

EVERY GRAIN OF SAND: WOULD A JUDICIAL TAKINGS DOCTRINE FREEZE THE COMMON LAW OF PROPERTY?

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ABSTRACT

In Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, a plurality of the U.S. Supreme Court endorsed the proposition that the Takings Clause of the Fifth Amendment might operate as a constraint not only on executive and legislative action, but also on judicial decisions. In a federal system in which property rights are established almost exclusively by state law, and in which the meaning of state law is determined by state courts, the notion of judicial takings raises several difficult questions. The question that is the province of this Note is whether a doctrine of judicial takings might somehow inhibit the development of the common law of property in state courts. This Note identifies two principal mechanisms by which that inhibiting effect might occur. First, the Court might insist on enshrining an authorized definition of constitutional property with certain approved, substantive features rather than simply leaving the content of property rights to be defined by state law. Second, the Court might ostensibly leave the development of property law to state courts while nevertheless adopting an overly aggressive posture in reviewing state property-law decisions: it might, in other words, be swift to hold that a state court decision had affirmatively changed, rather than merely explicated, the state law of property. This Note concludes that although the first possibility is nominally foreclosed by the Court's commitment to positivism, when reviewing especially difficult or novel property cases the Court may nevertheless be tempted to patch together a definition

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of property that borrows from the traditional substance of the common law. And although the second possibility is not an implausible one, Stop the Beach Renourishment suggested that plaintiffs in judicial takings challenges should bear the burden of establishing the prior existence of the allegedly extinguished property right. That suggestion, this Note argues, may ultimately preserve a great deal of interpretive freedom for state courts in adjudicating less-settled questions of property law. The Court's choices in these delicate areas will ultimately dictate whether judicial takings either preserves or imperils the common law of property.

INTRODUCTION

The Takings Clause of the Fifth Amendment¹ has been described as “a last lonely bulwark of property rights.”² It is, at bottom, an obstinate limit on the government’s ability to alter private-property entitlements without shouldering the burden of repayment.³ But the clause’s meaning and operation are complicated by the fact that property rights within the constitutional system are understood to be largely a function of state law.⁴ Given the accepted role of the state courts in defining state law,⁵ and given that even the most cautious property-rights advocates acknowledge the capacity of state common law to change over time,⁶ the question naturally announces itself: Might a state court interpretation of state property law venture so far afield from established precedent as to constitute a “taking” of property in its own right? In *Stop the Beach Renourishment, Inc. v.*

1. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

2. *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1212 (Cal. 1998) (Brown, J., dissenting).

3. See, e.g., Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1449 (1990) (asserting that the Fifth Amendment serves to “limit the degree to which legislative and executive bodies can reshuffle property rights without compensating injured property holders”).

4. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 487 (6th ed. 2009) (“The cases take the view that, in general, the question whether a ‘property’ interest exists is governed by state law.”); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 917–22 (2000) (discussing the ascendancy of the Supreme Court’s reliance on state law to define property).

5. *Murdock v. City of Memphis*, 87 U.S. 590, 611–12 (1874).

6. See, e.g., James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 ECOLOGY L.Q. 1, 23–24 (2008) (recognizing some flexibility in the articulation of the common law but arguing for a “demand-side” approach informed by social custom rather than a “supply-side” approach dictated by policy preferences).

Florida Department of Environmental Protection,⁷ decided in 2010, a plurality of the Supreme Court responded in the affirmative.⁸ Judicial takings, once a topic upon which scholars only speculated,⁹ suddenly emerged as a live field of inquiry.

Notwithstanding the plurality's firmness in recognizing judicial takings, *Stop the Beach Renourishment* inspired no small degree of confusion as to whether the concept might eventually be endorsed by a majority of the Court¹⁰ and as to what form a judicial takings doctrine might assume in that event.¹¹ This Note strives to bring some organization to the discussion by focusing on a specific problem raised by *Stop the Beach Renourishment*: the prospect that a judicial takings doctrine might inhibit the ongoing development of the common law of property in state courts. Critics have raised this issue in response to the plurality opinion without engaging in a great deal of elaboration.¹² As this Note emphasizes, the concern over freezing the common law does have a substantial genealogy within the Court's jurisprudence, one that makes the accusation especially germane to the plurality's exposition of judicial takings.¹³ The ambition of this Note is to assess the merits of that accusation more thoroughly.

Part I sketches a brief doctrinal pedigree of judicial takings, with a special eye trained on the potential of a judicial takings doctrine to inhibit the development of the common law of property. First, Part I.A seeks to define the central problem with greater precision. It

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

8. *See id.* at 2601 (plurality opinion) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.")

9. *See* Thompson, *supra* note 3, at 1451 ("Whether the takings protections constrain the judiciary in the same manner that they restrict the other branches of government is a crucial question today.")

10. *See* Richard Ruda, Essay, *Do We Really Need a Judicial Takings Doctrine?*, 35 VT. L. REV. 451, 451 (2010) ("There is . . . no need for the Supreme Court to adopt a new takings doctrine that substantially alters the federal-state balance by making federal courts the arbiters of state property law."); Daniel L. Siegel, Essay, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 460 (2010) ("[I]t is highly doubtful that on closer examination a majority of the current Justices would ever embrace the doctrine.")

11. *See* Robert H. Thomas, Mark M. Murakami & Tred R. Eyerly, Essay, *Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches*, 35 VT. L. REV. 437, 442 (2010) (proposing "a roadmap for analyzing judicial takings claims")

12. *See* Timothy M. Mulvaney, 120 YALE L.J. ONLINE 247, 261 (2011), <http://yalelawjournal.org/2011/2/18/mulvaney.html> (arguing that extending judicial takings to cover the adjudication of rights between private parties would "freeze[] evolution of the common law of property absent compensation"); Siegel, *supra* note 10, at 465 ("[A] judicial takings doctrine would ignore the evolving nature of the common law.")

13. *See infra* Part I.A.

styles the problem as a conversation between Justice Scalia and Justice Stevens that originated in the Court's 1992 decision in *Lucas v. South Carolina Coastal Council*,¹⁴ and it further explains why the conversation had a natural forum in the pages of *Stop the Beach Renourishment*. Part I.B then presents the procedural history and the various opinions from *Stop the Beach Renourishment*.

In Parts II and III, this Note engages with two basic ways in which a judicial takings doctrine, if indeed adopted by the Court, might freeze the common law of property. Part II focuses on what is perhaps best described as the substantive task of identifying property. It inquires whether the Court might be willing to enshrine a specific normative definition of property as a constitutional baseline in takings cases by giving recognition to certain kinds of common-law property principles but not to others. Part II suggests that "property" in the Takings Clause is likely to continue to be defined by state positive law, but that the Court may reserve some body of general common law as a definitional failsafe. Part III, by comparison, seeks to ascertain what procedural approach the Court might take in evaluating judicial takings claims regardless of how property is substantively defined. Using *Stop the Beach Renourishment* as an imperfect guide, it inquires into what extent, and under what conditions, the Court might be read to permit state courts to modify or reinterpret common-law principles of property without triggering the Fifth Amendment's compensation requirement. The plurality's discussion contained mixed signals: some of the Justices seem to counsel a deferential approach, whereas others might be read to encourage judicial discipline.

The two categories of analysis represented by Parts II and III will almost certainly overlap in places. Underlying each of them, after all, is the sensitive challenge of devising a path that will both preserve the Takings Clause as a meaningful feature of the Constitution and honor the state courts' position as the final expositors of state property law. Vexing though that challenge may be, a judicial takings doctrine that does not attempt to resolve it is liable to resemble a "bewildering mess,"¹⁵ as neither litigants nor state courts will have any reliable means of predicting exactly when a commonplace property dispute

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

15. James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997) (summarizing the confusion over the Court's regulatory-takings jurisprudence).

might rise to the level of a constitutional claim.¹⁶ At the very least, this Note aims to illuminate some of the tensions that will predominate in any nascent judicial takings regime, in the modest hope that the future architects—or excavators—of such a regime might do their work by a brighter candle.

I. A DOCTRINAL PEDIGREE OF JUDICIAL TAKINGS

On their face, the opinions in *Stop the Beach Renourishment* disclose significant disagreements among the Justices about the potential operation of the Takings Clause on judicial action. Those opinions, and indeed the broader history of the case, are worthy of attention in their own right. But exactly what the notion of judicial takings might mean for the future of the common law of property cannot fully be appreciated without first visiting an earlier exchange.

A. *The Fear of Freezing the Common Law*

Nearly twenty years prior to *Stop the Beach Renourishment*, in *Lucas*, the Court first gave formal recognition to the categorical rule that the Takings Clause requires compensation whenever a regulation denies a landowner “all economically beneficial or productive use of land.”¹⁷ The specific regulation challenged in *Lucas* was a South Carolina law that prohibited the erection of habitable structures on beachfront property seaward of a line fixed by the designated state agency.¹⁸ The South Carolina Supreme Court concluded that the statute effected no taking of beachfront property, and therefore required no compensation of beachfront property owners because it simply proscribed a harmful or noxious use of the land, thereby falling well within the accepted scope of the state’s police power.¹⁹

16. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2619 (2010) (Breyer, J., concurring) (cautioning that the plurality’s position might spur a multitude of constitutional challenges to state court rulings).

17. *Lucas*, 505 U.S. at 1015. As the Court acknowledged, this categorical rule was a departure from the “essentially ad hoc, factual inquiries” that had long been understood to precede any requirement of compensation under the Court’s prior takings jurisprudence. *Id.* (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)) (internal quotation mark omitted).

18. *Id.* at 1008–09.

19. See *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 900 (S.C. 1991) (“[T]he fact remains that the Supreme Court has time and again held that when a State merely regulates use, and acts to prevent a serious public *harm*, there is no ‘taking’ for which compensation is due.”), *rev’d*, 505 U.S. 1003 (1992).

Justice Scalia, writing for the *Lucas* majority, responded to this conclusion by attaching an important corollary to the Court's newly adopted per se rule: when a government regulation prohibits all economically beneficial use of land, the government may avoid compensating the landowner only by showing that the landowner did not enjoy any right to undertake that use in the first place.²⁰ That showing, Scalia's opinion noted, must be supported by reference to whichever "background principles of the State's law of property and nuisance" already imposed substantive limitations on the landowner's title.²¹

To a dissenting Justice Stevens, the *Lucas* Court's reliance on the ability of background principles alone to limit compensation under the Takings Clause was misplaced.²² The mere fact that a government regulation renders impermissible what may have been a permissible use of property under the previous state of the law, Stevens contended, should not by itself create a basis for compensation under the Takings Clause.²³ Rather, Stevens's dissent emphasized the principle that state governments, in regulating private property rights, ought to be afforded some flexibility to respond to new social emergencies and to serve the evolving needs of the public.²⁴ The principal transgression of Justice Scalia's majority opinion, according to Stevens, was that it "[froze] the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."²⁵ Lest that folly escape the appropriate measure of condemnation, Stevens did not hesitate, in language borrowed from Justice Marshall, to invoke the specter of *Lochner v. New York*,²⁶ a decision redolent of a jurisprudential era

20. *Lucas*, 505 U.S. at 1027.

21. *Id.* at 1029.

22. *See id.* at 1069 (Stevens, J., dissenting) (contending that legislatures "must often revise the definition of property and the rights of property owners").

23. *See id.* at 1068 ("One must wonder if government will be able to 'go on' effectively if it must risk compensation 'for every such change in the general law.'" (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922))).

24. *See id.* at 1069 ("More than a century ago we recognized that 'the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.'" (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877))).

25. *Id.* at 1068–69.

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

“when common-law rights were also found immune from revision by State or Federal Government.”²⁷

The tenor of Justice Stevens’s dissent in *Lucas* made all the more noteworthy his absence from the deliberations in *Stop the Beach Renourishment*, a decision in which Stevens took no part.²⁸ Although all eight participating Justices agreed that the Florida Supreme Court had not violated the Takings Clause by deciding against private-property owners in their challenge to a state erosion-control statute,²⁹ Justice Scalia’s plurality opinion took the significant step of asserting that a judicial decision might conceivably amount to a taking within the meaning of the clause.³⁰ The plurality’s willingness to recognize judicial takings occasioned some trepidation from Justices Kennedy³¹ and Breyer,³² who penned separate concurrences. But neither concurring opinion was quite so strident in evaluating Scalia’s arguments as to sound Stevens’s prior alarm against “freez[ing] the State’s common law.”³³

27. *Lucas*, 505 U.S. at 1069 (Stevens, J., dissenting) (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring)).

28. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2613 (2010). Although Justice Stevens gave no explanation for his recusal and no recusal motion was filed, before argument one of the amici curiae discovered and circulated documents indicating that Stevens owned a condominium property in Fort Lauderdale “within a renourishment zone similar to the property at issue in the case.” Tony Mauro, *Behind Justice Stevens’ Recusal in Florida Case*, THE BLT: THE BLOG OF LEGAL TIMES (Dec. 4, 2009, 1:41 PM), <http://legaltimes.typepad.com/blt/2009/12/behind-justice-stevens-recusal-in-florida-case.html>.

29. *Stop the Beach Renourishment*, 130 S. Ct. at 2613 (plurality opinion).

30. *See id.* at 2602 (“[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.”).

31. *See id.* at 2613 (Kennedy, J., concurring) (contending that the Court need not determine “whether, or when, a judicial decision” might violate the Takings Clause and noting “certain difficulties that should be considered” before recognizing judicial takings).

32. *See id.* at 2618 (Breyer, J., concurring) (“[T]he plurality unnecessarily addresses questions of constitutional law that are better left for another day.”).

33. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1068 (1992) (Stevens, J., concurring). Justice Kennedy seemed merely to suggest that the Due Process Clause, U.S. CONST. amend. XIV, § 1, would be better suited than the Takings Clause to guard against judicial encroachments on private property. *See Stop the Beach Renourishment*, 130 S. Ct. at 2614 (Kennedy, J., concurring) (“The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power.”). His concurrence was, at most, ambivalent toward the proposition that either state legislatures or state courts require any extraordinary degree of flexibility in shaping common-law background principles of property. *See id.* (“State courts generally operate under a common-law tradition that allows for incremental modifications to property law, but ‘this tradition cannot justify a *carte blanche* [*sic*] judicial authority to change property definitions wholly free of constitutional limitations.” (quoting Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 435 (2001))). Justice Breyer, for his part, was at

Several considerations suggest that, had Justice Stevens been given the chance to reprise that alarm in *Stop the Beach Renourishment*, he would have done so. For one thing, the majority opinion from which Stevens had so vigorously dissented in *Lucas* itself foreshadowed Justice Scalia's future acknowledgment of judicial takings: in a final footnote in *Lucas*, Scalia cautioned that a state court could not be so expansive in its interpretation of background property-law principles as to depart from "an *objectively reasonable application* of relevant precedents."³⁴ Additionally, Stevens's *Lucas* dissent was rhetorically indebted³⁵ to Justice Marshall's concurrence in *PruneYard Shopping Center v. Robins*,³⁶ a case in which Marshall argued that extending Takings Clause doctrine to elevate the common-law right of exclusion above the right to free speech would potentially "freeze the common law" and plunge the Court back into the days of *Lochner*.³⁷ When Scalia defended the notion of judicial takings in *Stop the Beach Renourishment*, he cited *PruneYard* as accommodating the very proposition that Marshall rebelled against: that an uncompensated judicial revision of private property rights might be struck down as violating the Takings Clause.³⁸ That Stevens might have condemned Scalia's reasoning on the same grounds first staked out by Marshall is, therefore, not implausible.

But a reprisal of Justice Stevens's *Lucas* dissent would have been pertinent to *Stop the Beach Renourishment* in the far more fundamental sense that the concept of judicial takings, if it is indeed to subsist as a cognizable feature of the Court's Fifth Amendment jurisprudence, will ultimately demand some resolution of the proper role of the common law in defining the background principles of property. After all, *Lucas* spoke only to the ability of legislatures to

least somewhat solicitous of the possibility that a judicial takings doctrine might entail "federal interference in matters that are primarily the subject of state law," but he did not appear to endorse any particular view of how mutable private property rights ought to be. *Id.* at 2618–19 (Breyer, J., concurring).

34. *Lucas*, 505 U.S. at 1032 n.18.

35. *See id.* at 1069 (Stevens, J., dissenting) ("Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development." (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring))).

36. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

37. *Id.* at 93 (Marshall, J., concurring).

38. *See Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality opinion) ("[The *PruneYard* opinion's] failure to speak separately to the claimed [judicial] taking . . . certainly does not suggest that a taking by judicial action cannot occur, and arguably suggests that the same analysis applicable to taking by constitutional provision would apply.").

reshuffle property rights within the existing framework of entitlements defined by the prevailing configuration of the law. A statute of the kind passed by South Carolina could constitute a taking only after courts had accepted that the regulated use or interest actually was property.³⁹ As commentators note, both lower courts and government defendants have increasingly focused their analysis on background principles in post-*Lucas* takings cases. If a plaintiff enjoys no property right in a regulated interest, the litigation will be defeated at an early stage and the opportunity for a more involved inquiry into whether and to what extent the regulated interest was indeed taken will be foreclosed.⁴⁰

But the question of exactly what should qualify as a background principle after *Lucas*, and, by extension, which types of inherent limitations might circumscribe property ownership without the need for compensation, has not been the object of any widespread theoretical consensus beyond a few elementary propositions.⁴¹ To

39. See *Lucas*, 505 U.S. at 1027 (“[W]e think [the state] may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” (emphasis added)); see also Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 325 (2005) (“*Lucas* thus elevated the task of defining the relevant property interest—what some have referred to as the ‘denominator’ question—to the role of a threshold inquiry.” (footnote omitted) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967))).

40. See Blumm & Ritchie, *supra* note 39, at 328 (suggesting that this “threshold inquiry” allows courts to “reduce the amount of information that they must process” and enables the government to obtain early dismissals of takings challenges); see also *id.* at 335 & nn.80–86 (collecting cases in which both state and federal courts have been receptive to government takings defenses based on background principles).

41. The right of exclusion, at least, seems to be a central and uncontroversial feature of most accounts of property in the takings context. See, e.g., Merrill, *supra* note 4, at 970 (“The statement . . . that the hallmark of property is the right to exclude others should be adopted as part of the definition of property for takings clause purposes.”); Walston, *supra* note 33, at 404 (“In takings cases, the Supreme Court has held that ‘property’ is not a monolithic economic interest, but instead is a ‘bundle of rights,’ the most important of which is the ‘right to exclude’” (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *PruneYard*, 447 U.S. at 82; *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))). Although most commentators appear to accept the notion that traditional common-law rules of nuisance will provide inherent limitations on title, scholars are by no means in agreement as to how susceptible those rules should be to modification or expansion by either courts or legislatures. Compare, e.g., Blumm & Ritchie, *supra* note 39, at 336 (“Because nuisance law is continuously expanding, new knowledge concerning the value of particular resources may bar liability for acts which have not historically been considered to be common law nuisances.”), and Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 316 (1993) (proposing that the capacity of common-law nuisance to change

recognize the Takings Clause as supplying an independent constraint on the antecedent judicial definition of property, then, might be to thrust upon federal courts the novel and delicate responsibility of discriminating between those portions of state court jurisprudence that effect some affirmative change to the state's property law and those portions that represent merely an explication of the law. One conceivable result, especially if federal courts were to carry out that duty aggressively, could be the instillation in state judiciaries of a greater reluctance to disturb or depart from established tenets of the traditional common law, in much the same way that Justice Stevens feared *Lucas* would dissuade legislatures from any attempt to revise existing property entitlements.⁴²

Stop the Beach Renourishment thus invites reflection on how a judicial takings doctrine might implicate Justice Stevens's concern about freezing the common law. Justice Scalia's opinion did not engage with this concern directly, but his discussion offered a helpful, if incomplete, roadmap as to how the Court might choose to resolve some important preliminary questions if it were to adopt a theory of judicial takings more wholeheartedly.⁴³ Before the problem can be embarked upon in earnest, a brief exposition of *Stop the Beach Renourishment* itself will be useful for understanding the types of circumstances under which judicial takings claims might occur.

over time might *itself* be considered a background principle), with Huffman, *supra* note 6, at 27 (“[I]t is a distortion of the common law process to suggest that state courts and legislatures can modify or abandon established common law principles in the name of present day notions of the public interest and public rights.”). Nor do commentators entirely agree as to whether inherent limitations on property rights might be derived from alternative sources of law in addition to common-law nuisance doctrine. Compare, e.g., Walston, *supra* note 33, at 402–03 (“[T]he *Lucas* Court appeared to embrace a general distinction between state common law—which normally provides ‘background’ principles of law—and state legislative enactments, which normally do not.”), with Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 6–7 (1996) (arguing that background principles should not be limited to the common law and may include statutes passed prior to a landowner's acquisition of property).

42. See *supra* note 25 and accompanying text (discussing Justice Stevens's fear that *Lucas* would erode the legislature's traditional power to revise the law governing the rights and uses of property).

43. One line in the plurality opinion that might have contained the germ of a fuller response to the criticism that a judicial takings doctrine would freeze the common law was Justice Scalia's comment that “in any case, courts have no peculiar need of flexibility.” *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (plurality opinion).

B. Anatomy of a Claimed Judicial Taking

Ironically, the claimed judicial taking in *Stop the Beach Renourishment* began not with an initial defeat for private-property owners, but with an initial victory.⁴⁴ Florida's Beach and Shore Preservation Act⁴⁵ authorizes local governments, upon permission from the state's Department of Environmental Protection, to initiate erosion-control projects along beachfront properties.⁴⁶ These projects frequently entail the addition of dry sand to permanently submerged coastal lands, which are traditionally held in public trust by the state—as opposed to the land above the mean high-water line, which is owned by the private-property owners.⁴⁷ In such situations, pursuant to statute, Florida's Board of Trustees of the Internal Improvement Trust Fund established an “erosion-control line,” which was typically identical to the preexisting high-water line.⁴⁸ The erosion-control line, once fixed by the Board, continued to define the boundary between the state's land and the private-property owner's, even if the state's addition of dry sand to the previously submerged lands moved the actual high-water line seaward: property upland of the erosion-control line remained in the hands of the property owner,

44. *See id.* at 2600 (majority opinion) (describing the initial determination by the Florida District Court of Appeal in *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, 27 So. 3d 48 (Fla. Dist. Ct. App. 2006), *quashed sub nom.* *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008), *aff'd sub nom.* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010), that the plaintiff's waterfront-property rights had been taken).

45. Beach and Shore Preservation Act, FLA. STAT. ANN. §§ 161.011–45 (West 2006).

46. *Stop the Beach Renourishment*, 130 S. Ct. at 2599; *see also* FLA. STAT. ANN. § 161.041(1) (requiring “any person, firm, corporation, county, municipality, township, special district, or any public agency” to obtain a permit from the Department of Environmental Protection before undertaking erosion-control projects); FLA. STAT. ANN. § 161.101(1) (providing that the state “may authorize appropriations to pay up to 75 percent of the actual costs for restoring and nourishing a critically eroded beach,” but noting that the local government “shall be responsible for the balance of such costs”); FLA. STAT. ANN. § 161.161(1) (“The department shall develop and maintain a comprehensive long-term management plan for the restoration and maintenance of the state's critically eroded beaches . . .”).

47. *Stop the Beach Renourishment*, 130 S. Ct. at 2598; *see also* Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 936 (Fla. 1987) (acknowledging Florida's adoption of “the common law rule that a riparian or littoral owner owns to the line of the ordinary high water mark on navigable waters”).

48. *Stop the Beach Renourishment*, 130 S. Ct. at 2599. The Court and the parties simply assumed for the purposes of the litigation that the erosion-control line in *Stop the Beach Renourishment* had been set at the preexisting high-water line. *Id.* at 2599 n.2.

and any newly created land on the seaward side of the line belonged to the state.⁴⁹

The plaintiff was a nonprofit corporation comprising beachfront landowners in the city of Destin whose properties abutted areas designated for an erosion-control project.⁵⁰ After an unsuccessful administrative claim, the plaintiff brought a takings challenge in Florida's District Court of Appeal, claiming that the state's application of the Beach and Shore Preservation Act to the landowners' properties, without compensation, would unconstitutionally deprive them of two littoral rights that the plaintiff argued had been traditionally conferred on beachfront landowners by Florida's common law: the right to enjoy any additions to their land caused by the accretion of dry sand and the right to maintain continuous contact between their property and the water.⁵¹ The appeals court agreed with the plaintiff that the statute had extinguished both of these rights unconstitutionally, and it remanded the case to the Department of Environmental Protection for the necessary eminent domain proceedings.⁵² The court also certified for the Florida Supreme Court the question of the statute's constitutionality in light of the plaintiff's takings claim.⁵³

49. *Id.* at 2599.

50. *Id.* at 2600.

51. *Id.* According to the Court, an "accretion" of sand is distinct from an "avulsion" in Florida law, in that the former refers to a process that occurs "gradually and imperceptibly—that is, so slowly that one could not see the change occurring, though over time the difference became apparent," whereas the latter describes alterations of the land caused by sudden and noticeable events. *Id.* at 2598; *see also Sand Key Assocs.*, 512 So. 2d at 936 (defining accretion as "the gradual and imperceptible accumulation of land along the shore or bank of a body of water" and avulsion as "the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream").

52. *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot.*, 27 So. 3d 48, 58 (Fla. Dist. Ct. App. 2006), *quashed sub nom. Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010); *see also Beach and Shore Preservation Act*, FLA. STAT. ANN. § 161.141 (West 2006) (requiring eminent domain proceedings if an erosion-control project "cannot reasonably be accomplished without the taking of private property").

53. The appeals court originally framed the question as an as-applied constitutional challenge. *Save Our Beaches*, 27 So. 3d at 60–61. The Florida Supreme Court rephrased the question as a facial challenge, but it limited its analysis "to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act." *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010). The state court proceedings apparently addressed the statute's constitutionality not under the federal Constitution but under the Florida constitution, which, as the Supreme Court later noted,

The Florida Supreme Court concluded that no taking had transpired.⁵⁴ In reaching its conclusion, the court relied on the crucial distinction between accretions and avulsions at Florida common law: whereas littoral property owners had always been entitled to any gradual additions to their land occasioned by the steady, sustained process of accretion, more abrupt additions or diminutions—avulsions—were understood not to alter the preexisting boundary between state-owned and privately owned property.⁵⁵ As a result, the court reasoned, Florida case law made clear that a private owner simply had no right to additions by avulsion to begin with, so the state could legally claim whatever land surfaced seaward of the original high-water line through avulsive events.⁵⁶ The addition of dry sand to submerged lands in the course of the state’s own erosion-control efforts was to be treated merely as the manmade equivalent of a natural avulsion, thereby placing the statute in harmony with traditional principles of common law.⁵⁷ As to the plaintiff landowners’ asserted right of contact between their land and the water, the court explained that this entitlement had never been recognized as a freestanding property right under Florida common law, but was simply an ancillary benefit intended to protect a littoral owner’s right to access the water, a right that the statute did not infringe.⁵⁸ Having thus satisfied itself that the Beach and Shore Preservation Act took nothing that actually belonged to the plaintiff, the Florida Supreme Court quashed the remand of the appeals court.⁵⁹

The Florida Supreme Court’s decision left the plaintiff in the awkward position of wishing to pursue its takings claim in federal court but of lacking a statute or executive action to challenge.⁶⁰ The

contains a takings clause, FLA. CONST. art. X, § 6, cl. a, similar to that found in the Fifth Amendment. *Stop the Beach Renourishment*, 130 S. Ct. at 2600 n.3.

54. *Stop the Beach Renourishment*, 998 So. 2d at 1116.

55. *Id.* at 1116–17.

56. *Id.* at 1117.

57. *See id.* (“Like the common law doctrine of avulsion, the Act authorizes the State to reclaim its storm-damaged shoreline by adding sand to submerged sovereignty lands.”).

58. *See id.* at 1120 (“[B]ecause the Act safeguards access to the water and because there is no right to maintain a constant boundary with the water’s edge, the Act, on its face, does not unconstitutionally eliminate the ancillary right to contact.”).

59. *Id.* at 1121.

60. The scenario would have more closely resembled a conventional takings claim if the Florida Supreme Court had merely upheld the erosion-control law and denied compensation *without* resorting to the rationale that the plaintiff landowners had never enjoyed their asserted property rights in the first place. In that event, the plaintiff simply would have had a ripe claim that either the statute or the state’s execution of the statute violated the Takings Clause. *Cf.*

disagreement in the state courts had been not so much over the scope or meaning of the regulation itself, but instead over whether the regulated interests met the threshold definition of property—or, more specifically, met the definition of the *plaintiff's* property.⁶¹ The plaintiff landowners' only conceivable recourse, therefore, was to argue that the Florida Supreme Court *itself* had extinguished their property rights in violation of the Takings Clause by redefining as not theirs something that previously had been theirs.⁶² Accordingly, the landowners' contention before the U.S. Supreme Court was that their right to addition by accretion and their right to direct contact with the water had been judicially eliminated.⁶³

In a decision endorsed by all eight deliberating Justices, the Supreme Court sorted through the body of relevant Florida precedents and unequivocally rejected that argument: the state supreme court's decision was a taking of neither such interest.⁶⁴ The asserted right to accretion, the Court explained, was limited by “[t]wo core principles of Florida property law.”⁶⁵ The first of these principles was that “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.”⁶⁶ And the second was that the state, not a private landowner, is entitled to any new dry land created by an avulsion seaward of the original boundary between state and private property.⁶⁷ The fact that the state's erosion-control project itself was

FALLOON ET AL., *supra* note 4, at 209–10 & n.7 (discussing the traditional ripeness requirements for takings claims and offering *Lucas*, among other cases, as an instance in which the Court has appeared to relax those requirements slightly).

61. See, e.g., *Stop the Beach Renourishment*, 998 So. 2d at 1107–09 (summarizing relevant provisions of the Beach and Shore Preservation Act); *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot.*, 27 So. 3d 48, 52–54 (Fla. Dist. Ct. App. 2006) (providing a similar outline of the statutory scheme), *quashed sub nom. Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010).

62. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2600 (2010) (“Petitioner sought rehearing on the ground that the Florida Supreme Court's decision *itself* effected a taking of the Members' littoral rights” (emphasis added)).

63. *Id.* at 2610–11.

64. *Id.* at 2613.

65. *Id.* at 2611.

66. *Id.*

67. *Id.*

the source of the avulsion in this case did not matter.⁶⁸ The right to accretion simply never entitled the plaintiff to any of the property claimed by the state under the Beach and Shore Preservation Act.⁶⁹ The Court similarly agreed with the Florida Supreme Court that the statute had not taken the property owners' right to direct contact with the water because no such right had *ever* existed.⁷⁰ Thus, to the extent that the state court's decision was "consistent with . . . background principles of state property law,"⁷¹ it had not "contravene[d] . . . established property rights"⁷² and could not be considered a judicial taking.

Justice Breyer, in a concurrence joined by Justice Ginsburg, made clear that he believed this brief consultation of Florida law was all that should have been needed to reject the plaintiff's claim; the plurality's further step of entertaining the extension of the Takings Clause to state judicial decisions, he suggested, was not just superfluous, but perilous.⁷³ To Justice Scalia and the rest of the

68. *Id.* The Court supported this conclusion with an earlier Florida Supreme Court case in which the state was held to retain ownership over a previously submerged lakebed that had dried up following the state's draining of the lake. *See id.* (citing *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927)).

69. *See id.* at 2612 ("[The Florida Supreme Court] did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied.").

70. The Court seemed to rely especially on the Florida Supreme Court's decision in *Martin v. Busch*, 112 So. 274 (Fla. 1927), for the proposition that an avulsive event, even if caused by the state itself, would not alter the preexisting boundaries between state-owned and privately owned property. *See Stop the Beach Renourishment*, 130 S. Ct. at 2612 ("Perhaps 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."). Curiously, the Florida Supreme Court had made no mention of *Martin*. *See id.* (acknowledging that "the opinion does not cite *Martin* and is not always clear on this point").

71. *Id.*

72. *Id.* at 2613.

73. *See id.* at 2618–19 (Breyer, J., concurring) (warning that the plurality's approach, if adopted by the Court, "would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law"). One doctrinal candidate for refereeing judicial takings claims, proposed by the Florida government, would be to inquire whether a state court property decision had a "fair and substantial basis," an inquiry imported from the Court's adequate-and-independent-state-grounds jurisprudence. *See id.* at 2608 (plurality opinion) (discussing the "fair and substantial basis" standard). Justice Scalia and the plurality appeared to reject this standard; Justice Breyer was agnostic. *Compare id.* ("A test designed to determine whether there has been an evasion [of a federal-law ground] is not obviously appropriate for determining whether there has been a taking of property."), *with id.*

plurality, which included Chief Justice Roberts and Justices Thomas and Alito, such a noncommittal position was a logical impossibility: one could not dismiss a judicial takings challenge without either first “knowing what standard it has failed to meet” or else disavowing the existence of judicial takings altogether.⁷⁴ Opting for the former task, the plurality explained its view that the agreed-upon absence of any judicial taking in this case ought not prevent the Court from affirming the potential operation of the Takings Clause upon state judiciaries in future cases.⁷⁵ And thus, after concluding from both constitutional text⁷⁶ and precedent⁷⁷ that the Fifth Amendment’s safeguard against takings makes no distinctions as to which branch of government performs the taking, the plurality announced what it regarded as the proper formulation: “If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”⁷⁸

The plurality’s enlistment of the Takings Clause to rein in state judicial decisions that destroy established property rights was troubling to Justice Kennedy, who, in a concurrence joined by Justice Sotomayor, contended that the same work could be done with equal effectiveness by substantive or procedural due process.⁷⁹ Justice Scalia’s opinion rejected both possibilities outright: using procedural

at 2618 (Breyer, J., concurring) (“I do not claim that all of these conclusions are unsound. I do not know.”).

74. *Id.* at 2603 (plurality opinion). Justice Breyer’s willingness to reject the plaintiff’s claim without confirming or denying the very possibility of a judicial taking was lampooned by the plurality as “reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?” *Id.*

75. *See id.* (recounting instances in which the Court has “recognized the existence of a constitutional right, or established the test for violation of such a right (or both), and then gone on to find that the claim at issue fails”).

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

77. *See id.* at 2601–02 (finding support for a judicial takings doctrine in *PruneYard* and *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)).

78. *Id.* at 2602.

79. *See id.* at 2614 (Kennedy, J., concurring) (“The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power.”). One consideration that seemed to give Justice Kennedy special pause was the possibility that the Takings Clause might permit courts to undertake otherwise egregious redefinitions of property rights so long as the compensation requirement were satisfied. *See id.* at 2616 (arguing that the idea of judicial takings “would give judges new power and new assurance that changes in property rights that are beneficial, or thought to be so, are fair and proper because just compensation will be paid”).

due process would “impose judicially crafted separation-of-powers limitations upon the States” with no doctrinal foundation for any such limitations,⁸⁰ and using substantive due process would threaten to “propel[] us back to what is referred to (usually deprecatingly) as ‘the *Lochner* era.’”⁸¹ Scalia probably had the better of these exchanges,⁸² but Kennedy’s concerns seemed tempered by an understandable hesitancy to embark on a jurisprudential tack for which few meaningful guideposts exist.⁸³ Even assuming that Scalia was correct that the Due Process Clause⁸⁴ is ill suited to serve as an antitakings instrument, at least the clause’s application to property interests is more fully developed than any existing judicial takings doctrine.⁸⁵ After all, a reasonably perceptive reader of *Stop the Beach Renourishment*’s plurality opinion may harbor some uncertainty as to what standards the Court might adopt in future judicial takings cases, beyond the bare assertion that destroying “an established right of private property” without compensation is unconstitutional.⁸⁶

Judicial takings, then, is a concept in need of some elaboration. Given the absence of Justice Stevens from *Stop the Beach Renourishment*, appraising the potential of a judicial takings doctrine to stagnate the development of the common law seems an appropriate, if slightly quixotic, task. The first respect in which such a doctrine might conceivably do so is by assigning a fixed, normative meaning to property in the first instance, literally constitutionalizing a common-law definition of property.⁸⁷ A second possibility is that,

80. *Id.* at 2605 (plurality opinion).

81. *Id.* at 2606.

82. One particularly potent sally was Justice Scalia’s remark that, under Justice Kennedy’s procedural due process proposal, “the citizen whose property has been judicially redefined to belong to the State would presumably be given the Orwellian explanation: ‘The court did not take your property. Because it is neither politically accountable nor competent to make such a decision, it cannot take property.’” *Id.* at 2605.

83. *See id.* at 2617–18 (Kennedy, J., concurring) (“It is not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by courts and commentators.”).

84. U.S. CONST. amend. XIV, § 1.

85. *See id.* at 2615 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), as demonstrative of the Court’s treatment of property rights under the Due Process Clause); *cf. Merrill, supra* note 4, at 934 (“The extensive jurisprudence seeking to define property for procedural due process purposes has no counterpart in the law arising under the Takings Clause.”).

86. *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (plurality opinion).

87. For a classic iteration of the criticism that the Court has mistakenly prescribed the common law as a constitutional baseline in various areas of its jurisprudence, including takings,

even without officially endorsing any such definition as a constitutional requisite, the Court might afford too little deference to state court interpretations of property law when deciding takings claims, especially in those hard cases in which the state-law precedents are sparse, ambiguous, or conflicting.⁸⁸ Each of these two prospects warrants separate analysis, with special attention owed to both the Court's precedent in the takings realm and the specific language employed by the plurality in *Stop the Beach Renourishment*.

II. SUBSTANTIVE CHALLENGES IN DEFINING PROPERTY: POSITIVISM WITH A COMMON-LAW FAILSAFE?

As suggested by *Lucas*'s discussion of background principles, courts evaluating takings claims will almost inevitably be forced to grapple with the question of whether the object of an alleged taking is indeed property and, if so, exactly how far the plaintiff's interests in that property originally extended.⁸⁹ This question is commonly treated as a threshold problem in a wide variety of takings cases,⁹⁰ and *Stop the Beach Renourishment* suggests that it will be routinely encountered in the judicial takings context as well.⁹¹

see generally Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987). Professor Sunstein contends that the chief sin of *Lochner* was its assumption that common-law rights represented a genuinely neutral backdrop rather than the product of legal and political judgments, an assumption that led the Court to treat any departure from common-law principles or entitlements as constitutionally suspect. See *id.* at 874 (arguing that “[f]or the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement” and that “[g]overnmental intervention was constitutionally troublesome, whereas inaction was not”). Subsequent scholarship has reexamined Professor Sunstein's central thesis, and has disputed whether the Court in the *Lochner* era actually viewed the traditional common law as an inviolable baseline. See David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 19 (2003) (challenging the notion that *Lochner* proceeded from any desire to entrench the common law as a constitutionally required status quo).

88. See Thompson, *supra* note 3, at 1532–34 (identifying and discussing “at least three types of legal indeterminacy” that may render the interpretation and demarcation of property rights more difficult under state law).

89. See *supra* note 39 and accompanying text; see also Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1639 (1988) (“Resolving the taking question . . . requires identifying a legitimate basis for choosing one definition of private property over another.”).

90. See Blumm & Ritchie, *supra* note 39, at 326–27 (pointing out that courts have conducted background-principles analyses as a threshold matter not only in cases of total loss of economic value, but also in cases of permanent physical occupation and in cases of regulatory action).

91. See *Stop the Beach Renourishment*, 130 S. Ct. at 2611–12 (summarizing the relevant background principles of Florida law that govern littoral property and finding the Florida Supreme Court's decision compatible with those principles).

Regrettably, case law and commentators have failed thus far to produce a uniform, reliable method for defining what qualifies as property under the Takings Clause.⁹² The challenge in producing such a method might be likened to that faced by Odysseus in charting a course between Scylla and Charybdis.⁹³ At one end of the spectrum lies the prospect that Justice Stevens so feared: namely, that of reading into the Constitution a single, static definition of property derived from the traditional substance of the common law.⁹⁴ At the opposite end lies the possibility of adopting a purely positivist conception of property, such that the term “property” in the Takings Clause would represent little more than a placeholder for whatever interests or entitlements a state government is willing to confer at any given time, whether through the common law or through other sources such as statutes.⁹⁵ Each extreme is accompanied by its own cluster of theoretical difficulties.

92. See Thompson, *supra* note 3, at 1523 n.277 (“It is fair to say . . . that the question of what property means in the takings context has not been rigorously analyzed by scholars and judges—despite the fact that it would seem central to any formulation of a coherent takings doctrine.”). *But see* Merrill, *supra* note 4, at 969 (arguing that the Court’s more recent jurisprudence can plausibly be read to yield “a federal patterning definition for takings purposes that would ask whether nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from specific assets” (emphasis omitted)).

93. See HOMER, THE ODYSSEY bk. 12, ll. 81–136 (Robert Fagles trans., Viking 1996) (portending the hero’s treacherous navigation between Scylla, the “yelping horror,” her many fangs “armed to the hilt with black death,” and “awesome Charybdis,” who three times a day “gulps the dark water down” before she vomits it up).

94. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 20–24 (1985) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *2) (proposing Blackstone’s formulation—under which property consists of exclusive control, enjoyment, and transferability of one’s acquisitions without any outside interference—as the most appropriate definition of property under the Constitution). As a corollary to enshrining a Blackstonian, common-law conception of property, Professor Epstein’s position would allow the exercise of the police power—and thus the exemption of the state from the requirement of compensation—only in those instances in which government action is necessary to prevent a common-law injury such as nuisance. See *id.* at 111 (“In a word, the police power gives the state control over the full catalogue of common law wrongs involving force and misrepresentation, deliberate or accidental, against other persons, including private nuisances.”).

95. See Merrill, *supra* note 4, at 949–50 (describing “pure positivism” as an entrenched legacy of legal realism and characterizing it as the proposition that “[p]roperty means whatever the nonconstitutional decisionmakers say it means, or whatever the nonconstitutional decisionmakers choose legally to protect as a ‘legitimate claim of entitlement’” (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972))).

A. *Problems with Adopting an Authorized Constitutional Definition of “Property”*

The Takings Clause does not, of its own force, foreclose the possibility that the meaning of “property” might be defined according to some fixed normative ideal.⁹⁶ Professor Richard Epstein’s preferred course, which would be to “take the meaning of private property from ordinary usage,”⁹⁷ is an elegant expression of the normative model, one whose strength proceeds from its simplicity.⁹⁸ But the matter still remains that “ordinary usage” must be determined along some lines. If originalism were to serve as the main interpretive criterion, then property might mean no more than what it meant under the common law at a certain historical moment.⁹⁹ Such an approach would almost certainly fail to extend a sufficient measure of protection to an institution whose protean nature allows it to assume as many novel configurations as human needs and ingenuity will accommodate.¹⁰⁰ If the Court instead annunciated a formulation of constitutional property without any explicit historical anchor, it might risk being seen as engaging in something resembling economic substantive due process,¹⁰¹ or, perhaps even worse, as resurrecting the discarded concept of a “federal general common law.”¹⁰²

96. See Thompson, *supra* note 3, at 1523–24 (“The available shards of history could be used to argue for either a positive definition or for a normative definition under which property would be defined by the Constitution itself.”).

97. EPSTEIN, *supra* note 94, at 23.

98. This simplicity would arguably spare the Court a great deal of time and effort in attempting to extrapolate the precise scope of property rights from state law. See Thompson, *supra* note 3, at 1524 (arguing that, under a normative definition of property, “it would be unnecessary to determine what the law was and how, if at all, it has changed,” and that instead, “[a]ny governmental action that significantly interferes with the normative constitutional image of property would raise takings concerns”).

99. Indeed, one historical account of the Takings Clause advances the position that the clause, as originally understood, actually provided *less* protection to private-property owners than subsequent takings jurisprudence did, not more. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785 (1995) (“Even after the establishment of a compensation requirement, it applied only to interference with *physical ownership*, and government routinely acted in ways that diminished the value of private property without providing compensation.” (emphasis added)).

100. See Merrill, *supra* note 4, at 945 (emphasizing the dynamic potential of property and speculating that a historically static definition would frustrate efforts to solve modern problems).

101. This notion seems to have been the basic thrust of Justice Marshall’s observations in *PruneYard*, see *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) (warning against a return to the *Lochner* era), as well as Justice Stevens’s later

The chance that a fully normative, fully prescriptive model of property would gain any traction within a judicial takings doctrine seems especially remote given the fact that positivism, at least in name, has been the ascendant principle of constitutional property since the Court's decision in *Board of Regents of State Colleges v. Roth*.¹⁰³ That case furnished the fundamental rule that property rights “are not created by the Constitution,” but rather “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”¹⁰⁴ *Roth*'s analysis was confined to the meaning of property under the Due Process Clause, but subsequent decisions such as *Webb's Fabulous Pharmacies, Inc. v. Beckwith*¹⁰⁵ and *Phillips v. Washington Legal Foundation*¹⁰⁶ have confirmed its applicability to takings cases as well.¹⁰⁷ Even *PruneYard* indicated that the Court was unwilling to commit to a strictly normative ideal of property under the Takings Clause: refusing to find a per se taking when the California state constitution's right of free speech trumped a property owner's right of exclusion,¹⁰⁸ then-Justice Rehnquist's majority opinion accorded

objections in *Lucas*, see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting) (quoting verbatim the key passage of Marshall's *PruneYard* concurrence).

102. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see also Michelman, *supra* note 41, at 319–20 (suggesting that Justice Scalia's *Lucas* decision flirted with the premise that “there is just one American background law of property and nuisance . . . that is common to the national jurisdiction and all the state jurisdictions,” but ultimately concluding that *Lucas*'s language should not be read as presenting any threat to the *Erie* doctrine).

103. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972).

104. *Id.* at 577.

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

106. *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

107. See *id.* at 164 (citing *Roth* for the proposition that “the Constitution protects rather than creates property interests”); *Webb's*, 449 U.S. at 161 (quoting *Roth*'s positivist mantra directly); Thompson, *supra* note 3, at 1524 (“When faced directly with the question of whether the takings protections embody a normative ideal of property independent of state law, . . . the Court has repeatedly responded negatively.”); see also *supra* note 4 and accompanying text. But see Merrill, *supra* note 4, at 958 (arguing that the definition of property under the Takings Clause is actually narrower and is closer to a traditional common-law formulation than the definition of property under the Due Process Clause).

108. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–83 (1980). The Court's decision in *PruneYard* appeared to address only whether the California constitution itself performed the equivalent of a legislative taking—not whether the California Supreme Court's interpretation of that constitution had so diverged from established precedent that the *interpretation* could be classified as a taking. See Thompson, *supra* note 3, at 1470 & n.89 (discussing the Court's confusion over precisely what kind of governmental action was at dispute in *PruneYard*). The plurality in *Stop the Beach Renourishment*, of course, reads *PruneYard* as leaving open the possibility that a state court decision might be enough at odds with state-law precedent as to

virtually no weight to the fact that the plaintiff's property had been subject to a temporary physical invasion.¹⁰⁹ The implication was that a state should be considered free, within reasonable limits, to adopt restrictions on property use that override traditional common-law rationales such as nuisance prevention.¹¹⁰ Even setting aside the theoretical and methodological shortcomings of a purely common-law approach like Professor Epstein's, the presumption that property is essentially a creature of positive law occupies too conspicuous a place in the Court's jurisprudence to forecast its total repeal under any potential judicial takings regime.¹¹¹

B. Hazards of the Positivist Method

If the Court has disclaimed any reliance on an entirely substantive account of property when analyzing takings claims, it has also hedged its commitment to positivism in a number of important ways.¹¹² To at least a limited extent, the very existence of the Takings Clause would appear to require the adoption of *some* neutral baseline definition of property; after all, if "property" were assumed to be an infinitely malleable construct of positive law susceptible to "perpetual legislative redefinition,"¹¹³ then it would be difficult to imagine how property could ever truly be "taken" by government regulation.¹¹⁴ Justice Marshall hinted at this problem in his *PruneYard* concurrence, immediately after airing his qualms about freezing the common law,

constitute "taking by judicial action." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion).

109. See *PruneYard*, 447 U.S. at 84 ("In these circumstances, the fact that [protesters] may have 'physically invaded' appellants' property cannot be viewed as determinative."). *But see* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982) (positing a "constitutional distinction between a permanent occupation and a temporary physical invasion").

110. Cf. Blais, *supra* note 41, at 50 & n.203 ("[S]tates, not the federal government, have traditionally established the scope and limits of private property rights . . ." (citing *PruneYard*, 447 U.S. at 84)). The question of whether a state judiciary can suddenly revise its interpretation of the state constitution and be entirely free of takings liability is, of course, a separate matter.

111. See Merrill, *supra* note 4, at 943 ("The *Roth* axiom . . . has far too much gravitational force for the Court to repudiate it entirely.>").

112. See Thompson, *supra* note 3, at 1526 (arguing that the Court's professed positivism does not align with what is really "an amalgam of positivist and normative approaches").

113. EPSTEIN, *supra* note 94, at 65.

114. See, e.g., Sunstein, *supra* note 87, at 913 ("The takings clause . . . was built on a belief in the meaning and importance of private property, and it would be difficult to read that clause in the fashion of [*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937),] without reading it out of the Constitution.>").

when he wrote that “serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way.”¹¹⁵ Carried to its extreme, the positivist view also poses precisely the opposite hazard: that of transforming practically every state-backed entitlement into a constitutionally protected property right under the Takings Clause, including a great many that never would have been recognized as property either at traditional common law or in everyday experience.¹¹⁶ The Court’s decision in *Memphis Light, Gas & Water Division v. Craft*¹¹⁷ provides just one glimpse of this hazard. In that case, state judicial precedents forbade public utilities from terminating service to a customer except for cause.¹¹⁸ Those precedents, the Court held, conferred a protected property interest upon customers in their utility services for due process purposes.¹¹⁹

Perhaps cognizant of the logical extremes of the positivist method, the Court has sought solid ground that might help to rescue property as both a meaningful and a manageable concept in the takings arena. Far from conceding the dominance of positivism, these cases have treated property as possessing discrete substantive characteristics independent of the contours of state or even federal law. To cite one notable example, *Lucas*’s establishment of a per se takings rule for the deprivation of all economically beneficial use of

115. *PruneYard*, 447 U.S. at 93–94 (1980) (Marshall, J., concurring). Justice Marshall may actually have had the Due Process Clause in mind more than the Takings Clause, *see id.* at 93 (arguing that “life, liberty, and property” must not be defined solely in positivist terms), but his point is germane to a discussion of takings nevertheless. In any event, Marshall agreed with the Court’s holding that no core constitutional rights had been abrogated. *Id.* at 94. Professor Epstein’s reasoning makes the case seem closer than the Court’s or Marshall’s opinion might suggest. *See* EPSTEIN, *supra* note 94, at 65–66 (disputing whether the freedom of speech “gives the appellee the right to appropriate the land of another for his own use, any more than the First Amendment gives a political candidate the right to use his neighbor’s telephone free of charge”).

116. One term for this phenomenon is the “positivist trap,” which Professor Thomas Merrill describes as springing up “whenever nonconstitutional law generates either too little property or too much property relative to some independent norm that is important to the Court.” Merrill, *supra* note 4, at 892.

117. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

118. *Id.* at 11–12.

119. *Id.*; *cf.* FALLON ET AL., *supra* note 4, at 488 (“[C]ould affording constitutional protection to whatever entitlement a state creates, no matter how unimportant, give rise to a flood of due process claims asserting the deprivation of quite trivial interests?”).

land might best be read as an explicit reaction against the notion that all property rights are enjoyed solely as a matter of legislative grace.¹²⁰

The *per se* rule for cases involving permanent physical occupation adopted earlier in *Loretto v. Teleprompter Manhattan CATV Corp.*¹²¹ similarly lines up on the normative rather than the positivist side of the ledger.¹²² In *Eastern Enterprises v. Apfel*,¹²³ the Court further indicated that the freedom from “severe retroactive liability” may, in some cases, constitute a property interest that is guarded by the Takings Clause.¹²⁴ In that case, the Court held that a 1992 congressional statute that required the plaintiff company to pay health benefits to workers it had employed decades earlier—despite the fact that the company had agreed to no such obligation under the original employment contracts—was a regulatory taking.¹²⁵

The holding of *Eastern Enterprises* gives reason to doubt that the infinite mutability of the positive law might ever qualify as a legitimate background principle of property rights.¹²⁶ Indeed, it seems to borrow more from a variation of Professor Epstein’s libertarian thesis that “[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property *prima facie* compensable by the state.”¹²⁷ The Court’s scrutiny of retroactive liability in the takings realm bespeaks a fundamentally normative conception of what property ownership ought to mean, one that lies somewhere outside

120. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992) (arguing that although a property owner in many settings may expect the use of his personal property to be revised or restricted by the state from time to time, even to the point of total destruction of its economic worth, real property is much too rooted in the “historical compact recorded in the Takings Clause” to be subjected to any such “implied limitation” on its use and value).

121. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

122. See *id.* at 435 (asserting that in cases of permanent physical occupation of a plaintiff’s property, “the government does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand”).

123. *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

124. *Id.* at 528.

125. *Id.* at 503–04; Merrill, *supra* note 4, at 900–01.

126. Professor Frank Michelman, writing in response to *Lucas*, speculates whether, on remand, the state court might be able to invoke the common law’s inherent capacity for change as a suitable justification for dismissing a takings claim when government action made unlawful what had previously been lawful. See Michelman, *supra* note 41, at 316–17 (imagining a possible remand decision hinging on the malleability of state property law). As Professor Barton Thompson points out, however, even before *Lucas* the Court had “never suggested that the government can protect itself against a regulatory takings claim simply by reserving the general right to reallocate property rights.” Thompson, *supra* note 3, at 1529.

127. EPSTEIN, *supra* note 94, at 95.

the currents of the positive law.¹²⁸ It is also consonant with the Court's prior disavowal of purely conditional property interests under the Due Process Clause, itself a maneuver designed to resist the corrosive dangers of all-out positivism by undergirding constitutional property with some independent content.¹²⁹

Finally, also in the due process context, the Court has sought a means to avoid generating too *much* property using the positivist route. By asserting, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,¹³⁰ that “[t]he hallmark of a protected property interest is the right to exclude others,”¹³¹ the Court announced a tenet that creates tension with *Roth*'s positivist regime, and that might even erect a bar against certain kinds of state-law entitlements that otherwise would have passed muster.¹³²

C. *The Definitional Approach of Stop the Beach Renourishment*

Against this slightly muddled jurisprudential background, some intelligible patterns can be extracted from Justice Scalia's majority and plurality opinions in *Stop the Beach Renourishment*. The first is the Court's official fidelity to positivism, announced in its opening statement that “[g]enerally speaking, state law defines property interests,”¹³³ and further advanced by its nuanced exegesis of Florida statutory and case law to determine the extent of the plaintiff landowners' antecedent littoral ownership rights.¹³⁴ A similar attitude is revealed in the plurality's refusal to follow Justice Kennedy's recommendation to use substantive due process rather than the Takings Clause to rein in judicial redefinitions of property.¹³⁵ That

128. See Merrill, *supra* note 4, at 951 (describing *Eastern Enterprises* as “endors[ing] substantive limitations on the meaning of property without making any reference at all to *Roth*'s positivist strategy”).

129. See Thompson, *supra* note 3, at 1529 n.301 (acknowledging the Court's rejection, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), of the “bitter with the sweet” thesis originally espoused by then-Justice Rehnquist in *Arnett v. Kennedy*, 416 U.S. 134 (1974)).

130. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

131. *Id.* at 673.

132. See Merrill, *supra* note 4, at 913–14 (noting the potential dissonance between the Court's reasoning in *College Savings Bank* and the positivist logic behind the “new property”).

133. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2597 (2010) (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

134. See *id.* at 2598–2600, 2611–13 (summarizing the Beach and Shore Preservation Act and parsing Florida precedent regarding the rights to accretions and avulsions).

135. See *id.* at 2606 (plurality opinion) (rejecting the use of substantive due process instead of the Takings Clause).

refusal suggests a reluctance to register any definitive pronouncements on exactly what, if any, normative image of property is required by the Constitution. If the plurality had truly been interested in erecting some preferred common-law baseline, it probably would not have been so careful to avoid the appearance of reviving a *Lochner*-style economic-libertarian approach.¹³⁶ The Court's reflexive positivism is summarized perhaps most pithily in Scalia's remark that, even if a more exotic reading of Florida cases might produce a more desirable result, the Court was not free to pursue it because "[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established."¹³⁷ In theory, then, the decision should have required nothing more than a straightforward explication of Florida precedents.

At several points in *Stop the Beach Renourishment*, however, the Court appeared to gather authority from sources beyond Florida's positive law to define the property interests at stake. When discussing the littoral owner's antecedent right to accretion, for instance, the majority opinion noted that Florida's rule is "generally in accord with well-established common law" and cited two early twentieth-century treatises on eminent domain and water rights.¹³⁸ A similar volume from the nineteenth century was employed later in this same discussion.¹³⁹ And when the Court explained that in Florida, "as at common law," avulsions do not result in changes in title, the Court cited none other than William Blackstone himself.¹⁴⁰

Although these citations do not, ultimately, do much work for the Court's analysis—Florida court decisions occupy a far greater portion of the Court's attention in *Stop the Beach Renourishment* than any learned treatises—under a purely positivist regime, such

136. The plurality's rejection of the substantive due process option may have been motivated more by the simple fact that precedent foreclosed reading economic rights into the Due Process Clause and less by a desire to flaunt its positivist bona fides. But even if the plurality's nod to the perils of "the *Lochner* era," *id.*, was only a rhetorical move, it was still a rhetorical move away from, and not toward, a normative ideal of property.

137. *Id.* at 2612 (majority opinion).

138. *Id.* at 2598 (citing 1 HENRY PHILIP FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 62 (1904); 1 JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* § 100 (3d ed. 1909)).

139. *Id.* at 2599 (citing JOHN M. GOULD, *A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND* § 158 (1883)).

140. *Id.* at 2598 (citing 2 BLACKSTONE, *supra* note 94, at *261–62).

references to general common law ought not to appear at all. The most innocuous explanation is that these sources, although not strictly necessary to decide the takings claim, do serve a useful purpose in helping the Court to check its work—that is, they ensure that the Court’s reading of Florida’s property law is not grossly aberrant from the historical arc of legal thought. A more subversive possibility, one likely to activate Justice Stevens’s alarm in *Lucas*, is that the Court might actively be using these independent common-law authorities to curb the very meaning of Florida precedent; and that, if Florida precedent actually were too dissonant with a Blackstonian definition of property for the Court’s taste, then the Blackstonian definition itself might be called upon to do work *in place of* the state’s positive law.

D. The Possibility of a Failsafe

In its efforts to define property, the Court is likely to fashion a role for independent common-law principles that falls somewhere in between active engagement and passive comparison with state-law precedents. The majority and plurality’s positivist mechanics in *Stop the Beach Renourishment*—the citation to *Phillips*, the close reading of Florida cases, the rejection of substantive due process—are simply too forthright and too convincing for any portion of Justice Scalia’s opinions to be read as demonstrating a willingness to discard the state’s antecedent rules for defining property. But judicial takings claims are most likely to arise when a state’s background principles are either ambiguous or in conflict.¹⁴¹ In such cases, if the threshold question of a plaintiff’s original property interests still demands resolution, the Court might be tempted to borrow common-law norms from outside the relevant jurisdiction as a kind of jurisprudential gap-filler.

Indeed, something resembling this approach has appeared before, in the ostensibly positivist decisions of *Webb’s Fabulous Pharmacies* and *Phillips*. Both cases involved state regulation that asserted public ownership of the interest accrued on private accounts—in the former, an interpleader fund holding the purchase

141. See Thompson, *supra* note 3, at 1531–32 (highlighting the inevitable indeterminacy of positive law and explaining that in judicial takings cases, state courts typically will not see themselves as changing the law “so much as clarifying the intent of prior cases, resolving inevitable conflicts between separate lines of cases, clearing away confusion and misunderstanding, or applying preexisting principles to new settings or conditions”).

price of an insolvent corporation,¹⁴² and in the latter, Negotiable Order of Withdrawal accounts into which attorneys had temporarily deposited their clients' funds.¹⁴³ Both cases involved state laws that yielded no ready answers to the question of who ought to own the interest.¹⁴⁴ And in both cases, the Court sought to escape the muddiness of the positive law by grasping for an old common-law chestnut: the rule that ownership of interest follows ownership of the principal.¹⁴⁵ Because the principal in each case belonged indisputably to the private parties, the Court concluded that the interest was, by default, private, and not public, property.¹⁴⁶

Webb's and *Phillips* thus raise the possibility that, in takings cases, the Court might consult the substance of some general common law, not as a true alternative to the positive law, but rather as a failsafe for those moments when positivism runs dry. How eagerly the Court might retreat to that failsafe is a separate matter, one whose resolution depends on the level of trust it is willing to place in the ability of state courts to decide novel property-law issues reliably and fairly. *Stop the Beach Renourishment* volunteers no explicit treatment of that question, chiefly because Florida law on littoral rights appeared to be neither ambiguous enough¹⁴⁷ nor divergent enough from broader common-law doctrines¹⁴⁸ to supply the Court with any reason for abandoning its official positivism. Justice Scalia's discussion does, however, offer some helpful clues for predicting how trusting the Court might be in the future.

142. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 157–59 (1980).

143. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 161–63 (1998).

144. In *Webb's*, the problem seemed to be an outright dearth of state court decisions on the matter. See Thompson, *supra* note 3, at 1538 (“[T]here was no prior state precedent addressing whether the interest at issue was private property . . .”). In *Phillips*, the situation was slightly trickier, but equally unexplored by precedent: the interest allegedly taken by the state had accrued on funds that, absent the state action being challenged, would never have been allowed to generate any interest in the first place. See Merrill, *supra* note 4, at 896 (“*Phillips* presented something of a brainteaser of an issue: whether the fruits of *X's* property that may only be enjoyed by *Y* are nevertheless the property of *X*.”).

145. *Phillips*, 524 U.S. at 165; *Webb's*, 449 U.S. at 162.

146. *Phillips*, 524 U.S. at 172; *Webb's*, 449 U.S. at 164–65.

147. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2611 (2010) (citing *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927), to illustrate that the doctrine of avulsion applies even when the state itself is the cause of the avulsion).

148. See, e.g., *id.* at 2598 (finding Florida's distinction between accretion and avulsion generally in accord with that described in 2 BLACKSTONE, *supra* note 94, at *261–62).

III. THE PROCEDURAL CHALLENGE IN REVIEWING STATE JUDICIAL ACTION: DISCIPLINE OR DEFERENCE?

As already noted, judicial takings claims, insofar as they might be cognizable after *Stop the Beach Renourishment*, are most likely to occur at the margins of the established property law, where rights as between parties are not clearly defined or understood but where the state court has nevertheless been forced to decide in favor of one party and against the other.¹⁴⁹ The crucial question for the Court in reviewing these claims—even presupposing a vigorously positivist outlook on the Court’s part—will be whether the state court decision is better read as working a genuine change in the positive law, which would amount to an uncompensated taking under the logic of the *Stop the Beach Renourishment* plurality,¹⁵⁰ or instead as simply offering an accurate, reasonable extension of the existing law to the facts at hand, which would not.¹⁵¹ Given the potential malleability of the law under a purely positivist system,¹⁵² this question will rarely be easy to answer.¹⁵³ If judicial takings cases are to be accepted and decided by the Court on any predictable or principled basis,¹⁵⁴ some

149. See *supra* note 141 and accompanying text; see also EPSTEIN, *supra* note 94, at 118 (“[L]itigation exerts powerful forces to select the most difficult cases for adjudication, no matter what the underlying standard.”). In this sense, *Stop the Beach Renourishment* may not be so typical of judicial takings claims, since it demanded little more than a parsing of precedents that were relatively plentiful and uncomplicated. See *supra* notes 147–148 and accompanying text.

150. See *Stop the Beach Renourishment*, 130 S. Ct. at 2609 (plurality opinion) (“It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislatures be free to revise pre-existing statutes that confer property entitlements . . .”).

151. See *id.* at 2610 (“A decision that *clarifies* property entitlements (or the lack thereof) that were previously unclear might be difficult to predict, but it does not *eliminate* established property rights.” (emphasis added)).

152. See *supra* Part II.B.

153. See Thompson, *supra* note 3, at 1537 (noting that the reviewing court in a judicial takings claim will “almost always have to face a claim by the state court that its new decision is within the boundaries of prior legal doctrine” and suggesting that positivism, if adopted in its purest form, will make it “exceptionally difficult to disagree with the state court”).

154. Uncertainty as to what constitutes a judicial change in the property law is likely to impose a considerable psychological burden on property holders in general. See *id.* at 1479–80 (describing the demoralization caused by “loose ends” in decisions affecting property rights). It may also disadvantage poorer or underrepresented citizens, who might be less capable of pressuring state courts to leave their property interests alone than more politically influential groups. *Id.* at 1494.

“procedural limitations or canons of deference” are required, to borrow from Justice Breyer’s concurrence.¹⁵⁵

The choice before the Court is best expressed as a tradeoff between instilling a high level of discipline in state courts in their reading of precedent and expressing a high degree of deference to those courts. Justice Scalia’s *Lucas* opinion, discussing the state court’s interpretation of background principles, seemed to stake out a middle ground. It left room for some flexibility in the development of the state’s common law—acknowledging that “changed circumstances or new knowledge may make what was previously permissible no longer so”¹⁵⁶—but it also sought to cabin that flexibility with its later insistence that the state judiciary’s application of case law must be an “objectively reasonable” one.¹⁵⁷ As discussed in this Part, *Stop the Beach Renourishment* similarly contained contrasting signals, ones that stacked up on different sides of the scale. Which signals end up being the most closely heeded may determine the Court’s future judicial takings jurisprudence, if it indeed has one.

A. *Abandoning Unpredictability*

One signal that may allay Justice Stevens’s criticism of freezing the common law is the plurality’s rejection of the plaintiff’s proposed “unpredictability” standard as the basis for knowing when a judicial taking has occurred.¹⁵⁸ That standard, borrowed from Justice Stewart’s 1967 concurrence in *Hughes v. Washington*,¹⁵⁹ would have declared as a judicial taking any state court decision that “constitute[d] a sudden change in state law, unpredictable in terms of relevant precedents.”¹⁶⁰ Justice Scalia’s objection was that this standard would be both overinclusive and underinclusive: some state court decisions might be unpredictable without eliminating property

155. *Stop the Beach Renourishment*, 130 S. Ct. at 2619 (Breyer, J., concurring). *But see id.* at 2608 n.9 (plurality opinion) (contending, in response to Justice Breyer, that the Court must make independent determinations of “state-court compliance with all constitutional imperatives” and that, in any case, the plurality’s standard for judicial takings does allow deference to state courts).

156. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992); *see also* Blumm & Ritchie, *supra* note 39, at 336 (exploring *Lucas*’s accommodation of an “evolving nuisance” takings defense).

157. *Lucas*, 505 U.S. at 1032 n.18; *see also supra* text accompanying note 34.

158. *Stop the Beach Renourishment*, 130 S. Ct. at 2610 (plurality opinion).

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

160. Brief of Petitioner at 17, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 2509219, at *17 (citing *Hughes*, 389 U.S. at 296 (Stewart, J., concurring)).

rights, and some judicial eliminations of property rights might not be unpredictable.¹⁶¹

This response displays a keen recognition of the hard legal questions with which state courts will usually be confronted at the time most judicial takings claims are conceived. After all, in the marginal property cases that are most likely to spur subsequent takings litigation, a state court will not easily know whether it is dealing with an “established right of private property”¹⁶² specifically *because* the meaning of relevant precedents is so difficult to decipher.¹⁶³ Removing the unpredictability test will likely allow the court to focus on reaching the best result in the dispute at hand, rather than forcing it to agonize over whether that result really amounts to a sudden development in light of sparse or muddled precedents.¹⁶⁴ Alternatively, the *Stop the Beach Renourishment* plurality does not stand for the proposition that all such close calls are beyond reproach; indeed, its affirmation that federal courts retain “the power to decide what property rights exist under state law”¹⁶⁵ indicates that at least some portion of state property decisions might be subjected to something approaching *de novo* review when challenged under the Takings Clause.¹⁶⁶

B. State-Level Separation of Powers?

A rather curious signal in the direction of judicial discipline comes from the plurality’s brief consideration of remedies. One of Justice Kennedy’s concerns about recognizing judicial takings was that state courts might actually revise property entitlements more aggressively because the reviewing court’s only weapon would be to mandate compensation, effectively turning the state legislature into

161. *Stop the Beach Renourishment*, 130 S. Ct. at 2610 (plurality opinion).

162. *Id.* at 2602.

163. *See supra* notes 88, 141.

164. Indeed, the plurality seemed to believe that relying on unpredictability as the sole benchmark of a judicial taking might discourage state courts from bringing needed resolution to ambiguities in the existing property law. *See Stop the Beach Renourishment*, 130 S. Ct. at 2610 (plurality opinion) (drawing a distinction between a mere clarification of the law and a judicial elimination of established property rights).

165. *Id.* at 2609.

166. The plurality opinion intimated that certain questions of state property law might simply be so difficult as to place the state court decisions effectively beyond aggressive federal review. *See id.* at 2608 n.9 (discussing the trouble with finding property rights to be “established” when state law is unclear). But it did not offer any elaboration on when those situations might be said to arise.

an involuntary underwriter for the state judiciary's revisions.¹⁶⁷ Justice Scalia disagreed: the reviewing court's response, he wrote, should be simply to overturn the offending state court decision, leaving the power to effect a compensated taking exclusively in the hands of the legislature, "where it has always resided."¹⁶⁸

Although this exchange technically bore on the question of how to redress a judicial taking, not on whether a judicial taking has occurred in the first place, the plurality's rejoinder to Justice Kennedy nevertheless bespoke an unmistakable vision of the proper assignment of functions among the different branches of government. Ironically, that vision is strikingly similar to the very approach the plurality refused to entertain under the Due Process Clause: a strict separation of state governmental authority, under which "courts cannot be used to perform the governmental function of expropriation."¹⁶⁹

Of all the potential options that might be pursued by a reviewing court upon a finding of a judicial taking,¹⁷⁰ the option advanced by the plurality is likely the *least* hospitable to the idea that courts ought to be afforded special latitude in refashioning the law to meet changed circumstances.¹⁷¹ Indeed, the plurality's attitude is far more closely aligned with the position that the Takings Clause contemplates a careful balancing of utilities by the legislature alone¹⁷² and that state courts as an institution are in no legitimate position to change the common law at all.¹⁷³ State judges might easily feel constrained in the belief that the Court favored such a view.

167. *Id.* at 2616 (Kennedy, J., concurring).

168. *Id.* at 2607 (plurality opinion).

169. *Id.* at 2605.

170. See Thompson, *supra* note 3, at 1513–22 (examining the remedies conceivably available to state courts and reviewing courts, including "automatic compensation" and "legislative choice").

171. See generally Blumm & Ritchie, *supra* note 39 (chronicling the expansion by state courts of numerous common-law doctrines—including nuisance, public trust, natural use, navigational servitude, customary rights, water rights, wildlife trust, and Indian treaty rights—to dismiss Takings Clause challenges).

172. See Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 620 (2008) ("[The Fifth Amendment's compensation requirement] disciplines government behavior by forcing taxpayers to make honest evaluations of whether they receive from acquiring public ownership a benefit commensurate with the costs that they impose . . .").

173. See Huffman, *supra* note 6, at 23 ("The common law is a formalization of custom, meant to evolve as custom evolves, not as judges' preferences change.").

C. *The Plaintiff's Burden*

Forbidding state courts to change the common law, however, is a meaningful stricture only when the law is developed enough that an observer can confidently tell when a change has been made. In areas in which the law is indeterminate, state courts are likely to reap the benefits of what is perhaps the strongest procedural signal sent in *Stop the Beach Renourishment*, not just by the plurality but by the entire Court: namely, its description of the proper burden of persuasion in judicial takings cases. The plaintiff contended that a judicial taking must be found by the Court unless the Florida government could produce some precedent that directly authorized the state to embark upon an uncompensated erosion-control project.¹⁷⁴ Disagreeing, the Court clarified that the correct formulation was precisely the contrary: the judicial takings claim would not prevail unless the *plaintiff* could show that, prior to the Florida Supreme Court's decision, the landowners had enjoyed the specific property rights that were allegedly taken.¹⁷⁵ In other words, judicial takings plaintiffs must persuade the reviewing court that the state's positive law was, essentially, unambiguous before the complained-of action—and furthermore, that it was unambiguous in the direction of investing them with intelligible property rights.

This principle, if honestly applied in future cases, has the potential to bestow a significant degree of flexibility on state courts interpreting property law at the margins.¹⁷⁶ Such flexibility might even be enough to bring some comfort to an observer as worried about “[a]rresting the development of the common law” as Justice Stevens was.¹⁷⁷ Admittedly, in situations involving a traditional, widely recognized form of property, the plaintiff will have little trouble

174. See *Stop the Beach Renourishment*, 130 S. Ct. at 2610–11 (summarizing the plaintiff's theory that a taking had been committed “because no prior Florida decision had said that the State's filling of submerged tidal lands could have the effect of depriving a littoral owner of contact with the water and denying him future accretions”).

175. See *id.* at 2611 (“There is no taking unless petitioner can show that, before the Florida Supreme Court's decision [in this proceeding], littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land.”).

176. Justice Scalia's plurality opinion embraced this very hypothesis, arguing that the plurality's proposed test for a judicial taking—“deprivation of an *established* property right”—accorded “a considerable degree of deference to state courts.” *Id.* at 2608 n.9. This deference, Scalia reasoned, was derived from the fact that “[a] property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court.” *Id.*

177. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting).

demonstrating the prior existence of the property interest.¹⁷⁸ But in many cases, particularly those involving more novel forms of property or more innovative arrangements of property ownership,¹⁷⁹ the law will be a frontier, devoid of any clear directive as to where the boundaries between various parties' rights should fall.¹⁸⁰ If the Court's unequivocal placement of the burden on the plaintiff in *Stop the Beach Renourishment* is to be believed, then state courts may rest easier in the knowledge that their labor of bringing order to the unsettled vanguards of property law is sheltered by some procedural deference on review.

Ultimately, the signals issued in *Stop the Beach Renourishment* are still only signals, and they furnish at best an incomplete forecast of how aggressive the Court will be in judging whether state courts are changing the law or merely clarifying it. Many more procedural questions remain to be worked out in the event that the Court decides to begin accepting judicial takings claims more forthrightly.¹⁸¹ But certain signals at least give reason for supposing that a judicial takings doctrine would not, by itself, freeze the common law in its current condition.

178. *Cf. id.* at 1016 n.7 (majority opinion) (explaining that the fee simple interest "is an estate with a rich tradition of protection at common law").

179. *See supra* note 100 and accompanying text.

180. *Webb's* and *Phillips*, both of which demanded judicial resolution as to the ownership of interest on special funds, provide ready examples of cases in which the specific property-law questions at issue simply had not been plumbed by any prior court decision. *See supra* note 144 and accompanying text.

181. One such question is how the burden of persuasion announced by the Court in *Stop the Beach Renourishment* squares with *Lucas's* proviso that the onus is on the state to make a showing that the background principles of property law place inherent limitations on the plaintiff's title. *See Lucas*, 505 U.S. 1031–32 (requiring South Carolina to demonstrate precedent prohibiting the plaintiff's use of his property). This proviso has generally been understood to fashion background principles into an affirmative defense for the government in takings claims. *See Blumm & Ritchie, supra* note 39, at 326–27 (interpreting *Lucas* as requiring the government to use background principles as an affirmative defense rather than as placing the burden on the claimant). But if, under *Stop the Beach Renourishment*, the plaintiff must initially show the existence of a property right under state law, then background principles will no longer be an affirmative defense for the government, in the sense that raising the affirmative defense will have become exactly the same thing as refuting the plaintiff's case in chief: both the plaintiff and the defendant will be arguing that background principles yield the favored view of property rights.

CONCLUSION

When reduced to its essence, the plurality's recognition of judicial takings in *Stop the Beach Renourishment* is probably no more than a truism, and a fairly inoffensive one at that: when presented with the claim that a plaintiff's property has been taken for public use without just compensation, state courts may not play fast and loose with the law of property and whittle away the very thing the plaintiff seeks to defend. To adopt any other position might threaten to turn the Takings Clause into a dead letter, or even to abandon the very notion of the rule of law.

But commentators would not be indulging in a groundless fantasy to fear that a judicial takings doctrine, if too haphazardly applied, might stunt the development of property law in state courts and lead toward an outright constitutionalization of the common law. This Note seeks to develop a plausible theoretical explanation for how and why such a consequence might flow from judicial takings in practice. The freezing of the common law could first assume a substantive dimension if the Court were to insist on a specific normative baseline as inhering in the definition of property under the Takings Clause. And secondly, it could assume a procedural dimension if, even in the absence of any such baseline, the Court were to maintain a particularly low threshold for determining that a state judicial decision actively changes, rather than merely explicates, the law of property. Substantively, the reign of positivism is likely to continue in cases involving an abundance of clear, thorough state precedents. In less settled areas, the Court may be tempted to enlist independent common-law norms. Procedurally, state judiciaries are unlikely to receive much deference or sympathy for the premise that common-law judging requires the flexibility to contradict previous case law, but they may at least receive the benefit of the doubt when that case law is so ambiguous that the extent of the plaintiffs' property interests is functionally an open question.

A workable judicial takings doctrine will require the Court to bring its slightly contrasting substantive and procedural attitudes into equipoise. When state positive law is scarce or nonexistent, for instance, should the Court invoke a Blackstonian failsafe and move forward with its judicial takings analysis, or should the takings claim instead simply stand or fall on the plaintiff's ability to tease a property right out of the state's judicial tea leaves? *Stop the Beach Renourishment* probably tilts toward the latter option, but the Court's

ratification of the former is not beyond imagination. Such conflicts will arise, and must be resolved, where they nearly always are: on the margins. The Court's choices along those outer boundaries may well decide the future of the common law of property. Either it will become arrested and entrenched, anchored permanently to a static ideal, or it will continue to move with the tide of human experience, sculpted gradually but surely by the dozens, even hundreds, of imperceptible additions and subtractions of precedent, "like every sparrow falling, like every grain of sand."¹⁸²

182. BOB DYLAN, *Every Grain of Sand*, on SHOT OF LOVE (Columbia Records 1981).