

# STOP THE BEACH RENOURISHMENT AND THE PROBLEM OF JUDICIAL TAKINGS

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## I. INTRODUCTION

*Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*<sup>1</sup> represents the Supreme Court's first effort to address the problem of judicial takings. The Takings Clause of the Fifth Amendment states that "private property" cannot be "taken without just compensation."<sup>2</sup> Until *Stop the Beach Renourishment*, however, the Court had never considered the question of whether an action by the judicial branch of government can ever be a "taking" requiring the payment of compensation.

Unfortunately, a divided Court failed to resolve the issue, which is now left for future cases. A plurality opinion authored by Justice Scalia ruled that judicial takings do indeed exist, but only four of the eight justices joined it.<sup>3</sup> Two Justices—Anthony Kennedy and Sonia Sotomayor—signed on to a concurring opinion authored by Justice Kennedy, which contended that the issue of judicial takings under the Fifth Amendment should be left for future resolution and that judicial actions similar to takings might instead be barred by the Due Process Clause of the Fourteenth Amendment.<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. U.S. CONST. amend. V.
3. *Stop the Beach Renourishment*, 130 S. Ct. at 2601–02.
4. *Id.* at 2613–18 (Kennedy, J., concurring).

Justice Breyer wrote a concurrence arguing that the entire issue of judicial takings should not have been addressed by the Court, which instead should simply have ruled that there is no judicial taking in this case regardless of whether judicial takings might ever occur elsewhere.<sup>5</sup> In sum, there is no majority for any position on the question of whether judicial takings exist at all or, if so, what factors determine whether a particular judicial action qualifies as a taking. For this reason, the question of judicial takings still remains to be addressed by future Supreme Court decisions.

This article argues that judicial takings do exist and are forbidden by the Fifth Amendment. I also explain why this conclusion would not require federal courts to take on any unusual administrative burdens. I do not consider several other important issues raised by *Stop the Beach Renourishment*, such as whether some judicial takings might also violate the Due Process Clause of the Fourteenth Amendment, whether the Florida Supreme Court's actions in *Stop the Beach Renourishment* itself should be considered a taking requiring compensation, or whether Justices Breyer and Kennedy were right to suggest that the Court should have avoided addressing the issue of whether judicial takings exist in this case.

Part II of this article briefly discusses the background of the case. In Part III, I defend Justice Scalia's conclusion that "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>6</sup> This principle follows logically from both the text and the original meaning of the Fifth Amendment. Various rationales for distinguishing judicial takings from other takings do not overturn this simple, but sound, conclusion.

Part IV addresses the claim that enforcing a takings doctrine would lead federal courts into severe practical difficulties. A judicial takings doctrine does not require legal principles significantly different from or more complicated than other takings claims. Justice Breyer and others are wrong to suggest that such a doctrine would "invite a host of federal takings claims" that federal judges would be unable to handle.<sup>7</sup>

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5. *Id.* at 2618–19 (Breyer, J., concurring).

6. *Id.* at 2602 (plurality opinion).

7. *Id.* at 2619 (Breyer, J., concurring).

## II. BACKGROUND TO THE CASE

Under Florida’s Beach and Shore Preservation Act (the Act),<sup>8</sup> the state government is required to establish “renourishment” projects to restore waterfront land that has become “critically eroded.”<sup>9</sup> Once the projects are complete, the Act gives the state title to any newly dry land that has been cleared as a result of the project’s displacement of the waterline. This deprives waterfront property owners of their previously existing right to ownership of land up to the “mean high water line” (MHWL).<sup>10</sup> This is exactly what happened to the six waterfront property owners in Florida’s Walton County, whose land abutted a renourishment project established in the area.<sup>11</sup> The property owners formed a group called Stop the Beach Renourishment, which became the petitioner in this case.<sup>12</sup>

The project in their area resulted in the creation of additional dry land between the property owners’ holdings and the ocean—land that was claimed by the state. The property owners argued that the state’s acquisition of land inside the MHWL constitutes a taking that requires compensation under the Takings Clause of the Fifth Amendment. The Florida Supreme Court ruled against the property owners, holding that state law did not give them the right to own all property up to the new MHWL created by the project.<sup>13</sup>

The property owners then appealed the decision to the federal Supreme Court, arguing that the state supreme court decision worked a taking by upsetting long-established property rights, thereby requiring compensation under the Fifth Amendment.

## III. JUDICIAL TAKINGS ARE JUST PLAIN TAKINGS

Judicial takings are ultimately no different from takings carried out by other government actors. The text and original meaning of the Constitution provide no basis for distinguishing between the two.

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8. Beach and Shore Preservation Act, FLA. STAT. ANN. §§ 161.011–161.242 (West 2010).

9. Ilya Somin, *Does Denying Property Owners Ownership Rights to Land Up to the Water Line Amount to a “Judicial Taking”?* ABA PREVIEW U.S. SUP. CT. CAS., 141 (Nov. 30, 2009) (summarizing the facts of *Stop the Beach Renourishment*).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1121 (Fla. 2008), *aff’d sub nom.* *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010).

Neither do Supreme Court precedents applying other parts of the Bill of Rights. Various efforts to distinguish judicial takings are ultimately unpersuasive.

#### A. *The Text and Original Meaning of the Takings Clause*

The Fifth Amendment states that “private property” may not be “taken without just compensation.”<sup>14</sup> Nowhere does it distinguish between takings conducted by the judiciary and those carried out by any other branch of government. As Justice Scalia puts it in his *Stop the Beach Renourishment* opinion,

[t]he Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . . . There is no textual justification for saying that the existence or the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.<sup>15</sup>

The simple textual solution to the judicial takings quandary is to assume that whatever action qualifies as a taking if conducted by the legislature or the executive also does so if done by a state judge. This approach conforms to the original meaning of the Takings Clause as understood at the time of the Founding. As Justice Kennedy points out and Justice Scalia acknowledges, the framers and ratifiers of the Bill of Rights did not specifically consider the question of judicial takings.<sup>16</sup> But neither did they in any way indicate that judicial action was to be excluded from the general prohibitory language of the Takings Clause.<sup>17</sup>

Justice Scalia suggests that the Framers did not consider the problem of judicial takings because they lived in an era when courts were believed to be unable to “change” the common law.<sup>18</sup> Whether or not this is true, the dominant view during the Founding era was that private property is a natural right that no government agency has the power to change.<sup>19</sup> James Madison, the principal drafter of the Takings

14. U.S. CONST. amend. V.

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

16. *Id.* at 2606 (Scalia, J., plurality opinion), 2616 (Kennedy, J., concurring).

17. *Id.*

18. *Id.* at 2606 (Scalia, J., plurality opinion).

19. See, e.g., Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877 (2004) (analyzing in detail eighteenth- and nineteenth-century

Clause, described “the personal right to acquire property” as a “natural right” that “gives to property, when acquired, a right to protection, as a social right.”<sup>20</sup> In his famous 1792 essay on property, written the year after the enactment of the Bill of Rights, Madison emphasized that “[g]overnment is instituted to protect property of every sort” and that a government that even “*indirectly* violates [the people’s] property” rights cannot be considered “just” and “is not a pattern for the United States.”<sup>21</sup> Obviously, government cannot be instituted to protect property rights or considered unjust for violating them if the rights in question were simply its own creations to begin with. In Madison’s view, and that of most of the Founding generation, government was required to protect property rights and did not have the power to redefine them at will.<sup>22</sup>

Thus, the original understanding of the Takings Clause did not assume that property rights were simply the creations of state governments or that either courts or legislatures had unconstrained authority to redefine them. From an originalist perspective, Justice Scalia was too sweeping in his assertion in *Stop the Beach Renourishment* that “[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.”<sup>23</sup>

The textualist and originalist conclusion that judicial takings are no different from other takings is in line with the Supreme Court’s treatment of judicial infringements of other rights protected by the Bill of Rights. For example, in the famous case of *New York Times v. Sullivan*,<sup>24</sup> the Supreme Court ruled that a state judicial libel judgment violated the First Amendment.<sup>25</sup> The Court rejected the libel plaintiff’s argument that the First Amendment did not apply to state judicial decisions in private civil actions, holding that

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conceptions of natural property rights and takings); JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 42–59 (3d. ed. 2008) (examining natural rights views of the founding era); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 103–04, 152–53 (1992) (discussing the “conventional wisdom” of the Founding era, that property was a natural right).

20. NEDELSKY, *supra* note 19, at 29.

21. James Madison, *Property*, [1792], 515, 517, IN MADISON, *WRITINGS* (Library of America, 1999).

22. *See generally*, NEDELSKY, *supra* note 19 (discussing that property was a natural right under the “conventional wisdom” of the Founding era).

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

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

25. *Id.* at 265.

[i]t matters not [under the First Amendment] that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.<sup>26</sup>

In *Stop the Beach Renourishment*, Justice Scalia cites the case of *PruneYard Shopping Center v. Robins*,<sup>27</sup> in which the Court concluded that a state property-law ruling violated the First Amendment rights of protestors.<sup>28</sup> The text of the Fifth Amendment does not distinguish between courts and legislatures any more than that of the First Amendment.

### *B. Possible Rationales for Treating Judicial Takings Differently from Other Judicial Infringements on Constitutional Rights*

Despite the plain text of the Constitution and the parallel treatment of judicial infringements of other constitutional rights, some scholars argue that judicial takings should not be forbidden by federal courts.<sup>29</sup> They advance a variety of arguments, including claims that state courts are, by definition, incapable of committing a taking, that courts are unlikely to engage in the sorts of “majoritarian” abuses that the Takings Clause was supposedly enacted in order to prevent, and that federal intervention against judicial takings requires an assumption that courts are inevitably “political.” None of these claims withstands scrutiny.

One of the most influential arguments against the idea of judicial takings, advanced by Justice Kennedy in his concurring opinion in *Stop the Beach Renourishment*, is that courts by definition cannot commit a taking because they lack the power of eminent domain, which is a legislative function.<sup>30</sup> As Justice Kennedy puts it, “[w]hen

26. *Id.*

27. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

28. *Stop the Beach Renourishment*, 130 S. Ct. at 2601–02 (citing *PruneYard*, 447 U.S. 74 (1980)).

29. See, e.g., John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary is Different*, 35 VT. L. REV. 475 (2010) (arguing that the Takings Clause should not apply to judicial actions); Richard Ruda, *Do We Really Need a Judicial Takings Doctrine?* 35 VT. L. REV. 451 (2010). For recent defenses of the idea of judicial takings in the wake of *Stop the Beach Renourishment*, see also D. Benjamin Barros, *The Complexities of Judicial Takings*, RICHMOND L. REV. (forthcoming), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1016&context=benjamin\\_barros](http://works.bepress.com/cgi/viewcontent.cgi?article=1016&context=benjamin_barros); and Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia’s Shifting Sands*, 35 VT. L. REV. 423 (2010).

30. *Stop the Beach Renourishment*, 130 S. Ct. at 2614–15 (Kennedy, J., concurring). This

courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision” and therefore cannot commit a taking.<sup>31</sup> In the words of one academic defender of Justice Kennedy’s argument, “[i]f the courts lack the power to ‘take’ within the meaning of the Takings Clause, their decisions obviously cannot give rise to takings claims.”<sup>32</sup>

This argument is flawed for three reasons. First, even if the court’s action is illegal under state law that does not mean that it cannot also qualify as a taking under federal constitutional law. There is no reason why the action of a state court or other state government agency cannot violate both state law and the federal Constitution simultaneously. Justice Kennedy appears to assume that a government action only qualifies as a “taking” if it is permissible under state law. But nothing in either the text of the Takings Clause or Supreme Court precedent requires that conclusion.<sup>33</sup>

Second, whether a state court has the power to “take” property is a question of state law, not federal constitutional law. No federal law prevents state governments from authorizing their courts to take private property. Thus, a state-court action that amounts to a taking is not inevitably illegal under state law.

Finally, as Justice Scalia noted, Justice Kennedy’s argument is premised on the notion that courts lack the power to allocate financial compensation as required for a taking.<sup>34</sup> Compensation, however, has never been the exclusive remedy for a violation of the Takings Clause. “Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.”<sup>35</sup>

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argument is also defended by Echeverria, *supra* note 29, at 487–88.

31. *Stop the Beach Renourishment*, 130 S. Ct. at 2614.

32. Echeverria, *supra* note 29, at 487.

33. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005), the Court stated “the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.” In context, however, it is clear that the Court was referring merely to whether the Takings Clause had met the requirements of the federal Constitution, including having a valid “public use” and meeting the terms of Due Process Clause. *See id.* (stating that “if a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry”). The Court’s main point was that a federal court’s inquiry into the “propriety” of a taking is separate from inquiry into compensation.

34. *Stop the Beach Renourishment*, 130 S. Ct. at 2607.

35. *First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987).

A second possible rationale for excluding judicial takings from federal scrutiny, developed by Professor John Echeverria, is that the Takings Clause is intended to protect against “majoritarian” abuses of property owners by elected officials, whereas courts are “generally anti-majoritarian” institutions whose task is the impartial enforcement of law.<sup>36</sup>

The Supreme Court has famously stated that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>37</sup> But no Supreme Court decision has ever ruled that takings claims can only prevail if the government acted out of “majoritarian” motives. Uncompensated takings, like other violations of constitutional rights, can also arise out of the machinations of minority interest groups or mistakes by well-meaning government officials. Because of widespread voter ignorance, much legislative and executive activity escapes meaningful majoritarian control by the voters.<sup>38</sup> The fact that a law violating constitutional rights was adopted by the legislature does not necessarily mean that it was “majoritarian.” Takings of private property are often undertaken at the behest of small, well-organized interest groups.<sup>39</sup>

The Supreme Court has never sought to determine whether a taking was motivated by majoritarian pressures, lobbying by influential minority interest groups, or some combination of the two. Furthermore, nothing in the text or original meaning of the Takings Clause requires it to do so. Indeed, the adoption of the Clause was partially motivated by fear of uncompensated “impressment” of private property by unaccountable federal officials against the will of the people.<sup>40</sup>

36. Echeverria, *supra* note 29, at 487–90.

37. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

38. See generally Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004).

39. See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 190–203 (2007) (discussing this general problem and giving examples).

40. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 79–80 (1998).



Moreover, courts are far from immune to majoritarian influence. Many states, including Florida, have elected judiciaries and judicial campaigns have become more competitive in recent years.<sup>41</sup> Professor Echeverria argues that any judicial takings doctrine adopted by the Court must also apply to federal judges, whom he claims are “insulat[ed] as much as possible from majoritarian influence” by life tenure.<sup>42</sup> Trends in public opinion, however, still have a substantial impact on federal-court decisions.<sup>43</sup> Courts may be more insulated from majority public opinion than legislatures. But they are still significantly influenced by it.

In his article for this symposium,<sup>44</sup> Professor William Marshall worries that recognizing the existence of political influence on state courts risks giving in to the “legal realist” notion that judging is purely political, with jurists simply voting their political preferences under the guise of following legal doctrine. However, acknowledging the existence of political influence on state courts does not mean that all, or even most, decisions are political. Acknowledging it merely means that state courts are not *completely* free of political influence. One need not be a thoroughgoing legal realist to believe that political pressure *sometimes* influences judges.

Even where political influence *is* present, it does not necessarily imply that the affected judges are deliberately subordinating the law to political considerations. The influence could take the form of a political coalition appointing or electing judges who are likely to support its political agenda for purely jurisprudential reasons. The judges themselves might have a completely sincere belief in the legal correctness of their decisions. Overall, Professor Marshall is wrong to assume that recognizing a cause of action for judicial takings necessarily requires federal judges to conclude that state-court decision-making is infected by politics.<sup>45</sup> Even state judges completely immune to political influence might engage in judicial takings as a

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41. See Matthew J. Streb, *The Study of Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS (Matthew J. Streb ed., 2007) (discussing the increasing influence of politics on judges). See also Echeverria, *supra* note 29, at 489 (acknowledging the influence of judicial elections on courts).

42. Echeverria, *supra* note 29, at 489.

43. For a recent survey of the evidence, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

44. See William P. Marshall, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL’Y 1 (2011).

45. *Id.*

result of honest intellectual error.

In sum, the “majoritarian” argument against the judicial takings doctrine errs both in assuming that the Takings Clause only protects against majoritarian abuses and that courts are insulated from majoritarian pressures.

A closely related argument is that state courts do not need as much federal judicial oversight of their takings practices as political officials because of the superior legal expertise of the former.<sup>46</sup> If judicial professionalism makes judges less likely to “impair federal constitutional values” than “the other branches,” that suggests that fewer meritorious takings claims will be brought against judicial action than legislative or executive action.<sup>47</sup> But the fact that a particular branch of state government is less likely to violate the Constitution than other branches is no reason to exempt its actions from federal scrutiny when it does. Moreover, the same argument would apply with equal force to all other constitutional rights. If state judges are so professional that federal scrutiny under the Takings Clause is unnecessary, why should federal courts review state decisions for possible First Amendment or Fourth Amendment violations?

Finally, Justice Breyer and at least one academic commentator suggest that a judicial takings doctrine would undermine state courts’ power to determine state property law.<sup>48</sup> The obvious answer to this argument is that state legislatures also have sovereign authority over state property law. Indeed, their power overrides that of state courts except in cases where a legislative enactment violates the state constitution. Yet no one argues on this basis that state legislative enactments on property law should be free of judicial review for possible Takings Clause violations.

#### IV. POTENTIAL PRACTICAL DIFFICULTIES

Even if a judicial takings doctrine is sound in principle, its implementation could lead to serious practical difficulties. Both

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46. Echeverria, *supra* note 29, at 492.

47. *Id.*

48. See *Stop the Beach Renourishment*, 130 S. Ct. at 2619 (Breyer, J., concurring) (expressing fear that a judicial takings doctrine would require federal judges to “play a major role in the shaping of a matter of significant state interest—state property law”); Norman Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 461–62 (2010) (arguing that a judicial takings doctrine would undermine state-court power to shape property law).

academic critics<sup>49</sup> and Justice Breyer<sup>50</sup> have raised several objections along these lines. Their most important concerns are federal judges' lack of expertise on state legal doctrines and the danger of opening the floodgates to numerous lawsuits challenging routine judicial rulings. Both fears, however, are greatly overstated.

### A. *The Problem of Expertise*

In his concurring opinion in *Stop the Beach Renourishment*, Justice Breyer worries that a judicial takings doctrine would require “constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges.”<sup>51</sup> Academic critics of Justice Scalia’s position have made similar claims.<sup>52</sup> The supposedly superior property-law expertise of state courts and other state officials is a standard argument deployed against federal judicial enforcement of constitutional property rights generally.<sup>53</sup> Elsewhere, I have responded to it in greater detail.<sup>54</sup> Here, I address only those aspects of it that relate to judicial takings.

There are two major problems with the expertise argument against the judicial takings doctrine. First, if taken seriously, the expertise argument applies to many other areas of constitutional law as well. In almost every area of constitutional law where litigants challenge the constitutionality of state laws, federal courts must determine what the state law means before deciding whether it violates the federal constitution. Federal judges also routinely consider the meaning of state law in diversity cases, where parties litigating cases under state law choose to do so in federal court

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49. See, e.g., Siegel, *supra* note 48, at 461.

50. *Stop the Beach Renourishment*, 130 S. Ct. at 2618 (Breyer, J., concurring).

51. *Id.* at 2619.

52. See, e.g., Siegel, *supra* note 48, at 461 (noting that state courts “have a special ability to develop rules of property grounded in the individual State’s unique history and physical landscape” and that this is an area of law with which federal judges are generally unfamiliar); Stacy L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL’Y 107 (2011).

53. See, e.g., Roderick Hills, Jr., *How Federalism Inevitably Trumps Taking Doctrine—And a Good Thing Too*, PRAWFSBLAWG (June 18, 2010), <http://prawfsblawg.blogspot.com/prawfsblawg/2010/06/how-federalism-inevitably-trumps-takings-doctrine-1.html> (arguing that the greater expertise of state judges over the details of state property law should obviate the need for federal oversight); US Senate Committee on the Judiciary, *Testimony of Thomas A. Merrill*, *Testimony in The Kelo Decision: Investigating Takings of Homes and Other Private Property*, at 5 (Sept 20, 2005), [http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=1612&wit\\_id=4661](http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=1612&wit_id=4661).

54. See Ilya Somin, *Federalism and Property Rights*, U. CHI. LEGAL F. (forthcoming 2011).

because they are citizens of different states.<sup>55</sup>

Second, many areas of constitutional law require federal courts to analyze local conditions on which state officials and state judges are likely to have superior knowledge. For example, Fourth Amendment search and seizure cases depend on judgments of “reasonableness,” in which local conditions play a crucial role.<sup>56</sup> The Supreme Court acknowledges that the reasonableness of a search often depends on “the facts of a particular case in light of the distinctive features and events of the community,” about which local judges and “law enforcement officers” may have specialized “expertise.”<sup>57</sup> Yet that does not mean that federal judges must simply defer to state judges’ assessments of Fourth Amendment claims. Similar local expertise issues arise with other areas of federal constitutional law, including freedom of speech and Establishment Clause claims.<sup>58</sup>

Assessing state property law might well be an easier task for federal judges than understanding other variations in state law and local conditions. There is considerable standardization of basic property law across state and local lines. For example, nearly all common-law jurisdictions divide property into a few basic types of estates with standardized packages of rights.<sup>59</sup> Standardization is also promoted by the influence of the Restatement of Property Law and various treatises.<sup>60</sup>

A variation on the expertise argument is that state judges are better qualified to assess whether a taking has occurred by unduly changing state law than federal judges are, due to the superior knowledge of state property law of the former.<sup>61</sup> The possibly superior expertise of state judges on state law, however, is counterbalanced by the superior expertise of federal judges with respect to federal

55. See 28 U.S.C.A. § 1332 (West 2005) (authorizing diversity jurisdiction lawsuits).

56. See Somin, *Federalism and Property Rights*, *supra* note 54.

57. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); see also *United States v. Brown*, 310 F. App’x 776, 778 (6th Cir. 2009) (noting relevance of “understanding local conditions” in determining whether a search is reasonable); *United States v. Atchley*, 474 F.3d 840, 847 (6th Cir. 2007) (claiming that local courts have an institutional advantage in ascertaining a search’s reasonableness because they better understand local conditions).

58. See Somin, *Federalism and Property Rights*, *supra* note 54, at 28–33.

59. See Thomas W. Merrill & Henry M. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 12 (2000) (discussing the standardization of property rights across common-law jurisdictions).

60. See Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 41 (1997).

61. See Dogan & Young, *supra* note 52.

constitutional law. As with any constitutional claim challenging the validity of a state government action, judges will have to interpret both the relevant state law and the federal constitutional law that applies to the situation.

Moreover, in practice, most state judges are not property-law experts. It is not clear that a state judge without special expertise in property law will have significantly greater knowledge than a federal judge from the same geographic region. Federal district judges, for example, generally hail from the states where they sit, and often practiced in those states before their appointment to the federal bench.<sup>62</sup> Senators also seek to ensure that their states are well-represented on the courts of appeals.<sup>63</sup> There is thus no reason to believe that federal judges sitting in a given state are likely to be less expert on relevant property law than state judges in the same area.

### *B. Opening the Lawsuit Floodgates?*

The second major practical objection to a judicial takings doctrine is the fear that it would open the floodgates for numerous lawsuits against routine state judicial decisions. As Justice Breyer puts it, a judicial takings doctrine

would invite a host of federal takings claims . . . . Property owners litigate many thousands of cases involving state property law in state courts each year . . . . Losing parties in many state-court cases may well believe that erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims.<sup>64</sup>

Others have raised the same concern.<sup>65</sup>

Such claims are, at best, exaggerated. Property owners are only likely to file judicial takings cases in federal court if they believe that they have a strong enough case to justify the cost of litigation. It seems highly unlikely that the Supreme Court will adopt a judicial takings test that gives property owners greater protection than its current regulatory takings doctrine for legislative and administrative

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62. See C.K. ROWLAND & ROBERT CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 87–116 (1996) (discussing “home-state recruitment” of district judges).

63. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* 319–23 (1997).

64. *Stop the Beach Renourishment*, 130 S. Ct. at 2618–19 (Breyer, J., concurring).

65. See, e.g., Siegel, *supra* note 48, at 461–62 (arguing that “the doctrine would encourage dissatisfied litigants to argue that a state court has taken property without payment of just compensation because it has issued a decision that purportedly departs from prior holdings”).

takings. And the latter is quite deferential. Government actions are only considered “*per se*” takings if they involve a permanent physical occupation of property,<sup>66</sup> or if they permanently deprive the owner of “all economically beneficial or productive use” of his property.<sup>67</sup> Even a temporary but very long-lasting 100% deprivation of all economically valuable use is insufficient.<sup>68</sup>

All other takings claims are assessed under the so-called *Penn Central* test, which sets out three factors that must be weighed in determining whether a regulatory action that does not involve a physical invasion of property is a taking: “[t]he economic impact of the regulation on the claimant,” the “extent to which the regulation has interfered with distinct investment backed expectations,” and the “character of the government action.”<sup>69</sup>

Courts generally apply the *Penn Central* test in ways that favor the government.<sup>70</sup> In 2002, the Supreme Court majority itself indicated that the *Penn Central* test had become the “polestar” of its regulatory takings jurisprudence in large part because it shielded from invalidation “numerous practices that have long been considered permissible exercises of the police power.”<sup>71</sup> A 2003 study of 133 cases decided under the test found that property owners prevailed less than 10% of the time.<sup>72</sup>

66. *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 426 (1982).

67. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

68. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (discussing the severe negative implications of *Tahoe-Sierra* for regulatory takings claims); Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the “Poor Relation” of Constitutional Law*, George Mason Law & Economics Research Paper 08-53, 17–19 (2008), available at <http://ssrn.com/abstract=1247854>. For related criticisms of *Tahoe-Sierra*, see, e.g., Richard A. Epstein, *The Ebbs and Flows of Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUPREME COURT REV. 5 (2002). *See also* Eric R. Claeys, *Takings and Private Property in the Rehnquist Court*, 99 NW. U. L. REV. 187, 214–15 (2004) (concluding that the case essentially “limited *Lucas* to its facts”).

69. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

70. *See, e.g.*, Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENV. L. REV. 339, 340–344 (2006) (arguing that the majority of the Court’s justices apply the *Penn Central* test in a way that is generally deferential to the government and noting that the “conventional wisdom” among “land-use lawyers” interprets the Court’s application of the test that way); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 333 (2007) (noting that property owners rarely prevail in the Supreme Court under the *Penn Central* test).

71. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quotation omitted).

72. F. Patrick Hubbard, et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENV. L. & POL'Y F. 121, 141–42 (2003). The owners won in 9.8% of cases overall and 13.4% of cases that reached the merits stage. *Id.* The authors claim that the 13% success rate is not especially low

Justice Scalia's opinion in *Stop the Beach Renourishment* implies that the test for judicial takings might be less deferential than *Penn Central*; he notes that a judicial taking occurs if a state court concludes that "an established right of private property no longer exists."<sup>73</sup> Professor John Echeverria claims that this means that Justice Scalia "believes that a judicial taking occurs whenever a court ruling changes an 'established' rule of property law."<sup>74</sup> In the same paragraph, however, Justice Scalia writes that "[c]ondemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent."<sup>75</sup> This suggests that judicial takings claims should be subject to the same standards as legislative or executive takings claims. Regardless of Justice Scalia's personal preferences, it is unlikely that a majority of the Court will agree to treat judicial takings claims more favorably than other takings. Given the deferential nature of established regulatory takings jurisprudence, it is highly unlikely that applying those standards to judicial takings claims will result in a flood of litigation.

Obviously, more litigation can be expected if the Court were to adopt stronger rules for regulatory takings claims generally, a position that others and I have advocated.<sup>76</sup> The additional litigation, however, would be justified if the case for a stronger regulatory takings jurisprudence is sound. After all, the new litigation would arise only because the federal courts had under-enforced a constitutional right for many years, thereby incentivizing state and federal officials to violate that right on a large scale. Historically, every effort to enforce constitutional rights after a long period of neglect has stimulated a wave of new litigation. For example, *Brown v. Board of Education*<sup>77</sup>

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when one considers that all but one of the cases where property owners lost were ones where low litigation costs or high potential rewards justified pursuing a case with a low probability of success. *Id.* However, the fact that nearly all of the *Penn Central* cases litigated in the authors' sample involved cases where plaintiffs had incentives to go forward with even a low probability of success merely underscores the fact that the test is tilted against owners. Otherwise, we should observe a much larger number of cases where plaintiffs went forward despite the fact that they needed a substantial chance of winning in order to make the costs of litigation worthwhile.

73. *Stop the Beach Renourishment*, 130 S. Ct. at 2602.

74. Echeverria, *supra* note 29, at 476 (quoting *Stop the Beach Renourishment*, 130 S. Ct. at 2602).

75. *Stop the Beach Renourishment*, 130 S. Ct. at 2602 (emphasis added).

76. See Somin, *Taking Property Rights Seriously*, *supra* note 68, at 25–38. For the best-known work advocating a much stronger regulatory takings standard, see RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN* (1985).

77. 347 U.S. 54 (1954).

led to a significant increase in race discrimination claims filed against state governments. Whether the benefits of the new litigation are worth the costs depends on whether state governments really have violated the constitutional right in question on a large scale. If the answer is yes, then the wave of lawsuits is an indication of the scale of the violations and the degree of federal intervention needed to curb them. Should the Supreme Court have decided *Brown* the other way in order to avoid the resulting increase in litigation?

In the long term, of course, government officials likely will adjust their policies in response to newly strengthened judicial enforcement of rights, thereby reducing the flow of litigation. Moreover, as the new rules become better established and understood, litigants will be able to predict the likely outcome of takings claims and settle out of court.

In this article, I do not try to make the case for a stronger regulatory takings jurisprudence. I only suggest that any such case would not be undermined by the need to enforce the Takings Clause against courts as well as other government actors.

## V. CONCLUSION

Judicial takings are fundamentally similar to other takings. The fact that judges, rather than legislators or executive branch officials, enact them is irrelevant under the Constitution. No one doubts that judges are forbidden to violate other constitutional rights. Property rights protected by the Takings Clause are no different.

Although the definition and enforcement of a judicial takings doctrine poses genuine challenges, these difficulties are fundamentally similar to those presented by other takings claims. There is room for wide-ranging disagreement over such issues as what kinds of government actions qualify as takings and how much compensation is owed to property owners in the event a taking occurs.<sup>78</sup> But the answers to such questions should not turn on whether the case involves a judge or some other agent of the state.

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78. See generally Glenn S. Lunney, *Compensation for Takings: How Much is Just?*, 42 CATH. U. L. REV. 721 (1993) (describing various alternative methodologies for determining compensation).