that were disrupted by the Preservation Act.²⁷

II: THE PROPERTY LAW CONTEXT

A. *Land, Water, and Beaches*

It is well understood that two major branches of property law deal with water and land and that these areas of law are governed by quite different principles. The gist of the distinction is that property rights in land start with the notion of a relatively coherent body of rights in a determinate thing, which can be measured in three dimensions: space, time, and incidents of ownership. The first of these is space. The general view follows the Roman maxim, *cuius est solum eius est usque ad coelum usque ad inferos*,²⁸ such that whosoever owns land owns from the heavens above to the depths of the earth below. Under that view, all air and mineral rights belong to the surface owner, who can use or dispose of them as he sees fit. Next, property must be organized along the dimension of time. In addition to the fee simple,

(2010).

25. *See id.* at 2601 (“The Takings Clause . . . is not addressed to the action of a specific branch or branches.”).

26. *See id.* at 2615.

27. *See infra* Part IV.B.

28. Meaning, “for whoever owns the soil, it is theirs up to Heaven and down to Hell.”

property can be divided into life estates and remainders, so that different people can hold sequential interests in the same asset at different pre-appointed times.²⁹ And finally, property in land can be divided by the incidents of ownership, including possession, use, and disposition. The strong consensus with respect to property in land is to favor a set of exclusive rights so that a single owner is in a position to deal with the property to the exclusion of everyone else.³⁰ This basic position is qualified in a number of ways, but these modifications, with reciprocal easements between neighbors, are sufficiently limited so that they do not undermine the basic overall conception.³¹

Property rights in water start from the opposite direction. Whether we think of rivers and streams on the one hand or lakes and oceans on the other, property rights tend to be held in common so that large numbers of individuals have access to a body of water in different ways, but over which no one person has exclusive rights.³² Quite simply, the property arrangements that are most conducive to the efficient use of land are wholly inappropriate for water. At the same time, however, the complexity of water rights is such that no single system of shared or common use makes sense for all the places in which water is used. Variation across systems is a given and it is these differences that have to be accommodated in connection with the constitutional protection of property rights. In this regard, the received wisdom is that the state defines the rights that the Takings Clause then protects under a set of constitutional tests and standards that are decidedly a matter of federal common law.³³

The beach, of course, lies at the crossroads between land and water. In most cases, the size of a beach tends to be relatively

29. For the standard account of future interests, see THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (1984); for its evolution, see A.W.B. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986).

30. As in Blackstone's oft-stated dictum of real property: "That sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *2, discussed in Epstein, *Playing by Different Rules*, *supra* note 8, at 51–52. For the overemphasis of exclusivity in the bundle of rights, see *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and also, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

31. For a discussion of implicit in-kind compensation in this connection, see TAKINGS, *supra* note 23.

32. For the relationship between private and common property, see Richard A. Epstein, *On the Optimal Mix of Common and Private Property*, 11 SOC. PHIL. & POL. 17 (1994).

33. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2597 (2010).

constant, but its location can shift back and forth as a result of climatic changes, both large and small. The basic logic of beach formation is easy enough to understand. Water runs back and forth over land. On the ocean, the beach is extensive in low tide and is far less so in high tide. As the water rushes back and forth, no vegetation can take root, so the beach is sand and rock. But, the vegetation creeps down to the high-water line. If some exogenous shock pushes the water higher up, the vegetation dies and a new beach establishes itself. If the water level drops, the vegetation pushes outward and the beach retreats seaward. With rivers and lakes the mechanism for movement of the banks or beach could be somewhat different. It is quite easy to see how the changes from the spring melt to the summer drought can change the size of a river, and how the constant forces of nature can easily change the direction of its flow. The boundaries of beachfront property therefore raise profound issues that do not arise with respect to most plots of land.

B. Customary Rights and Common Law

The key challenge to state property law is to find a set of mechanisms to mediate the different regimes for land and water that come together on the beach. These problems are very old and the solutions to them were customary long before any state legislature could address the matter at hand. The practices involved, though, were not local customs, which necessarily vary from place to place to fit Blackstone's definition of "particular customs, or laws, which affect only the inhabitants of particular districts."³⁴ These local customs are of immense importance. Their distinctive features, however, often present serious problems of proof, which are discussed at length in David Bederman's excellent article on the subject.³⁵ It was well understood that these particular customs could vary freely across districts, without any evident rhyme or reason.³⁶

Those local customary rights, however, are *not* what are referred to in dealing with the general rules that govern the intersection of public and private rights at the beach. The principles involved in

34. 1 WILLIAM BLACKSTONE, COMMENTARIES *74.

35. David Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996).

36. See 1 BLACKSTONE, *supra* note 34 ("[P]articular counties, cities, towns, manors, and lordships were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large.").

dealing with these nationwide or universal practices were far broader and did not depend on specific proof of particular practices, over a long period of time, in a given locale, by a specific set of persons. In dealing with these practices, Blackstone looked to “general customs; which are the universal rule of the whole kingdom,”³⁷ for which no individualized proof of custom was required.

There is a substantial glitch, however, in this effort to paint a seamless web between local customs and the common law, which did not pass unnoticed. Judge Buller wrote: “How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom.”³⁸ The key question is whether it is possible in principle to overcome that perceived gap. The task is not easy. With respect to particular customs, virtually every case requires particular proof of the practice dating back a long time, which often enmeshes a case in such difficult issues as to the geographical extent of the supposed custom, the individuals who are bound and benefited by it, and the countless issues of dedication and prescription.³⁹ Answering these questions requires a court to establish appropriate burdens of proof on each of these matters of material fact. The general common law labors under none of these limitations. Any custom that is universal does not have any limited geographical extent, but applies anywhere and everywhere. Since it is said to be universal, there is no need to find some magic start date by which time the custom must have been solidified. The clear implication is that cut-offs of this variety no longer matter.

37. *Id.* at 66.

38. *Fitch v. Rawling*, 2 H. Bl. 393, 398, 126 Eng. Rep. 614, 617–18 (C.P. 1795) (Buller, J.), discussed in Bederman, *supra* note 35. Bederman also cites *Earl of Coventry v. Willes*, 12 W.R. 127, 128 (Q.B. 1863), which asserted a custom that the public was entitled to view a horse race from its perch on a private manor. The ground given to reject that claim was that “the rights possessed by the Queen’s subjects generally are part of the general law of the land, and not the customs of a particular place.” The truth, however, is that even if one treated, in line with Blackstone’s remark, the common law as a supercustom, this claim was in its very formation so particularistic that it would have to be rejected on its individual merits in the absence of any *per se* rule.

39. *See* Bederman, *supra* note 35, at 1414. Prescription usually refers to situations where a particular individual obtains some easement over the land of another. Dedication usually refers to the situation where the public at large gains a similar right. With easements, the various elements of continuous and open use have to be satisfied by one person. With dedication, the public is a shifting group of individuals, so that extensive use by a fluctuating class of individuals allows the benefits to go to members of the public who have never entered the property at all.

Yet, there has to be a flip side to the problem. The requirements for proving a local custom are onerous, which makes sense given the observable variations at that level. But there is no reason to impose similarly strict requirements on universal customs, whose powerful common features generate a dominant solution that, as an empirical matter, no one is really prepared to contest. The durability of the practice is its strongest calling card. If everyone does it this way, why quarrel even if you do not understand how the common practice is put together? To the modern functionalist mind, this slavish devotion to tradition is, if anything, a source of condemnation. But for most traditional writers, the reference to universal custom slipped imperceptibly into another mode of address that seems archaic and stilted to the modern era. The broad notion of universal practice is treated as part of the *ius naturale*, or those rights given and defined in accordance with nature. This natural law strand makes no appearance whatsoever in any of the opinions of the Supreme Court in *Stop The Beach Renourishment*,⁴⁰ which is itself quiet testimony to the extent that the natural law thinking of earlier ages has fallen into disrepute.

III: PROPERTY AND THE *IUS NATURALE*

Historically, matters were quite different from the way that they appeared to the Supreme Court. There is little doubt that the entire body of law that related to the intersection of land and water was treated as part of the *ius naturale*.⁴¹ The centrality of this concept is evident from the opening passages in both Gaius's and Justinian's Institutes, which pick up on the same theme. Thus, for Gaius, the lay of the land is set out in the opening passage of his Institutes:

All peoples who are ruled by laws and customs partly make use of their own ius, and partly have recourse to those which are common to all men; for what every people establishes as ius is their own and is called the ius civile, just as the ius of their own city; and what natural reason establishes among all men and is observed by all peoples alike, is called the ius gentium, as being the ius which all nations employ. Therefore the Roman people partly make use of their own ius, and partly avail themselves of that common to all men, which matters we shall explain separately in their proper

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

41. See GETZLER, *supra* note 20, at 65–71, 129–40 (describing Roman law and the “substantive nature of water rights” and the “triumph of natural-right analysis” in riparian doctrine respectively).

place.⁴²

In dealing with this passage, it is important to note several points. The first is the appeal to natural reason—although *naturalis ratio* is better translated as the reason of nature—which suggests that a transcendent justification for law does not depend on the vagaries of local customs. Cognitive skills and deductive argument seem to suffice. It is equally important to note that, by referring to reason, the natural lawyers denied that these rules were established in an arbitrary fashion by judicial decisions. Instead, they were thought to be the result of a process of reason that allows these rules to be “common to all men.”⁴³ On this view of the world, general reason, not the peculiar dictates of the Florida Supreme Court, is the source of law. Thus, the reason of nature should instruct the Florida Supreme Court on how to deal with these issues.

Accepting this view of the subject, as it was surely accepted at the time of the Founding,⁴⁴ Justice Scalia cannot just dismiss the claims for compensation raised in *Stop the Beach Renourishment* solely on the ground that the Florida cases (which he over-reads in any event) are dispositive to the problem at hand. Indeed, the very treatises to which he refers stress time and again that the rules with respect to alluvion and avulsion are governed by the natural law and not by any form of local custom.⁴⁵ The 1904 Farnham treatise, for example, contains

42. G. INST. 1.1. The parallel passages in Justinian are found in J. INST. 1.2.1. The Latin for the law of nations is *ius gentium*, and for law the Latin is *ius*. Thus, the Latin of the quoted passage reads:

[I. De iure civili et naturali.] 1. Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: Nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur. Quae singula qualia sint, suis locis proponemus.

43. See G. INST. 1.1.

44. The tradition is most evident in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Self-evidence is yet another variation on universal custom. Note that natural rights play little role in the United States Constitution, which is a compact between states, but the logic was evident in state constitutions of the time. See, e.g., MASS. CONST. of 1780 art. I (“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”).

45. See HENRY PHILIP FARNHAM, LAW OF WATER AND WATER RIGHTS 324 (1904) (“When it is determined that a separate parcel of land is accretion or alluvion, it is the property

references to rights that are *jure naturae*, by the right of nature.⁴⁶ “The right to future alluvial formation or batture is a vested right, inherent in the property itself, and forming an essential attribute of it, resulting from natural law in consequence of the local situation of the land.”⁴⁷ Elsewhere, that same treatise says, in criticism of some state-law cases, that “the stream is created by nature, and man has no right to destroy it.”⁴⁸ Instructively, that treatise also states that the state has never attempted to avoid its obligation to provide compensation when it so interfered with water rights “to dispose of the land in front of its grantees of shore land because ‘the attempt to make such grants is calculated to render titles uncertain, and derogate from the value of natural boundaries, like streams and bodies of water.’”⁴⁹ The appeal to natural law was likewise made in Lewis’s treatise, where he quotes at length from the decision of the House of Lords on the question of “whether a riparian proprietor on the banks of a tidal navigable river had any rights or natural easements similar to those which belong to a riparian proprietor upon a non-tidal stream.”⁵⁰ In ways that differ from the modern American law on the navigation servitude, that question was answered in the affirmative so that the riparian rights survived. The Lord Selborne squarely rested his decision on natural law by noting that “[t]he rights of a riparian proprietor, so far as they relate to any natural stream, exist *jurae naturae*, because his land has, by nature, the advantage of being washed by the stream”⁵¹

This extensive reliance on the natural law dates back to Roman times, where the laws of alluvion and avulsion were part of the natural law as defined by Gaius and Justinian in their respective Institutes. These classical texts, moreover, do not at any point treat these forms of property as though they are owned by the state. Rather the term is that they are “public,” which refers to a system that guarantees all persons open access, not to a system of state-owned properties like public buildings and amphitheatres.⁵² In this regard, it is instructive to

of the owner of the bank to which it forms, the same as though it had always existed there. This is the rule recognized by the law of nations.”)

46. *Id.* at 111, 280, 294.

47. *Id.* at 330 n.8. Batture refers to “deposits along the shore of the Mississippi river.” *Id.* at 330.

48. *Id.* at 613.

49. *Id.* at 316 (quoting *Hardin v. Jordan*, 140 U.S. 371, 381 (1891)).

50. JOHN LEWIS, *LAW OF EMINENT DOMAIN* 89 (Chicago: Callaghan & Co., 1888).

51. *Id.* at 90 (quoting *Lyon v. Fishmongers Co.*, 1 App. Cas. 662, 682 (1876)).

52. For the difference, see J. INST. 2.1.1–3, contrasting the sea and the shore, which are open to all, with those things that are said to belong to the corporate body, like theaters and

quote from Gaius to see how the matter was perceived.

(70) Land acquired by us through alluvion also becomes ours under the same law. This is held to take place when a river, by degrees, makes additions of soil to our land in such a way that we cannot estimate the amount added at any one moment of time; and this is what is commonly stated to be an addition made by alluvion, which is added so gradually as to escape our sight.⁵³

(71) Therefore, if the river should carry away a part of your land and bring it to mine, that part will still continue to be yours.⁵⁴

(72) But, if an island rises in the middle of a river, it is the common property of those who possess land on both sides of the stream; but if it is not in the middle of the river, it will belong to those who have land on the nearest bank of the stream.⁵⁵

There is a lot that can be learned from these simple passages. Let us start with alluvion, move on to *occupatio* and *accessio*, and then turn to avulsion, which is only addressed in Justinian, who found (correctly) that Gaius was incomplete on this point.

A. Alluvion

First, in the key passage, “the same law” refers to the law of nature, which Gaius had elaborated on in preceding sections of his Institutes that were devoted to showing how the natural laws on occupation allowed individuals to take title to land, wild animals, and chattels, each with its own peculiar variations, based of course on the nature of the type of property acquired.⁵⁶ Since these rules are part of the law of nature, there is no mention here of any particular source of law or any particular custom that creates the rights in question. There is, however, the clear implication that the rules are followed by just about everyone, so that one test of their rationality is their commonality and durability. It is not a formal justification of *why* the rules make sense, but an instructive test that can be applied to indicate that they do work well. The constant shift between natural reason and rules common to all men makes sense.

racecourses. The key point is that rights of exclusion make perfectly good sense for the latter, where the rights to exclude are functional, but they make no sense with the former.

53. G. INST. 2.70.

54. *Id.* at 2.71.

55. *Id.* at 2.72.

56. *See id.* at 2.66–69 (describing property rules over animals and land). For the parallel passages in Justinian, see J. INST. 2.2.1–19.

This is doubly true in this context because, with respect to the natural modes for the acquisition of property, no formal devices (such as the Roman *mancipatio*—a formal conveyance obsolete by the time of Justinian)⁵⁷ are needed to explain how title is obtained. The want of formality is what tends to distinguish the natural law from the civil law. Thus, the natural law will posit marriage as a natural relationship, but then leave the ceremonies for marriage to the civil law. Similar rules apply with respect to contracts and conveyance. There is, accordingly, far less reason to expect any local variation in the natural modes of acquisition.

Second, Gaius explains that the rules on alluvion apply to those incremental adjustments to ownership that are too small to “estimate” at any point in time.⁵⁸ He offers no systematic argument on behalf of that critical proposition. Rather, in line with the work by most natural law theorists, both he and Justinian tend to rely on dogmatic assertions of the way things are without offering any detailed explanation of why they remain that way.⁵⁹ It does not follow, however, that we cannot find any explanation for the rules in question that makes sense, in our time as well as in theirs.

With respect to alluvion, the explanations draw from a useful mix of common sense and basic economic theory. On the former issue, boundary disputes in ancient times were, if anything, far more important than they are today, where it is possible to describe land by metes and bounds and to protect any land title by state action. The easiest way to define boundaries is to say that “my plot runs down to the river,” which is just the way that everyone, everywhere, describes the situation in ordinary speech. Hence, it is easy to see the customary ways in which the norm was established.

That everyday statement also contains the seeds of profound economic wisdom. As a practical matter, that sentence should not be rendered false if the river bank itself moves by small increments that can barely be observed. It adds to the stability of possession that these random perturbations of a given equilibrium point do nothing to alter the ownership of the land. The opposite position could easily result in having the same point on the earth’s surface count as the boundary line between two riparians even if it moves to the middle of the river.

57. For a description of how *mancipatio* worked, see G. INST. 1.119. These rules also applied for the conveyance of land, slaves, and certain herd animals. *Id.* at 1.120.

58. G. INST. 2.70.

59. *See, e.g.*, G. INST. 2.70–78; J. INST. 2.1.20–25.

The constant geographical position could separate the former riparian from the river by a sliver of land too small to be viable economically. Clearly, two riparians are better than one, or perhaps even none. This is not one of those situations where fine calipers are needed to measure the gains or losses from choosing the right rule for a situation that is defined by topology, not politics. The alluvion rule is universal precisely because of the winning combination of sensible property rights and low administrative costs.

B. *Occupatio and Accessio*

The Roman law of *occupatio* involves the natural modes of acquisition of things that were previously unowned. The law of *accessio* arises when two things owned by separate individuals are to some extent combined into a single whole, which thereafter gives rise to the question of whether to undo the union, divide the ownership, or pay compensation to one side for the loss of its rights.⁶⁰ Those rules do not work well with respect to an island that arises in the middle of the stream, belonging to either or both riparians depending on its exact location. The key point is not how those disputes are likely to be resolved. Rather, it is that the creation of the new land does not create any claim for the “state,” which is nowhere mentioned in this account of how ownership rights are assigned. Essentially, it gets rid of the rule of first possession that normally applies to unoccupied land and limits the universe of potential takers for the land to the riparians on both sides of the river, conceivably more than one on each side.

Clearly these rules have to be modified to some extent to deal with littoral lands, where there is only one shore and not two banks. The modifications in question, however, should not go to the question of incremental changes by the beach because the same considerations at work in the riparian context carry over with equal force in this context. Access to the ocean is the critical variable and there is no reason for it to be disturbed by these incremental movements in the shore. To be sure, these are often more extreme in many locations than are movements in the banks of the river, but the size of the variance does not look to be the decisive feature, except to this extent: If the movement of the ocean boundary is so extreme that an entire plot of land is wiped out, the abutting land now becomes riparian

60. For the basic rules, see BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1976); for the explanation of how and why these works work, see RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 67–70 (1995).

land, subject to the same rules on alluvion. If the land that washed away is somehow magically restored in anything like its original form within a short period of time, the new littoral owner could perhaps be demoted again to inland status. A question of this sort, however, is not likely to generate anything close to the same consensus as the original basic rule that allows a riparian or littoral owner to maintain his access to a river or lake in the face of any small fluctuations of the location of the river, stream, ocean, or lake.

The position of riparian and littoral owners also differs with respect to the case of new land. For littoral owners, new land could arise at an extensive distance from the shore, so that recognizing the littoral owner's presumptive claim to that distant land seems far weaker than the comparable claims of riparians for an island that emerges in the middle of the river. In light of these physical realities, the rule changes such that the ownership of the island, according to Justinian, belongs to the first party to occupy the land.⁶¹ But he does not follow the general rules governing ownership of land islands that lie within rivers, which is, as he notes, the much more common occurrence.⁶² In these cases, there is little benefit from letting a third party gain access to small slivers of property that are more efficiently divided between the two riparian owners. One vital point, however, is the common feature of both these rules. The state does not enjoy any greater rights in the littoral context than it does in the riparian one. Any new island is fair game for any taker. It does not in any way, shape, or form become the property of the state. Nor need it, because the first possession rule does not require any state office for its implementation, in sharp contrast to a land or patent registry, which is necessarily a creature of the state.

Thus far I have not discussed the short passage in Gaius's *Institutes*, Book II, Section 71, which deals with land that has been dislocated from its original perch and carried downstream.⁶³ That

61. J. INST. 2.1.22.

62. *Id.* ("When an island is formed in the sea, which rarely happens, it is the property of the first occupant; for before occupation, it belongs to no one. But when an island is formed in a river, which frequently happens, if it is placed in the middle of it, it belongs in common to those who possess the lands near the banks on each side of the river, in proportion to the extent of each man's estate adjoining the banks. But, if the island is nearer to one side than the other, it belongs to those persons only who possess lands contiguous to the bank on that side. If a river divides itself and afterwards unites again, thus giving to any one's land the form of an island, the land still continues to belong to the person to whom it belonged before."). Note that Justinian offers the correct solution to the problem of the divided river.

63. G. INST. 2.71.

passage is clarified by the slightly longer discussion in Justinian, which notes that the removed soil remains the property of its original owner so long as it is in a free (i.e., unattached) state. Quite simply, the Roman rules (and ours) do not think that the movement of one thing onto the land of another by natural forces is sufficient to transfer ownership. Usually, a voluntary transaction is required. Thus, no one would think that a roof uprooted by a storm would become the property of the person on whose land it eventually landed. That roof would remain the property of the owner, who might be required to bear the costs of its removal if he wished to reclaim ownership. The distinctive feature with respect to land is that the rules on ownership change when it is no longer possible to simply return the thing to its original owner.⁶⁴ Thus, Justinian provides that “[i]f, however, it remains for long united to your neighbor’s land, and the trees, which it swept away with it, take root in his ground, these trees from that time become part of your neighbor’s estate.”⁶⁵

This rule makes eminently good sense for two reasons. First, the process of taking root is not instantaneous, such that once the trees take root it is quite sensible to apply some inchoate notion of an individual waiver or statute of limitation to bar the action for return. Second, the return of the property makes no sense because it would necessarily result in a diminution of property value, which, from an ex ante perspective, does not work to the advantage of any riparian. To be sure, it might well be possible to introduce some notion of compensation for the additional land, but that would be exceedingly difficult to determine. In addition, compensation would not serve any useful social function in this context. The land in question was taken by forces of nature, so that these cases do not raise the serious moral hazard associated with the taking of land (for public purposes, we hope) by government parties. In those circumstances, an explicit price mechanism via a just compensation requirement makes perfectly good sense as a constraint on government appetites to acquire land

64. *Id.*

65. J. INST. 2.1.21. The parallel to the rules of *accessio*, which govern the combination of one thing out of the inputs of two people, cannot be overlooked. See G. INST. 2.72–79 (treating these natural modes of acquisition just after the discussion of riparian rights); see also J. INST. 2.1.25–34, (treating natural modes of acquisition just after the discussion of riparian rights). Note that in Gaius, the discussion of natural modes of acquisition takes place after the discussion of the formal modes of conveyancing, which to the modern mind is out of chronological sequence since acquisition normally precedes transfer. The order is reversed, surely consciously, in Justinian because the abolition of *mancipatio* made it easier to take the two topics in their natural sequence.

for public projects. In these cases, however, the land movement is done by no human agency, so that the simple prompt request to allow for the return of the detached bit of land is sufficient to deal with any potential source of individual misconduct.

C. Avulsion

The situation once again shifts with avulsion. In the case of rivers, the rapid shift in location is not amenable to the solution that is used in the alluvion cases. The extent of the shift is not possible to calculate in the land and could easily cover extensive territory, so that the new course of the river runs through the land of individuals who were not riparians when the river was on its previous course. In these cases, the only sensible rule is the one adopted by Justinian:

23. If a river, entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent that their respective estates adjoin the banks. The new bed follows the condition of the river, that is, it becomes public. And, if, after some time, the river returns to its former channel, the new bed again becomes the property of those who possess the lands contiguous to its banks.⁶⁶

Once again, Justinian gets it exactly right. It is pointless to think that the old riparians could claim that status with respect to lands that they never owned. Hence, the sensible solution is to treat, by operation of law, the new set of riparians as owners of the land as it runs down its new course. The abandonment of the old riverbed then raises the question of ownership, and here the Romans took the correct position that the land was divided between the two adjacent parties.⁶⁷ In taking that view they necessarily rejected the view that the newly dried land could be taken by the first possessor. Smart. What possible use is there in a long thin strip of land under separate ownership? The automatic rule leads to reduced uncertainty and cleaner property lines. By taking this position, Justinian necessarily rejected, yet again, the view that the state could make any special claim to this property, especially because the rules were developed before the advent of the state.

66. J. INST. 2.1.23.

67. *See id.*

D. Littoral Rights

The same problem cannot arise for littoral rights, but variations on the theme can. For example, if a violent storm cuts off some portion of an owner's land from the remainder, there is no reason why he should not continue to own what he did before, while the new channel is public water just as it would have been if nothing were there. Likewise, if the waters inundate the land so that it disappears under public waters, the land is lost to its original owners. In dealing with the problem of inundation from rivers, Justinian again takes the correct position that once the waters retreat into the natural channel, the land reverts to its original owner. The solution is less clear when the oceans or lake wipe out littoral land (or even inland parcels), only to restore some fraction of it years later. It may well be that, at that latter point in time, the better solution is for the new littoral owner to extend his land out to where the previous owners had held title. It is just too costly to figure out what to do with the original owner when only a tiny slice of his land resurfaces from the waters. But for these purposes, these details—on which honest differences of opinion can arise—do not matter. The two points that do emerge are these: First, the rules on alluvion and avulsion apply only to natural events, for there is no mention of any form of human intervention in any of the quoted passages from Gaius or Justinian.⁶⁸ The standard modern definitions of avulsion reflect just that settled understanding: “The removal of land from one real property and its deposit on the property of another, by the sudden action of nature (e.g., water or volcano).”⁶⁹ Second, somewhat more narrowly, “[a] sudden removal of land caused by change in a river's course or by flood.”⁷⁰ The restriction to actions by nature is critical because once human interaction is introduced the question of incentives for good and bad behavior becomes the linchpin for the overall analysis.

Similarly, the rules in question at no time allow the changes in natural topography to create a state interest in the land in question. Rather, at all points the applicable phrase is that the rivers, lakes, and oceans are *publici juris*, dealing with the right of the public to access these waters. The challenge in modern law is to apply this body of law to those cases in which state action is responsible—whether for good

68. G. INST. 2.66–79; J. INST. 2.2.1–34.

69. *Avulsion Definition*, DUHAIME.ORG, <http://www.duhaime.org> (last visited Apr. 15, 2011).

70. BLACK'S LAW DICTIONARY 157 (9th ed. 2009).

reason or bad—for the change in the flow of rivers, lakes, or oceans. It is just these issues that come into play in *Stop the Beach Renourishment*, in which Justice Scalia acutely senses that he is about to fall off an intellectual cliff. He is dead on the money when he talks about the role of a doctrine of judicial takings. Once he turns to the particulars of the case before him, however, he barrels down the wrong track to a judicial train wreck.

IV. JUDICIAL TAKINGS AND ITS MISAPPLICATION IN *STOP THE BEACH RENOURISHMENT*

A. *The Takings Clause and Judicial Action*

In dealing with *Stop the Beach Renourishment*, there is much to be said for Justice Scalia's initial proposition that the Takings Clause of the Constitution applies to judicial as well as legislative action.⁷¹ He puts the point well when he writes:

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. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.⁷²

In effect, Justice Scalia combines two powerful positions of constitutional interpretation applicable in this case.⁷³ The first is a close textual reading, which does not in this instance reference the source of the taking, but rather uses the passive voice, making it broad enough to cover all branches of government. The second approach is more functional: If the legislature and the executive can be stopped, why not the courts? Judicial decree (with an intended sense of

71. For the earlier articulation of the point, see the concurring opinion of Justice Stewart in *Hughes v. Washington*, 389 U.S. 290, 294–98 (1967). For an extended discussion, see Bederman, *supra* note 35, at 1436–38. See also Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1463 (1990).

72. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601 (2010). I ignore here the extensive dialogue between Justices Scalia, Kennedy, and Breyer on this doctrine, which is analyzed in Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199, 1203–10 (2009); Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

73. For further development, see RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE THE CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS* (2008).

arbitrariness) and legislative fiat are cut from the same cloth. That same approach was taken in connection with the First Amendment guarantee of freedom of speech in *New York Times Co. v. Sullivan*.⁷⁴ That case upended huge bodies of the state common law of defamation on constitutional grounds, even though the First Amendment applies explicitly only to acts of Congress.⁷⁵ Yet, the Supreme Court, speaking through Justice William J. Brennan, resisted any invitation to apply it only to state statutes and not to state common-law rules.⁷⁶

Justice Scalia's position on judicial takings is especially strong in light of the previous discussion, where it was assumed that the creation of these rights in the first instance did not follow from any judicial decision whatsoever, but from the long-standing common understanding of how alluvial and avulsive changes impacted the riparian or littoral rights.⁷⁷ Thus, if the consequences of alluvion were clear, any judicial decision that altered the initial balance should be regarded as a taking of private property. At that point the state must supply compensation unless it can offer some police power justification for its action. This is indeed the constant theme of the earlier treatises, which note that while the rights of riparian owners might be at the "mercy" of the English Parliament, they were strongly protected against expropriation by federal or state action.⁷⁸

The power of vested rights has been recognized with various kinds of local customs. It should apply with equal force to the universal rules on alluvion and the like, which had complete traction long before they were announced or ratified in any judicial opinion. In this regard, Hawaiian customary law, expertly analyzed by Professor Bederman, is especially dense and offers a good laboratory to test the general problem of judicial takings.⁷⁹ The key point is that this basic principle works in both directions, such that a claim of private ownership by occupation should be rejected in the face of a custom that treats transitional beach land as common property. Bederman

74. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

75. See U.S. CONST. amend I ("Congress shall make no law . . ." (emphasis added)).

76. *New York Times Co.*, 376 U.S. at 265.

77. See *supra* Part III.

78. See FARNHAM, *supra* note 45, at 613 (using the term to state that even where property rights are completely at the "mercy of Parliament, a local body supplying its district with water has no power other than that given by statute to alter the flow of the water of a stream, although the alteration causes no sensible damage to riparian proprietors").

79. Bederman, *supra* note 35, at 1426–34.

points first to *In re Ashford*,⁸⁰ in which the littoral owner sought to register title to the land located between the vegetation line and the high-water mark—the dry beach, which in Hawaiian goes under the name “me ke kai.” Yet the tradition on this issue ran clearly in the opposite direction, so that this effort at private encroachment was squelched, as it should have been. The universal rule is that private occupation is not allowed for any form of property that is held in common, lest the commons disintegrate by noncooperative forms of individual behavior. At most, there are sensible practices that allow for temporary use of the beach as a refuge from storm, but none that allow permanent occupation.⁸¹

By the same token, an aggressive (mis)interpretation of custom should not be allowed to trump established property rights. The way in which this transformation can be undertaken is revealed in a discussion of three cases dealing with a profit à prendre, that is, a right to gather sticks and other small objects from the land over which another individual holds legal title.⁸² As with many local customs, the peculiarities of geography matter, for a custom like this one could never develop with respect to lands that did not offer these opportunities for collection. In dealing with these issues, the dimension of the custom is key.⁸³ In *Kalipi v. Hawaiian Trust Co.*,⁸⁴ the court began by noting that “traditional gathering rights do not accrue to persons, such as the Plaintiff, who do not live within the ahupuaa in which such rights are sought to be asserted.”⁸⁵ From this it was an easy leap to the proposition that these individuals, at the least, could not use their claims to the custom to block any development that a landowner might otherwise make of his property.⁸⁶ The people who benefited were those individuals who lived in a given ahupuaa, which is a portion of the island that is defined by the valley that starts at the top of the mountain and works itself down to the seashore.

As stated in this fashion, the local custom seems to coexist with the general common-law system of property rights, which was

80. *In re Ashford*, 440 P.2d 76 (Haw. 1968), discussed in Bederman, *supra* note 35, at 1428.

81. See J. INST. 2.1.5, (the correct translation of the Latin is “hut,” not “cottage”).

82. See Bederman, *supra* note 35, at 1417–25.

83. For the basic discussion, see Bederman, *supra* note 35, at 1426–35, from which this narrative is drawn.

84. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982).

85. *Id.* at 752.

86. *Id.*

incorporated explicitly into the Hawaiian Constitution of 1892.⁸⁷ Put in this form, the reconciliation makes good sense. These ahupuaas are of exceptional importance in Hawaiian water law. Water coming down mountainsides does not easily lend itself to distribution under a riparian system, as there are no rivers with banks. These ahupuaas define the class of individuals who are eligible to use that water, which is essential to avoid the risks of overconsumption that are always posed by any scarce resource.⁸⁸ In effect, the localization of the custom prevents an excessive surcharge on the common resource, in much the way that limiting the right to withdraw water from the river is limited to riparians for riparian use only.

By the same token, the rule has the right relationship between the profit à prendre and development rights. When land is in its idle state, the right to collect twigs and branches is of little or no inconvenience to anyone, so the custom grew up to exploit that possible source of gain. The genius of the custom is that it is never generates permanent title by prescription so that landowners are not put in the position of having to take unnecessary steps to exclude others when such actions are both expensive and counterproductive. This situation is not unprecedented in the law, for the strategy of allowing the use right while tolling the statute of limitations parallels the legal treatment to the coming of the nuisance doctrine at common law. In that setting, a person whose property is next to vacant land can make extensive use of his own property until the neighbor chooses to build, at which time the statute of limitations starts to run.⁸⁹ That configuration of rights accomplishes two objectives. First, it allows the maximum extraction of value from both parcels of land combined. Second, it prevents the statute of limitations from running until an actual conflict emerges, thereby reducing the possibilities of litigation. For courts to switch the rule around in the Hawaiian context is a great mistake. It takes the trivial rights of gathering that were traditionally subordinate to development and turns them into superior rights that may now be

87. See 1892 Haw. Sess. Laws ch. 57, 5 (codified as amended at HAW. REV. STAT. (1994)) (“The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage.”).

88. See *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985). This decision inserted state ownership where it was not needed. *Id.* at 1475. This decision, however, has not been generally approved. See *Bederman*, *supra* note 35, at 1438.

89. See generally RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY AND THE COMMON GOOD* (1998).

used to block development projects of vastly greater value. This approach gives any landowner a strong incentive to block the development of any custom at all. In contrast, the rule that allows members of the larger community a set of “fill in” rights, lasting until development starts, permits an interim use to add value to the land in ways that do not prejudice the long-term position of the landowner. The older custom is therefore efficient in the way that newly articulated judge-made rule is not. To be sure, it is always possible for any developer to try to buy back rights to development. Yet, given the inchoate group that possesses these rights, the ability to buy back the rights, in the context of a holdout, is a slim possibility.

The original sensible treatment in *Kalipi* was undercut in *Pele Defense Fund v. Paty*.⁹⁰ There the court refused to limit gathering rights to those within the ahupuaa because the claimants introduced affidavit evidence indicating that these gathering rights extended to others on the island. The evidence used was far weaker than what would be needed to satisfy Blackstone’s exacting standard for proving a local custom.⁹¹ The much more dramatic switch took place in *Public Access Shoreline Hawaii [PASH] v. Hawai’i County Planning Commission*,⁹² insofar as it inverted the relationship between the local custom and the common-law development rights by treating the profit à prendre (often held by a broad and diffuse group of individuals) as sufficient to block future development.⁹³ At this point it is difficult to disagree with the assessment of Bederman when he writes:

It is one thing (as has already been suggested) to use custom in a parcel-by-parcel examination of community rights and interests. It is quite another to use custom as a means of rewriting the jurisdiction’s general property law, and, with one stroke of the judicial brush, to declare public easements in the entirety of the state’s beaches.⁹⁴

It is, of course, not likely that any state court that has introduced such mayhem with development rights will invalidate its own judicial

90. *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992).

91. *Id.* at 1222.

92. *Public Access Shoreline Haw. [PASH] v. Haw. Cnty. Planning Comm’n*, 903 P.2d 1246 (Haw. 1995), criticized in Bederman, *supra* note 35, at 1431–35.

93. *See PASH* at 1272 (“Thus, to the extent feasible, we hold that the HPC must protect the reasonable exercise of customary or traditional rights that are established by PASH on remand.”).

94. Bederman, *supra* note 35, at 1441.

decision on constitutional grounds. Certainly, the federal courts cannot review a state-law decision on state-law constitutional grounds, but it makes good sense with respect to these general rights to treat judicial nullification of established customs as a taking under state law, which is subject to federal reexamination, just as Justice Scalia held in *Stop the Beach Renourishment*.⁹⁵ That point is especially true in connection with the *ius naturale* where there are no local uncertainties that interfere with the understanding of the underlying rights. There are a number of judicial decisions and articles that take this position.⁹⁶ The question is whether it was applied correctly to the Florida situation in *Stop the Beach Renourishment*. The answer to that question is unfortunately not, as the next section explains.

B. The Misunderstanding of Judicial Takings in Stop the Beach Renourishment

However strong Justice Scalia's decision is on the grand question of judicial takings, it misfires in understanding how the argument should proceed in the context of this particular case. His decision starts with the view that it is the holdings of earlier Florida decisions that establish the background norm against which the claim of a judicial taking must be made.⁹⁷ Justice Scalia's point reflected the way in which the case had evolved in the Florida courts. The State had argued that there could be no judicial takings because under Florida law, the littoral owner did not enjoy any protected access to the water in the first place, so that there was nothing left to take. In dealing with this challenge, Justice Scalia makes no mention of the *ius naturale* in relation to these cases. Nor does he make any effort to ask whether the Florida decisions he examines are sound. The only question that he brings himself to address is whether these earlier cases—none of which are discussed in the proceedings below—gave the State a leg up in dealing with this question.⁹⁸

Right off the bat, it is clear that he misapprehends how these rules on littoral rights should work. After his long discussion on judicial takings, he continues as follows:

95. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2609–10 (2010).

96. See Somin, *supra* note 3.

97. *Stop the Beach Renourishment*, 130 S. Ct. at 2611–12.

98. *Id.*

Two core principles of Florida property law intersect in this case. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners. . . . Second, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. . . . The issue here is whether there is an exception to this rule when the State is the cause of the avulsion. Prior law suggests there is not. In *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), the Florida Supreme Court held that when the State drained water from a lakebed belonging to the State, causing land that was formerly below the mean high-water line to become dry land, that land continued to belong to the State. . . .

Thus, Florida law as it stood before the decision below [in this case] allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership.⁹⁹

It is instructive to compare this outlook to the treatment of the same subject under the *ius naturale*. *Martin v. Busch*¹⁰⁰ is the only case that need be examined to illustrate the legal chasm. *Martin* does not explain why the state should have ownership of the land it drained. If the earlier conceptions of natural law applied, that land would be a *res nullius* or owned by the owner of the littoral lands,¹⁰¹ thereby avoiding the risk that the state could profit handsomely from its own conduct. The critical question, however, is whether the draining of the lake should be regarded as a taking of the property rights of the littoral owner. In order to answer that question, the proper approach is to put the matter this way: Suppose that the drainage in question had been worked by a private party to the detriment of the owner of the littoral land, whose property values were diminished by virtue of the loss of view on the one hand and access to the lake on the other. It is perfectly clear that anyone who dams up a river so that it does not flow by the property of a lower riparian has committed a major tort in every jurisdiction that deals with the subject. By the same token, it is hard to see how the littoral owners on a lake would have no ability to enjoin that kind of action when done by a private party, especially one who intends to occupy the land for his own use and benefit.

99. *Id.* at 2611 (citations omitted).

100. *Martin v. Busch*, 112 So. 274 (Fla. 1927).

101. *See* G. INST. 2.72.

The question then is: What difference does it make that the state does the taking? In this context, we do not have to trouble ourselves with the difference between cases that involve beaches and those that only involve land that is far removed. In each case, the only difference between the state and the ordinary private party is that the former cannot be enjoined while the latter can, so long as the taking is for a public use.¹⁰² The point of this test is to prevent the kind of dangerous political arbitrage whereby those individuals who would have to buy rights in the private context now expend energies before legislatures and planning bodies to obtain political cover that allows them to acquire these rights for nothing at all.¹⁰³ In this situation, it would be odd to say that the regulation in question is needed to prevent some abuse by the littoral landowners. It is not as though they have committed any form of common-law nuisance that their neighbors could have enjoined by right. Put bluntly, it is a case in which the state has no credible police power justification for its action.

At this stage in the argument, one can concede that emptying a lake counts as a public purpose, under any test one prepares to announce. The only question, therefore, is whether there is a duty to pay compensation. The reason for the just compensation requirement of the Takings Clause is to make sure that the coercive power of the state, which cannot be enjoined, is only used to transfer property from lower to higher-valued uses.¹⁰⁴ Forcing the state to supply compensation is the only possible way to rein in the political factions that would otherwise consume legislative and administrative branches. In some instances, it is possible to find that general statutes of uniform application create a form of in-kind compensation that dispenses with the need for cash payments between the parties. Thus, in the case of reciprocal easements that, on net, benefit each person subject to the general ordinance, the right way to think about the problem is to treat the loss of the right to build (say to the edge of a lot line) as the taking of property for which full compensation is rendered by the imposition of a like restriction on a neighbor. There is no need to belabor the intricacies of that formulation here. It is sufficient to note that none of the littoral owners in *Martin* received any sort of benefit from the draining of the lake that offset their loss

102. See TAKINGS, *supra* note 23, at 332–33.

103. For an expanded account of this theme, see Epstein, *Playing by Different Rules*, *supra* note 8.

104. See EPSTEIN, SUPREME NEGLECT, *supra* note 73, at 89–93.

of traditional littoral rights.¹⁰⁵ The decision therefore represents a howling intellectual blunder that is wholly inconsistent with the general pro-property rights vision that rests with the *ius naturale*. Why this decision should be regarded as the baseline against which the claim is measured is an unexplained mystery. Recall that Justice Scalia did say that “judicial decrees” were no better than “legislative fiat.”¹⁰⁶ If there was ever a case that was a sheer judicial decree in need of constitutional amputation, *Martin* is it.

Nonetheless, Justice Scalia shrinks away from applying that *coup de grace*. At one point, he invokes his own oft-quoted statement from *Lucas v. South Carolina Coastal Council*¹⁰⁷ that government action depriving a property owner of all “economically beneficial use of his land” is not a taking if the restriction “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”¹⁰⁸ But he never closes the loop to note that whatever one wants to say about *Martin*, it does not reach that status. There is no legal support, even in the misguided *Martin* decision, to support the view that the drainage of an inland lake should be regarded as an avulsion for which no compensation was in fact awarded. He is in fact queasy about that conclusion when he writes:

The result under Florida law may seem counterintuitive. After all, the Members’ property has been deprived of its character (and value) as oceanfront property by the State’s artificial creation of an avulsion. State-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior Florida law makes such a distinction, and *Martin* suggests, if it does not indeed hold, the contrary.¹⁰⁹

“Counterintuitive!?” A better word is horrendous. Justice Scalia’s reading of *Martin* violates every known reading of the *ius naturale* against which it should be tested. It makes far more sense in this context to knock out a malign state-court decision than it does to follow it slavishly, even though it is bankrupt on the very points that

105. *Martin v. Busch*, 112 So. 274 (Fla. 1927).

106. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (“It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”).

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

108. *Id.* at 1029.

109. *Stop the Beach Renourishment*, 130 S. Ct. at 2612.

are at issue. The matter here is not one of those fine points on which learned judges could differ in their opinion. It is just a howling mistake that Justice Scalia follows.

How, then, should he have proceeded? The sensible way is to see whether *Stop the Beach Renourishment* can be distinguished from the earlier decision in *Martin*. That exercise requires that the Supreme Court spend less time on the abstract question of whether there can be a judicial taking and more time looking at the statute itself. In this case, moreover, the differences matter. Justice Scalia held that this particular “avulsion” should be treated like a natural event, even though government agents engineered it from top to bottom. It is instructive that even *Martin* did not contain the word avulsion in its decisions. The consequence was that the state owned the land outright and in fee simple. By the logic in question, there would be nothing wrong with the state, in its role as owner of private property, deciding to exclude all others, including the former littoral owners, from the property and from building a wonderful high rise that would block the view of those same littoral owners. After all, if no property rights are taken, the state can act just like any other property owner.

It is worth noting that the Florida legislature did not entertain such grotesque ambitions for its scheme. To Justice Scalia, it could not matter at all that the statute took explicit steps to preserve rights of both access and view over the land that was subject to the state’s intervention in the case. The reason his approach is wrong, though, is that these both matter a lot. Recall that compensation for a statutory scheme could come in cash or in kind.¹¹⁰ In this case, the limitations that the state imposed on itself offer huge in-kind benefits to the former littoral owners who are now guaranteed the two key incidents of ownership normally associated with littoral land.¹¹¹ The key question, therefore, is the extent to which these furnish the needed in-kind benefits. In principle, it looks as though access and view from a distance are not as valuable as those benefits one had as a littoral owner. The picture is incomplete, however, because the creation of the erosion line offers a protection to littoral owners that may well tip the balance in favor of just compensation. Furthermore, the littoral owner loses any rights to expansion of his or her land that come with alluvion.

110. See EPSTEIN, SUPREME NEGLECT, *supra* note 73, at 49–50.

111. 1961 Fla. Laws ch. 61–246, *amended by*, FLA. STAT. §§ 161.011–161.45 (2007).

In deciding whether any landowner is hurt by this statutory intervention, four factors have to be put into the mix: (1) the loss of accretion, which has to be set against (2) the protection of land on the landward side of the barricade, (3) the preservation of easement of access, and (4) that of the easement of view. The appropriate disposition of the case, therefore, is to remand to the lower court to see how the four factors net out. On remand, the obvious difficulty is that all these owners may not be similarly situated so that some individuals are left better off than others. The best way to deal with that complication is to start with a typical landowner and see which way the balance cuts. Thereafter, each individual landowner could introduce evidence to indicate that his position is worse or more vulnerable than those of his neighbors. The State could introduce evidence on the other side. My own guess is that the State will fare fairly well under this calculation, which shows ironically that a careful combination of the right definition of property rights with the correct eminent-domain analysis can lead you to the right place.

V. JUDICIAL TAKINGS WRIT LARGE

Thus far I have argued that the application of the doctrine to judicial takings should curb actions such as those taken by the Florida Supreme Court in cases like *Martin v. Busch*. One serious objection to adopting a doctrine of judicial takings is that it might lead to the unfortunate state of affairs where every switch in state common-law rules could lead to a federal constitutional challenge.¹¹² To be sure, the possibility of that extravagant reading cannot be dismissed on a priori grounds. But, by the same token, it is important to stress just how narrow a rule is needed in order to pick off cases like *Martin* without granting federal courts the position of a council of revision on steroids over state laws.

Ironically, the best way to understand the appropriate balance is to generalize from the distinction between alluvion and avulsion. The Supreme Court should only intervene in those cases that look like avulsions—radical deviations from established practice that are made without rhyme or reason. In this case, the transformation was complete. The standard rules of avulsion never allowed for man-made changes.¹¹³ The moral hazard from such a rule was too great. That

112. See, e.g., Dogan & Young, *supra* note 4.

113. See *supra* notes 68, 69, and accompanying text.

certainly applies in *Martin*, where state intervention resulted in giving the state uncontrolled fee ownership of the lakebed. The striking feature about the case was that it equated a situation where there was no moral hazard—avulsion—with those cases where the risk of moral hazard is greatest—deliberate state action from which the government profits and littoral owners lose.

This last observation offers some clue as to how best to attack the question of judicial takings. Begin with those cases where the risks of misbehavior are greatest. That approach is taken with respect to political action, and one line of cases where that is undoubtedly true involves the situation where the government has an interest in the outcome of the case. Nearly 50 years ago, Professor Joseph Sax faced just this question in seeking to work out what he thought to be appropriate limits for the takings doctrine by asking such questions as whether the abolition of the privity rule in product liability cases, or the defense of charitable immunity more generally, should count as takings.¹¹⁴ From his perspective, the correct answer to both these queries is sharply in the negative because he thinks that the critical distinction in this area is that between arbitral and entrepreneurial rules:

The rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.¹¹⁵

It is worth examining both the uses and limitations of this distinction. On one side, it makes sense to cast a suspicious eye on government activities that enhance the government's position, as took place in *Martin*.¹¹⁶ Here, the case falls securely on the less problematic side of the line and compensation could be paid to those parties hurt by this particular rule, given that in each case the dollars owed are triggered not just by the passage of legislation, but by the concrete decision to drain a particular site. The difficulties, however, emerge on the other side. The traditional accounts of the police power did not

114. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 51 (1964).

115. *Id.* at 63.

116. See *Martin v. Busch*, 112 So. 274 (Fla. 1927) (where the state is awarded ownership of the land it has drained).

extend to any and all efforts in which the government sought to adjudicate disputes between private parties. Rather, it extended only to those cases in which the government sought by appropriate means to advance the “health, safety, morals, or general welfare,” of the population, which is far narrower, but which receives no mention in the Sax account.¹¹⁷

The consequences of this distinction are substantial. Using this definition of police power, decisions like *Lochner v. New York*¹¹⁸ suddenly become credible when it can be shown that the decision to impose a ten-hour maximum work-day statute was intended to benefit unionized bakers at the expense of their non-union opponents. At this point, the statute was declared an illegal labor statute and struck down accordingly. Now let us suppose, as I believe, that the earlier decision in *Lochner* was far sounder than the subsequent judicial decisions that spelled its demise. The next question is: Should the United States Supreme Court act differently on this matter if the ten-hour work day was declared to be state policy by a judicial decision that equally upset the ordinary common-law rules on freedom of contract? I see no reason to accept the distinction. To writers like Professor Sax, the point hardly matters because they would never allow a legislature to strike down this sort of law. But if the freedom of contract is allowed to regain its status as a real constitutional principle, the issue of judicial takings has to be faced. In this regard, moreover, it is instructive to note that both the abolition of the privity rule and of charitable immunity are suspect precisely because in each case the rule was applied in such a fashion that blocked any effort to contract away from the rule.¹¹⁹ That issue is one that far transcends this discussion, but suffice it to say that if the legislative version of the action passes constitutional muster, then the judicial version passes muster as well. The modern rational basis test as it applies to a wide range of property and contract regulations does not raise this question today.

117. See Sax, *supra* note 114.

118. *Lochner v. New York*, 198 U.S. 45 (1905).

119. For products liability, see *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (blocking the use of disclaimers as unconscionable in implied warranty actions brought by nonpurchasers of the product), and *President & Dirs. of Georgetown Coll. v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942) (Rutledge, J.). I explore the boundaries between tort and contract on these questions in Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, Article 6, 3 J. TORT LAW (2010) (defending charitable immunity in consensual, but not in stranger, cases).

Yet, in principle, surely it should. To return to Sax's formulation, it is always risky to use the pronoun "its" as a way to describe government action.¹²⁰ As a brute fact of nature, all actual decisions are made by either individuals or groups of individuals. There is therefore a real risk that one side in any partisan battle can seize the power of the state and turn it to its end. Thus, the situation in cases like *Stop the Beach Renourishment* would hardly improve if the lakebed were given to some designated private developer once the water was removed from it. It is therefore incumbent as a matter of first principle to look at the major forms of redistribution that judicial decisions can work between private parties. At this juncture, the old line between alluvion and avulsion helps show the way. If the doctrinal changes introduced by judicial decisions are incremental and do not unfairly favor one class of actors over another, they should normally be allowed to pass. Thus, a change in the parole evidence rule to allow in more or less evidence does not put the judicial thumb on the side of either landlords or tenants. The rule may be wise or foolish, but the sensible response is to let it pass because there is no obvious tilt in its application. Indeed, from the *ex ante* perspective, there is reason to hope that the new change leaves all parties better off.

In those cases where there is an abrupt change that works in one direction, however, a much closer level of scrutiny ought to apply. This should be the case, for example, when a well-established statute of limitations opened up in ways that benefit only one side, which was the case with respect to those many statutes that lift the protection of the statute of limitations on lapsed cases in such hot-button areas as criminal prosecution of child abuse.¹²¹ The same logic should apply to lifting the statute of limitation by legislation for civil actions brought by private parties. I see no reason why that result should differ if the state court decided to lift the statute of limitations of its own motion. So understood, it seems that the proper scope of the judicial takings doctrine is dependent on the ability to mirror the decisions used to evaluate legislative or executive decisions achieving the same end. In both contexts, every effort should be made to avoid interfering on small adjustments that have no clear distributional consequences. It is

120. For an illustration of the dangers, see *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988), where customary tribal claims over public lands were dismissed on the ground that the government could do what it wanted with "what is, after all, its land."

121. See, e.g., *Stogner v. California*, 539 U.S. 607, 632–33 (2003) (striking down by a five-to-four vote under the Ex Post Facto Clause to the United States Constitution a state statute that removed the protection of the statute of limitations for criminal prosecutions of child abuse).

not, in my view, sufficient to invoke the doctrine of judicial takings to show that the case law on a difficult point such as the scope of the fair use privilege in copyright should trigger the application of this doctrine, if only because there is no secure natural law basis that undergirds the creation of that elusive privilege. What is really needed, therefore, is a massive affront to established doctrine of the sort found in *Stop the Beach Renourishment*.

VI. WHY THE BREAKDOWN OF PROPERTY RIGHTS?

At this point, the question arises: How it is possible to get such poorly reasoned decisions like *Stop the Beach Renourishment* in the Supreme Court? In this instance, it is hard to attribute the serious mistakes in the case to any ideological division. Even if the usual conservative/liberal split arises on the question of whether judicial takings are cognizable in federal court under the Takings Clause, there is nothing about the outcome or analysis of the case that shows Justice Scalia to be an ardent defender of the property rights to which, in the end, he attaches no real weight. In this instance, I think that there are two chronic modern mistakes that lead to the result. First, the Supreme Court has an unnecessary level of nominalism in dealing with the definition and enforcement of property rights. Second, the Court has no real appreciation of how a systematic theory of takings works except in the most simple of contexts. I have discussed this issue exhaustively elsewhere,¹²² and thus will only hit the high points here.

To see why, it is instructive to discuss for a moment two cases that Justice Scalia cited without discussion for the apparently innocent proposition that “state law defines property interests, including property rights in navigable waters and the lands underneath them.”¹²³ The two cases, *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*¹²⁴ and *United States v. Cress*,¹²⁵ in fact, represent quite a difference in world views. *St. Anthony Falls* involved two operators of dams and sluices for the use of the water within a navigable river for their own power plants.¹²⁶ The state of Minnesota, by legislation,

122. See Epstein, *Playing by Different Rules*, *supra* note 8.

123. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2597 (2010) (citations omitted).

124. *St. Anthony Falls Water Power Co. v. St. Paul Water Comm’rs*, 168 U.S. 349 (1917).

125. *United States v. Cress*, 243 U.S. 316 (1917).

126. *St. Anthony*, 168 U.S. at 353.

authorized another company to divert the water from the Mississippi for use in its business, to the detriment of the defendant below.¹²⁷ The United States Supreme Court denied the two plaintiffs any injunctive relief, holding, in effect, that the state had within its power the ability to define property rights as it saw fit within a navigable river so that the takings claim was out of place.¹²⁸ Under the approach that I developed in this article, that decision is wrong, given that the government is not entitled to order, without compensation, any diversion that a private party could not commit by itself.

Cress involves actions by the federal government and thus necessarily had to deal with actions that were authorized under the Commerce Clause with respect to the operation of an interstate river.¹²⁹ In dealing with this issue, Justice Mahlon Pitney took the view that I defend here and refused to allow the recognition of the navigation easement to snuff out the property rights of ordinary riparians, whether they are located on a navigable or nonnavigable river.¹³⁰ That decision was, for all intents and purposes, overruled in Justice Robert Jackson's highly influential but ultimately facile decision in *United States v. Willow River Power Co.*,¹³¹ which was explicit in its view that the state has untrammelled power to define property rights in navigable and nonnavigable rivers and thus is allowed to engage in works on a navigable river that removed from an upper riparian, in this instance, on a nonnavigable river, the right to its head of water.¹³² The decision rested on the key assumption that property rights were highly malleable. In Justice Jackson's view, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."¹³³ But what is needed here is not a stirring declaration of the limits of private property rights, but a concrete explanation of exactly how to determine which economic interests are property rights and which are not, which Justice Jackson never supplied. Needless to say, the *ius*

127. *Id.* at 354.

128. *Id.* at 367.

129. *See Cress*, 243 U.S. at 319 (where the states' authority to establish property laws is subject to Congress's authority to regulate navigable streams for the purpose of commerce).

130. *See id.* at 321.

131. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

132. *See id.* at 511.

133. *Id.* at 502.

naturale did not figure in any of these calculations and reflections.

In effect, *Willow River* rejects the two premises that make *Cress* the only intelligent modern decision dealing with navigation easements. First, *Cress* refuses to allow either legislatures or states to just define away property rights that fall comfortably within the existing categories.¹³⁴ The contagion quickly spread beyond these water law cases. It is no coincidence, for example, that Professor Sax, in dealing with a wide range of government regulations, quoted just this passage in his effort to insulate all sorts of changes in the law governing private relationships from constitutional oversight.¹³⁵ In his view, the decision stood for the proposition that any “mere diminution” in value should be the source of compensation from the state.¹³⁶ But that is not the point of contention here. In all private settings the standard rule is that competitive injury is not actionable, even—make that especially—for “established firms” that are unaccustomed to competition.¹³⁷ Nor is it any surprise that Justice Jackson’s dictum was extended to land-regulation cases. Indeed, in his ill-conceived decision in *Penn Central Transportation Co. v. City of New York*,¹³⁸ Justice William Brennan relied on just that decision to rule that the vested air rights under New York state law did not have any weight in supporting a requirement of compensation for a landmark-preservation law that prevented the construction of a tower over Grand Central Station.¹³⁹ Does anyone think that a judicial declaration that it is no longer possible to create or protect air rights in New York does not count as a judicial taking?

All these cases make a common error. Use of the words “private property” in the Takings Clause is clear evidence that the Framers did not regard the institution as subject for degradation by legislation or judicial administration. They were all firmly in the natural law camp and none of them, as was common at the time, thought that there was any deep cleavage between the dictates of natural law and the general welfare of the public at large. The modern legal realism simply disregards those conceptions. If, as I have argued here, the institutions of property that were battered yet again in *Stop the Beach*

134. *Cress*, 243 U.S. at 329.

135. See Sax, *supra* note 114, at 51.

136. *Id.*

137. For a discussion of how this plays out, see Richard A. Epstein, *Property Rights, State of Nature Theory, and Environmental Protection*, 4 N.Y.U. J. L. & LIBERTY 1 (2008).

138. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978).

139. See *id.* at 136.

Renourishment have real firmness and highly desirable social properties, then the legal nominalism of the United States Supreme Court comes at a high price. The newly indefinite property rights open the way to political intrigue that leads to extensive dissipation of social wealth in pointless factional intrigue. At this point, we can only wonder: Why does it matter if the Supreme Court labors hard to establish a doctrine of judicial taking if it mangles its application in the cases that matter most? It is hard to write intelligently about the constitutional protection of private property without a deep and accurate knowledge of the subject—an expertise that is not in great supply in the United States Supreme Court.