

# JUDICIAL TAKINGS AND STATE ACTION: REREADING *SHELLEY* AFTER *STOP THE BEACH RENOURISHMENT*

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## I. INTRODUCTION

When the Supreme Court recently dipped its toe into long-standing debates about judicial takings in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>1</sup> the intimation that the Court might finally recognize the doctrine generated a wave of responses.<sup>2</sup> Commentators concerned with the expansion of regulatory takings jurisprudence argued that it would be unwise to apply the Takings Clause to the judiciary;<sup>3</sup> those inclined to defend a more vigorous application of the Clause, perhaps not surprisingly, saw a promising new avenue of vindication.<sup>4</sup>

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

2. Judicial takings involve the proposition that not only legislative and executive action might violate the Fifth Amendment's Takings Clause, but a decision interpreting a state's common law of property might also be violative when it functions as the equivalent of an affirmative exercise of eminent domain. See generally Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990). The closest the Court had gotten to recognizing that a judicial decision might constitute a taking of private property was Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 296–98 (1967). See also *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1207 (1994) (Scalia, J., dissenting from denial of certiorari).

3. See, e.g., John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475, 475–76 (2010) (arguing that the Takings Clause should not extend to the judicial branch); Barton Thompson, *Judicial Takings Redux: Stop the Beach Renourishment v. Florida Department of Environmental Protection* 4 (Nov. 5, 2010) (unpublished manuscript), [http://www.boalt.org/elq/documents/takingsconference\\_Thomson\\_2010\\_1025.pdf](http://www.boalt.org/elq/documents/takingsconference_Thomson_2010_1025.pdf) (“Those justices (and members of the academy and bar) already skeptical of expansive takings protections are unlikely to advocate for their extension to courts, further constraining the ability of the state to adapt property law to changing knowledge, conditions, and norms.”).

4. See, e.g., Thompson, *supra* note 3, at 6 (arguing that *Stop the Beach Renourishment* and

In recent years, whenever the Court has commented on aspects of takings jurisprudence, a perennial tension has resurfaced between concerns about limitations on the government’s flexibility to adjust property rights over time and the recognition of limits on that perceived interference with individual property rights. Thus, arguments about this balance have reemerged following decisions about the standard for public use,<sup>5</sup> the role of notice in regulatory takings,<sup>6</sup> the limits on land-use conditions and exactions,<sup>7</sup> and others. The question whether a judicial act can violate the Fourteenth Amendment’s incorporation of the Fifth Amendment may seem an unremarkable new ground for this running debate, with the real conceptual challenge lying in the relevant substantive standard for determining when a judicial act, to borrow Justice Holmes’s memorably cryptic phrase, “goes too far.”<sup>8</sup>

The threshold proposition that a judicial decision elucidating the contours of common-law property rights is state action under the Fourteenth Amendment, however, puts *Stop the Beach Renourishment* in a different category than many of the Court’s recent forays into takings. Constitutional property cases often present starkly different conceptions of the role of the state in private property. On the one hand, private property is understood as relatively fixed according to long-standing common-law doctrine that reflects almost pre-political norms of ownership and exclusion—a view to which Justice Scalia seems to subscribe. On the other hand,

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judicial takings “can serve as useful reminders to state courts of the importance of property precedents”); D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 904 (2011) (exploring how courts can implement judicial takings doctrine).

5. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

6. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

7. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994).

8. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Justice Scalia, in the *Stop the Beach Renourishment* plurality, brushed aside this challenge, asserting simply that a decision that “declares that what was once an established right of private property no longer exists” constitutes a taking. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2596 (2010). What standard will guide that determination—in other words, what constitutes “established” rights and what kinds of decisions should be understood to eliminate such rights—is only hinted at in a footnote in which Justice Scalia makes clear that any such determination that there has been a change in state law should be made without deference to the very state judges responsible for defining that law. *Id.* at 2608 n.9. For an argument for applying a natural law standard for determining when a state common-law decision transgresses the Takings Clause, see Richard A. Epstein, *Littoral Rights under the Takings Doctrine: The Clash Between the Ius Naturale and Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL’Y 37 (2011).

some Justices seem to embrace a more legal realist approach that recognizes the interrelation between the contingency of property rights and the inherent centrality of the state in defining and moderating this aspect of private ordering.<sup>9</sup>

In many ways, a high-water mark for the realist conception of property came in the famous 1948 decision *Shelley v. Kraemer*,<sup>10</sup> a case that involved judicial enforcement of racially restrictive covenants. After finding that the covenants would be legally unobjectionable if left entirely in the realm of “voluntary adherence,”<sup>11</sup> the Court held that the act of judicial enforcement brought the covenants into the realm of state action, and thus amenable to review under the Equal Protection Clause.<sup>12</sup> The Court has never fully embraced the implications of this view of the state role in defining private property and in fact rarely recognizes state action in other circumstances that might logically dictate a straightforward application of *Shelley*.<sup>13</sup> As a result, *Shelley* has largely been limited to its own context and the Court has resisted expanding the realm of decisions involving private property that could be considered state action.<sup>14</sup>

Few would lightly associate Justice Scalia and the other members of the *Stop the Beach Renourishment* plurality with core realist understandings of property, but the framework the plurality deployed to find judicial opinions subject to review under the Takings Clause resonates strongly with the Court’s earlier approach to state action in *Shelley*. Justice Scalia’s argument in *Stop the Beach Renourishment* is grounded largely in text and what he saw as a conceptually problematic attempt to impose a state separation of powers doctrine as a matter of federal constitutional law.<sup>15</sup> Simply put, Justice Scalia argued, if a legislative or executive act can be considered state action, then the same can be said of a judicial decision, thus opening the possibility of recognizing the state role in a much broader array of property disputes.

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9. For a discussion of competing approaches, see Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1558–66 (2003).

10. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

11. *Id.* at 13.

12. *Id.* at 20.

13. See generally *Developments in the Law, State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1261–64 (2010) (discussing the Rehnquist Court’s turn toward neoformalism in state-action doctrine and scholarly critique of that turn).

14. *Id.*

15. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2605 (2010).

It would be naïve to argue that the plurality’s logic could—or necessarily should—revive *Shelley*’s implicit promise of weighing a broader array of individual rights in property disputes. Nevertheless, the felt necessity remains for finding guidance in constitutional rights in the oversight of private property regimes that implicate equality, due process, free speech, and other values.<sup>16</sup> Accordingly, that some measure of blurring between public and private is a logical consequence of the *Stop the Beach Renourishment* plurality may mean that a doctrine of judicial takings is worth defending for those concerned with *Shelley*’s legacy.

## II. THE SHORT HALF-LIFE OF *SHELLEY V. KRAEMER*

*Shelley v. Kraemer* still stands as a landmark case, continuing to form a part of the basic property canon, but nonetheless seems like an odd outlier. The case arose in the era before the Fair Housing Act and other statutes generally barred private discrimination in real property.<sup>17</sup> *Shelley* consolidated two similar cases, each involving an attempt by an African-American family to purchase a home in violation of a racially restrictive covenant.<sup>18</sup> In each case, neighbors sued to void the relevant sales, and in each case, the lower courts ultimately agreed to enforce the covenants and bar the owners from occupying the property they had purchased.<sup>19</sup>

The primary issue before the Supreme Court was whether “judicial enforcement of the restrictive agreements” violated the

16. See Shelley Ross Saxer, *Shelley v. Kraemer’s Fiftieth Anniversary: “A Time for Keeping; A Time for Throwing Away”?*, 47 U. KAN. L. REV. 61, 100 (1998) (“Examples abound of situations in which individuals seek constitutional protection against what are essentially private actions.”).

17. Congress passed Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. § 3601 *et seq.* (West 2010), at a time when the Court was also revising its understanding of the coverage of the Civil Rights Act of 1866. That Act, which textually barred private racial discrimination in property and related contractual relations, *see* 42 U.S.C.A. §§ 1981–1982 (West 2010), had been understood for more than a century to require state action. The Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), however, held that the Civil Rights Act of 1866 applies to private discrimination.

18. The first of the two consolidated cases came out of St. Louis, Missouri; the other out of Detroit, Michigan. The covenant in the first case provided that for a period of fifty years, “no part of said property . . . shall be occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.” *Shelley v. Kraemer*, 334 U.S. 1, 4–5. Likewise, the second covenant provided that the relevant property “shall not be used or occupied by any person or persons except those of the Caucasian race.” *Id.* at 6.

19. *Id.* at 6–7.

Fourteenth Amendment's Equal Protection Clause.<sup>20</sup> At the outset, the Court, with Chief Justice Vinson writing, distinguished the private covenants at issue from state action that mandated discrimination, as with ordinances that required segregation<sup>21</sup> or that limited occupation on the basis of race.<sup>22</sup> The Court made clear that, unlike an ordinance, racially restrictive covenants as such

cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of the agreement are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State, and the provisions of the Amendment have not been violated.<sup>23</sup>

The Court, however, did not stop with that recognition of the distinction between direct state discrimination and the challenged private covenants. “[H]ere there was more,” the Court noted; in the cases at issue, “the purposes of the agreements were secured only by judicial enforcement by state courts.”<sup>24</sup> The Court’s theory of state action flowed in clear terms, beginning with the Fourteenth Amendment’s text.<sup>25</sup> Thus a state, the Court went on, “may act through different agencies, either by its legislative, its executive, or its judicial authorities, and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.”<sup>26</sup> Likewise, state action under the Amendment includes judicial action and, the Court noted, “it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of state government.”<sup>27</sup> Textually and structurally, the Court found, the Fourteenth Amendment draws no distinctions between various state actors.<sup>28</sup>

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20. *Id.* at 7. Petitioners in the case also raised Due Process and Privileges and Immunities Clause challenges, but the Court resolved the case under the Equal Protection Clause. *Id.* at 23.

21. *Id.* at 11–13 (citing *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down, under the Fourteenth Amendment, a municipal ordinance that prohibited “colored” persons from moving into majority-white blocks and white people from moving into majority-“colored” blocks) and *Harmon v. Taylor*, 273 U.S. 668 (1927) (similar)).

22. *Id.* at 12 (citing *City of Richmond v. Deans*, 281 U.S. 704 (1930)).

23. *Id.* at 13.

24. *Id.*

25. *Id.* at 14.

26. *Id.* (quoting *Virginia v. Rives*, 100 U.S. 313, 318 (1879)).

27. *Id.* at 18; *see id.* at 20 (“State action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.”).

28. *Id.* at 20.

The Court concluded, “[w]e have no doubt that there has been state action in these cases in the full and complete sense of the phrase.”<sup>29</sup> The enforcement of the restrictive covenants represented an instance in which “the States have made available to [private] individuals the full coercive power of government,” and, accordingly, “the power of the State to create and enforce property interests must be exercised within boundaries defined by the Fourteenth Amendment.”<sup>30</sup>

In terms of conceptions of property, it is hard to imagine a clearer illustration than *Shelley* of the realist insight that property is an inherently three-part relationship between the entitlement holder, the state, and everyone else. As Felix Cohen famously put it, property can be thought of metaphorically as an object with a label that reads:

To the world:

Keep off X unless you have my permission, which I may  
grant or withhold.

Signed: Private citizen

Endorsed: The state.<sup>31</sup>

When the discriminating neighbors in *Shelley* called the endorsement for all it was worth, they were asserting their purported right to say to African-American purchasers “keep off,” and the lower courts obliged. The Supreme Court in turn made pellucid the necessity for the state to be involved in order for the private citizen’s rights to have meaning.<sup>32</sup>

In the history of antidiscrimination jurisprudence, *Shelley* represents at once a landmark achievement and a reminder of paths glimpsed and then abandoned by the Court.<sup>33</sup> There are many reasons

29. *Id.* at 19.

30. *Id.* at 22.

31. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954). For a classic general realist discussion of the role of the state in the enforcement of private ordering, see ROBERT L. HALE, *FREEDOM THROUGH LAW* (1952).

32. See *Shelley*, 334 U.S. at 19 (“The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.”).

33. See Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); see also Martin A. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 TOURO L. REV. 775, 779–86 (2000) (surveying state-action cases involving racial discrimination and contrasting to non-race cases).

why *Shelley* proved limited as a conceptual framework for judicial oversight of private property arrangements that might infringe on individual rights. The most central, however, was likely the seemingly untenable implications of a doctrine that could have rendered all judicial enforcement of private ordering constitutionally suspect. As Professor Mark Rosen recently noted, *Shelley* “threatened to dissolve the distinction between state action, to which Fourteenth Amendment limitations apply, and private action, which falls outside the Fourteenth Amendment.”<sup>34</sup> That possibility, however, is just as evident in *Stop the Beach Renourishment*.<sup>35</sup>

### III. REREADING *SHELLEY* AFTER *STOP THE BEACH RENOURISHMENT*

It is not uncommon to see *Shelley* invoked to bolster the argument for judicial takings, including in the pleadings before the Court in *Stop the Beach Renourishment*.<sup>36</sup> It is perhaps not surprising, but is striking nonetheless, how closely the *Stop the Beach Renourishment* plurality’s reasoning seems to echo *Shelley*’s logic.

Justice Scalia’s approach in *Stop the Beach Renourishment* was simple and blunt. He began, inevitably, with text. “The Takings Clause,” Justice Scalia noted, “unlike, for instance, the Ex Post Facto Clauses . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, not the government actor.”<sup>37</sup> There is “no textual justification,” Justice Scalia continued,

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34. Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 453 (2007).

35. The brief promise of *Shelley*’s approach to state action parallels a similar conceptual opening for finding a different balance between private property and public law values that began with *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that a privately held “company town” was subject to constitutional scrutiny), and essentially closed with *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976) (applying the *Marsh* test to shopping malls would “wholly disregard[] the constitutional basis on which private ownership of property rests in this country” (quoting *Amalgamated Food Emps. Union v. Local Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting))). The theory in *Marsh* was that a private owner was essentially acting in a state role, but the result was quite similar to *Shelley*’s implication that under the right circumstances, the private right to exclude in state law must yield to federal constitutional rights of those against whom that right is asserted.

36. This tendency goes all the way back to Professor Thompson’s early seminal treatment, see Thompson, *supra* note 2, at 1456, and continued with amici before the Court in *Stop the Beach Renourishment*, see Brief of Amici Curiae National Association of Home Builders and Florida Association of Home Builders as Amici Curiae Supporting Petitioners at 4–5, *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010) (No. 08-1151).

37. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t. of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (“nor shall private property *be taken* . . . .” (emphasis added) (quoting U.S. Const. amend

“for saying that the existence or scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.”<sup>38</sup>

To Justice Scalia, this plain language reading of the Takings Clause has the force of common sense. “It would be absurd to allow a State to do by judicial decree,” he argued, “what the Takings Clause forbids it to do by legislative fiat.”<sup>39</sup> In sum, Justice Scalia concluded, “the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.”<sup>40</sup> To the argument made by Justice Kennedy in concurrence that the Takings Clause should not apply to courts because the judiciary is not designed to make policy choices and is not politically accountable, Justice Scalia responded that while these “reasons may have a lot to do with sound separation of powers principles that ought to govern a democratic society,” such political process rationales “have nothing whatever to do with the protection of individual rights . . . .”<sup>41</sup>

Justice Scalia’s entire textual and structural argument for allowing judicial review of allegations that a state-court decision has “taken” property applies with equal force to any other individual right incorporated in the Fourteenth Amendment. Nothing in the relevant text, or in any constitutional structural principle, insulates courts from accountability when courts act in ways that contravene individual rights constraints on the state. In short, the *Stop the Beach Renourishment* plurality reaches the same conclusion that Chief Justice Vinson did in *Shelley*, and by almost the same path.

There are ways, of course, to distinguish *Shelley* from Justice Scalia’s paradigmatic judicial taking. First, *Shelley* arose from the enforcement of private covenants, whereas *Stop the Beach Renourishment* involved the judicial definition of common-law property rights. Second, the fact that the challenged elimination of property rights in *Stop the Beach Renourishment* accrued to the benefit of the state, as opposed to a decision resolving a conflict

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38. *Id.* Justice Scalia focused on the text of the Fifth Amendment, but he noted earlier in the opinion that the Fifth Amendment applied in this case through its incorporation in the Fourteenth Amendment. *Id.* at 2597.

39. *Id.* at 2601.

40. *Id.* at 2602.

41. *Id.* at 2605.



between two private parties, might be significant.<sup>42</sup> Third, there may be an argument that would distinguish the clause of the Fourteenth Amendment at issue in each case. Each of these potential grounds, however, for distinguishing judicial takings from other constitutional property decisions with respect to the issue of state action seem unconvincing.

On the first point, although the question of enforcement versus substantive definition might make some difference with respect to the ground for liability (under the Equal Protection Clause, the Takings Clause, or otherwise), it is difficult to see how the distinction could matter for whether there has been state action. Indeed, except for the rare instance of a court that issues advisory opinions, such as the Massachusetts Supreme Judicial Court, a state court is almost always going to define the scope of property rights in the context of a dispute between litigants.

The inevitability of state-court dispute resolution leads to the second potential distinction: that it might somehow make a difference that the potential beneficiary of the judicial decision is the state, rather than another private party. Some scholars, most notably Professor Joseph Sax, have drawn a distinction between proprietary and nonproprietary governmental actions in the regulatory takings context,<sup>43</sup> suggesting the need for more searching oversight when the

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42. In a post, Professor Lior Strahilevitz thoughtfully argued that the “best way to make sense of Justice Scalia’s plurality opinion in *Stop the Beach Renourishment* is that judicial takings arise only in those instances in which the government now owns property that was previously held by a private party.” Lior Strahilevitz, *Stop the Beach Renourishment, Kelo, and the Future of Judicial Takings*, U. CHI. L. SCH. FACULTY BLOG (June 17, 2010, 3:32 PM), <http://uchicagolaw.typepad.com/faculty/2010/06/stop-the-beach-renourishment-kelo-and-the-future-of-judicial-takings.html#tp>. Strahilevitz reached this conclusion through two pieces of evidence. First, he noted that Justice Scalia made clear in *Stop the Beach Renourishment* that the remedy for a finding of a judicial taking is invalidation; to this he added Justice Scalia’s apparent view from the dissent the Justice joined in *Kelo v. New London*, 545 U.S. 469, 494 (2005) (O’Connor, J., dissenting), that absent blight, the “public use” requirement of the Takings Clause bars private-to-private transfers. Strahilevitz, *supra*. This argument, however, may conflate limits on the affirmative exercise of the power of eminent domain that the *Kelo* dissenters would have imposed with the general question whether an exercise of the police power (or other state power) constitutes a taking. It may be that in a given instance, the private nature of the recipient would cause a regulatory regime to fail, if it were a taking, for lack of public use, but regulations that transfer valuable property rights for the benefit of private parties are commonplace.

43. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63 (1964) (“[W]hen economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the

government seeks to benefit itself rather than resolve disputes between private parties. As interesting as it would be to see Justice Scalia endorse this distinction, the logic of the plurality cannot support that. While not always clear, the basic thrust of the plurality's approach seems to suggest that in any situation in which it would violate the Takings Clause for a legislature to declare the property of private party A to be the property of private party B,<sup>44</sup> the same act in a private suit would be a judicial taking. On Justice Scalia's logic, it is not where the property right goes after it is taken, but rather the fact of the expropriation itself—the destruction of the established right—that matters.<sup>45</sup>

Indeed, nothing in Justice Scalia's takings jurisprudence, or, for that matter, in the Court's approach to regulatory takings writ large, suggests a distinction between invasions of property rights that benefit the state and those that benefit private parties. The force of Justice Scalia's argument for recognizing judicial takings turns on the proposition that there are neither textual nor institutional reasons to distinguish courts as arms of the state for purposes of review. Nowhere do the traditional kinds of political process rationales for cabining state legislative and executive action (such as fiscal illusion and the risk of abuse of the minority) appear in the plurality's rationale.<sup>46</sup> And, more generally, regulatory takings cases regularly

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police power.”).

44. Private-to-private transfers of property by the state do occur, and the Court made clear in *Kelo* that the question whether such a transfer satisfies the Public Use Clause turns on whether there is a sufficient public purpose. *See Kelo*, 545 U.S. at 480 (“The disposition of this case . . . turns on the question whether the City’s development plan serves a ‘public purpose.’”); *see also id.* at 477 (“Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.”).

45. *See Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (noting that “though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing” and “our doctrine of regulatory takings ‘aims to identify regulatory actions that are functionally equivalent to the classic taking’” (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005))). It is true that in enumerating general principles that govern takings jurisprudence, Justice Scalia notes “we approach the situation before us” in the category of takings that involves “States . . . recharacteriz[ing] as public property what was previously private property.” *Id.* Nothing in the rest of the plurality opinion, however, suggests that the potential ground for takings liability—that recharacterization—is the only kind of judicial decision that might transgress the Takings Clause.

46. Writing for the plurality, Justice Scalia criticized Justice Kennedy’s invocation of judicial restraint by arguing that the Court should not impose some kind of federal

involve private beneficiaries, as with the traditional private mill/flooding cases<sup>47</sup> and the modern “permanent physical invasion” cases.<sup>48</sup>

Finally, the logic of the *Stop the Beach Renourishment* plurality provides no basis for drawing distinctions on the question of state action between the various provisions of the Bill of Rights incorporated through the Fourteenth Amendment.<sup>49</sup> Text and structural logic, shorn of context and purposive reading, have the virtue of clarity, but the very same arguments would seem to apply to *any* substantive provision incorporated in the Fourteenth Amendment. This all the more so, given that the relevant harm (in *Stop the Beach Renourishment*, a judicial decision alleged to have eliminated established property rights) is in no way relevant to the question whether state action embodied in a judicial decision might transgress individual rights. Had Justice Scalia relied on a purposive reading of the Takings Clause, somehow elevating and distinguishing the particular property rights at issue for purposes of the state-action analysis, this distinction might make sense. That, however, is not the approach he took in the *Stop the Beach Renourishment* plurality.<sup>50</sup>

State action remains as much a flashpoint when it comes to the definition and enforcement of private property rights as it is in the larger discourse on the public/private divide.<sup>51</sup> As easy as it is to point out routine judicial enforcement of private arrangements that would likely transgress various constitutional provisions, the felt necessity to

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constitutional separation of powers limitation upon the states, *Stop the Beach Renourishment*, 130 S. Ct. at 2605, suggesting that Justice Scalia’s analysis is predicated on institutional equivalence, not the risk of state aggrandizement.

47. See, e.g., *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177–78 (1871) (finding a taking under a state eminent domain provision, where a company had been authorized to build a dam and flooded property as a result).

48. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding a per se taking in law that authorized the permanent physical occupation of an apartment building by wire owned by a cable television company).

49. One could argue that the text and concept of the “state” for purposes of the Fourteenth Amendment’s Due Process Clause (“nor shall any state deprive any person of life, liberty, or property, without due process of law”) somehow varies from the same text and concept a clause later, which does not itself reference the state (“nor deny to any person within its jurisdiction the equal protection of the laws”). Given the interdependence of these clauses, it is hard to see a distinction on this point.

50. Chief Justice Vinson in *Shelley* was more explicitly animated by a purposive reading of the Equal Protection Clause. See *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (discussing the historical context in which the Fourteenth Amendment was ratified and the purposes it was chiefly designed to achieve).

51. See *Developments in the Law*, *supra* note 13.

invoke constitutional protection where the judiciary enforces seemingly private claims for property continues to surface.<sup>52</sup> Thus, for example, in a number of common interest community cases, governance regimes that functionally resemble traditional local government actions generate calls for constitutional oversight.<sup>53</sup> Though such claims are rarely validated, people subject to judicial enforcement of covenants that limit free speech, due process, equal protection, and other fundamental values argue that such judicial enforcement should come within the ambit of state action.<sup>54</sup>

The persistence of claims for the constitutionalization of property disputes highlights a dilemma for those inclined to see merit in a broader state-action doctrine. The Takings Clause tends to find relatively little support compared to other enumerated federal constitutional rights from scholars otherwise inclined toward a vigorous view of individual rights.<sup>55</sup> This point is only worth mentioning to note that the *Stop the Beach Renourishment* plurality highlights that Takings Clause exceptionalism works both ways. Structural constitutional rules developed to protect property rights—the animating spirit of the plurality—can as easily apply to other individual rights.

#### IV. PROPERTY'S COMMON LAW EVOLUTION AND RHETORICAL FEINTS

On one level, an overly intrusive takings doctrine risks limiting important state flexibility to respond to evolving understandings of harm and public exigency. This might seem troubling if *Stop the Beach Renourishment* engenders litigation as advocates and courts try to give life to the plurality's approach (and perhaps persuade Justice Kennedy). This early wave of litigation is especially likely given that the plurality did not explicitly limit the scope of judicial takings to cases where the state is the beneficiary of the decision, which means

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52. See Saxer, *supra* note 16, at 91–102. For a discussion of common-law alternatives to achieve the substantive goals advocated by those who would expand *Shelley's* approach to state action, see *id.* at 102–19.

53. See, e.g., Comm. for a Better Twin Rivers v. Twin Rivers Homeowners Ass'n, 929 A.2d 1060 (2007) (involving restrictions on expressive conduct imposed by a homeowners' association).

54. See also *supra* note 35 (discussing *Marsh v. Alabama*, 326 U.S. 501 (1946)).

55. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 139–41 (3d ed. 2008) (“[I]t is difficult to reconcile the subordination of property rights with the specific property guarantees in the Constitution.”).

that any change in property law that is thought to eliminate an established property right might be fair game.<sup>56</sup>

On another level, however, *Stop the Beach Renourishment* may prove to be another instance in which the Court seems to draw a fundamental line in takings doctrine, the implications of which then turn out to be relatively minor. The best example of this kind of rhetorical feint is *Lucas v. South Carolina Coastal Council*.<sup>57</sup> Although Justice Scalia's majority opinion in *Lucas* advanced a seemingly uncompromising view of the Takings Clause, the opinion included an exception for restrictions that inhere in title.<sup>58</sup> Justice Kennedy has subsequently suggested that legislative enactments, no less than judicial decisions, can create the background principles that form the basis for the *Lucas* exception.<sup>59</sup> Lower courts, moreover, have been quite comfortable recognizing that the common law of property has give in its joints; thus, for compensation purposes, legislative acts are often judged by conceptions of harm that are not frozen in the realm of nineteenth-century nuisance law.<sup>60</sup>

Likewise, the exchange between Justice Scalia and Justice Kennedy in *Stop the Beach Renourishment* about the nature of evolutionary norms in common-law property doctrine reveals a basic disagreement about when a change in law might transgress either the Takings Clause (for Justice Scalia) or the Due Process Clause (for Justice Kennedy). Justice Scalia, echoing his view about the narrowness of background principles of state law in *Lucas*, asserted that the Framers could not have contemplated judicial takings because "the Constitution was adopted in an era when courts had no power to 'change' the common law."<sup>61</sup> Furthermore, in Justice Scalia's view, even when courts began to recognize an evolutionary common law, "it is not true that the new 'common-law tradition . . . allow[ed] for incremental modifications to property law.'"<sup>62</sup> Justice Kennedy, by contrast, highlighted that the state common law of property includes "incremental modification" that "owners may reasonably expect or

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56. See *supra* text accompanying notes 43–45.

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

58. *Id.* at 1029.

59. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001).

60. See Richard J. Lazarus, *Lucas Unspun*, 16 SOUTHEASTERN ENVTL. L.J. 1 (2007) (discussing *Lucas*'s reception).

61. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2606 (2010).

62. *Id.*

anticipate courts to make.”<sup>63</sup> Although Justice Kennedy is less than clear about how far this principle goes, the view of the evolutionary nature of private property and the expectations of most owners that he expressed in his *Stop the Beach Renourishment* concurrence seem likely to prevail if judicial takings are recognized.

As with *Lucas*—the paradigm of what Laura Underkuffler has called the “Scalian” view of property<sup>64</sup>—the parade of horrors that might flow from accepting the substantive concern underlying judicial takings is unlikely to emerge. This is because, as *Stop the Beach Renourishment* itself demonstrates, Justice Scalia’s apparently broad view of what constitutes a clear contravention of existing law is not widely shared, and most courts are likely to find Justice Kennedy’s view of the flexibility of the common law more amenable. Thus, finding a true expropriating judicial decision—like a regulation that destroys all economic value without a countervailing background principle of state law—is likely to be exceedingly rare in practice.<sup>65</sup>

The *Stop the Beach Renourishment* plurality, in short, is likely to be a wonderful source of intellectual puzzles, but is built on a predicate sufficiently rare that it amounts to an almost abstract question. As a result, those who are concerned that a broader recognition of the role of the state in enforcing private property norms will limit needed flexibility in economic regulation more generally may have little to fear.

## V. CONCLUSION

It is too soon to know if the *Stop the Beach Renourishment* plurality will be remembered more as Pandora or Pirandello—the unleashing of a plague or simply a slightly absurd set piece (one characteristic in search of authority?). At the least, the decision has revived, even if momentarily, long-standing questions about the constitutional dimension of the judicial role in otherwise seemingly

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63. *Id.* at 2613–18 (Kennedy, J., concurring).

64. See Laura S. Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 728 (2004) (describing this view as holding that “the idea of property is a concrete, objectively knowable, and immutable legal barrier which marks the boundary between protected individual interests and the permissible exercise of government power”).

65. In retrospect, the Justice who seemed to have understood *Lucas* best was Justice Souter; he would have dismissed the case as improvidently granted because the factual predicate was so implausible. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1076–79 (statement of Souter, J.).

private aspects of property. While that, too, may prove fleeting, it does provide an opportunity to reflect on aspects of the state role that are often left unnoted.

*Stop the Beach Renourishment*, then, may have a silver lining for those concerned with the potential for private property to transgress public law norms. The case can provide a contemporary argument for understanding that judicial decisions setting the terms of private property may, in some circumstances, merit review for conformance with constitutional norms. Is it likely that the plurality's approach will generate a flood of homeowner association due process cases or First Amendment suits against malls that limit speech? Most likely not, but the impulse to weigh private interests against constitutional values remains and *Stop the Beach Renourishment* provides a reminder of the importance of reflecting on that balance.