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D. Benjamin Barros

Widener University School of Law

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THE COMPLEXITIES OF JUDICIAL TAKINGS

D. Benjamin Barros *

INTRODUCTION

When (if ever) a judicial action can be an unconstitutional taking of private property has long been an open question in American constitutional law. Nested within this larger question are a host of detailed issues concerning both substance and procedure. Despite passing references in some cases, and a more direct discussion in one concurring opinion, the Supreme Court of the United States—until recently—had never squarely addressed the question of judicial takings or the detailed issues that a judicial takings doctrine would present.

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, in which the Court specifically granted certiorari to consider a judicial takings claim against a decision by the Florida Supreme Court,¹ appeared to present a vehicle for the Court to finally resolve the judicial takings question. The opinions in *Stop the Beach*, however, were highly fragmented, and no position on the major issues of judicial takings commanded a majority of the Court.² Justice Scalia wrote an opinion that constituted the unanimous opinion of the Court in rejecting the judicial takings claim, but constituted only a plurality opinion on the important open issues.³ The plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Alito, expressed strong support for a judicial takings doctrine grounded in the Fifth

* Associate Professor of Law, Widener University School of Law, Harrisburg Campus. Thanks to Nestor Davidson, John Dernbach, and David Spohr, and to participants in faculty workshops at Widener University School of Law and Lewis & Clark Law School, for helpful comments.

1. 560 U.S. ___, ___, 130 S. Ct. 2592, 2597 (2010).

2. See *id.* at ___, 130 S. Ct. at 2597 (detailing the many opinions issued by various Justices on the Court).

3. See *id.* at ___, 130 S. Ct. at 2610–13 (majority opinion); *id.* at ___, 130 S. Ct. at 2601–10 (plurality opinion).

Amendment's Just Compensation Clause.⁴ Justice Kennedy, joined by Justice Sotomayor, wrote a concurrence grounded in substantive and procedural due process,⁵ and Justice Breyer, joined by Justice Ginsburg, wrote a concurrence that was non-committal on most issues.⁶ Justice Stevens, who owns Florida beachfront property, recused himself.⁷

As a result of this division among the members of the Court, all of the major issues presented by the problem of judicial takings—including the larger question of whether a judicial action could ever be considered a taking—remain open. Nonetheless, the Supreme Court's grant of certiorari, along with the strong endorsement of a doctrine of judicial takings in Justice Scalia's opinion for the plurality, are sure to bring renewed attention to what has in the past been a relatively neglected area of law. Indeed, Justice Scalia's opinion expressly invites property owners to bring judicial takings claims in the lower federal courts challenging state court property decisions.⁸ The federal courts, therefore, are likely to see litigation over judicial takings claims and will have to resolve these controversies without any binding guidance from the Supreme Court.

One theme of the fragmented opinions in *Stop the Beach* is that the legal issues raised by judicial takings are many and complex. I argue that judicial takings issues are even more complex than the members of the Court suggested. In particular, I argue that three factual distinctions—largely ignored in *Stop the Beach*—could lead to dramatically divergent outcomes in matters of judicial takings standards, procedures, and remedies. The first distinction is between government actions that mandate transfers of property from a private person to the public (“private-public transfers”) and government actions that mandate transfers of property from one private person to another (“private-private transfers”). The second distinction is between judicial takings claims brought by the original parties to the state court litigation and claims brought by other similarly situated property owners. The third distinction is between cases in which the judiciary

4. See *id.* at ___, 130 S. Ct. at 2601–10 (plurality opinion).

5. See *id.* at ___, 130 S. Ct. at 2613–18 (Kennedy, J., concurring).

6. See *id.* at ___, 130 S. Ct. at 2618–19 (Breyer, J., concurring).

7. Kimberly Miller, *Florida Residents on Beach Lose Case*, PALM BEACH POST (Fla.), June 18, 2010, at 1A; see *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2613.

8. See *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2609–10 (plurality opinion).

acted unilaterally and cases in which the judiciary acted in the context of a constitutional challenge to an underlying legislative or executive act. I elaborate on these three distinctions and illustrate them with examples in Part I. I also provide in Part I a brief introductory overview of the state of judicial takings pre- and post-*Stop the Beach*.

In Part II, I consider the substantive issues that arise in judicial takings cases. I first argue that the Supreme Court had no need to settle on a judicial takings standard in *Stop the Beach*. In Part II, I make three substantive arguments. First, I argue that judicial takings does not require a substantive standard that is different from the standards that are applied in takings cases involving the legislature or executive. Second, I argue that a judicial takings doctrine (and regulatory takings doctrines more generally) should apply to private-public transfers but not to private-private transfers. Third, I argue that federal courts should defer to state court property decisions, and that Justice Scalia's *Stop the Beach* plurality opinion reflects a substantial amount of deference to the Florida Supreme Court. Finally, I consider how the analysis might differ under the substantive due process approach advocated by Justice Kennedy in his *Stop the Beach* concurrence.

Part III examines procedural and remedies issues that are presented by judicial takings scenarios. I first explore how procedural due process issues can arise in judicial takings contexts. I then examine the application of *Williamson County* exhaustion requirements, the *Rooker-Feldman* doctrine, and the statute of limitations, to judicial takings cases. Finally, I discuss the remedies that might be available for a judicial taking. The distinctions between judicial takings claims brought by the losing state court parties and claims brought by other property owners, and between unilateral judicial actions and cases involving underlying legislative or executive acts, are both significant in these contexts. In Part IV, I briefly address the concern, articulated by Justice Breyer in his *Stop the Beach* concurrence, that recognizing a judicial takings doctrine would result in the federal courts becoming the appellate courts of last resort for all state court property claims. I argue that there is little risk of a flood of litigation so long as a judicial takings doctrine is limited to public-private transfers.

I conclude that courts considering the many open questions presented by the judicial takings problem should be mindful of

the factual and legal distinctions between different types of cases that bring additional complexity to an already difficult area of constitutional law.

I. BACKGROUND

In this Part, I provide a foundation for the subsequent discussion. First, I elaborate on the three factual distinctions that form the basis for many of my subsequent arguments. Second, I provide a brief overview of the state of the judicial takings doctrine before and after *Stop the Beach*.

A. *Three Distinctions*

1. Private-Public Transfers v. Private-Private Transfers

Cases in which the challenged government action transfers private property to the public may be distinguished from cases in which the government action transfers private property from one private person to another. Here are some examples of the first type of case, which I call a private-public transfer:

A court redefines a certain area that had been private property as public property. Beachfront property has been a focus of recent judicial takings cases and commentary in significant part because it involves an often-contested border between public and private property. In all jurisdictions, at some point on the beach private property ends and public property begins. This borderline is set at various places in various jurisdictions, but two likely candidates are the mean high tide line (i.e., the average point that the water reaches at high tide) and the vegetation line (i.e., the point at which vegetation starts to grow).⁹ On many beaches, there is an area of sand between the mean high tide line and the vegetation line, and this part of the beach is commonly used for recreation. Imagine that a jurisdiction had clearly established case law that set the mean high tide line as the public-private boundary. If the state supreme court in that jurisdiction issued an opinion changing the boundary to the vegetation line, then the area of beach between the mean high tide line and the vegetation

9. See, e.g., TEX. NAT. RES. CODE ANN. § 61.011 (West Cum. Supp. 2009).

line, which had been private, would be transferred by the judicial decision to public ownership.

A court grants public access to what had previously been private property. Imagine that, as in the prior example, a jurisdiction has clear case law that establishes the mean high tide line as the private property boundary for beachfront property, and that private property owners have the right to exclude the public from the area above the mean high tide line. In this scenario, however, the state supreme court departs from prior precedent and holds that the public must be allowed access to the area between the mean high tide line and the vegetation line. Here, unlike the prior example, the property remains in private hands, but it is subject to a public right of access. The judicial action can be conceptualized as removing part of the private property owner's right to exclude, or as transferring an easement for public access from the private property owner to the public. If the legislature or an executive agency had done the same thing, this action would be a per se taking under the Supreme Court's regulatory takings case law.¹⁰

A court changes property law so that private property transfers to state ownership. A property owner typically has the right to transfer property at death. Imagine that a state supreme court changed its existing law and held that upon a property owner's death, certain types of property escheated to the state. This judicial action would lead to the transfer of private property to the state. If this change in the law was performed by the legislature or an executive agency, it would be an unconstitutional taking under the Supreme Court's regulatory takings jurisprudence.¹¹

A court destroys existing-use rights in private property. Imagine that in our hypothetical jurisdiction, the preexisting case law clearly permitted a property owner to build on a particular type of property. The state supreme court then issues an opinion changing the law, and as a result the property owner is no longer permitted to build on the property. Whether or not this change would constitute a taking if enacted by the legislature or an executive agency would depend on the specific facts of the case and the idiosyncrasies of regulatory takings law. In at least some circum-

10. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

11. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 718 (1987).

stances, such a legislatively or executively enacted change would be a taking.¹² Regardless of whether the change is unconstitutional, it involves a private-to-public transfer because the use rights that before the judicial action were in private hands no longer exist as private property. These use rights were not transferred to another private person; rather, use rights were destroyed as private property rights. The destruction of private property rights in this sense is the equivalent of transferring them to the public.¹³ The government could change the law to recreate these use rights, and thereby transfer them back to the private property owner.

The second type of case, which I call a "private-private" transfer, involves a government action that transfers property from one private person to another. Here are some examples:

- A state supreme court changes its rules on interpreting ambiguous conveyances; as a result, person *A* is held to own a parcel of property, whereas person *B* would have owned the parcel under the prior law.

- A state supreme court changes its law of future interests; as a result, person *A* now holds the future interest to a certain parcel of property, whereas under the former rule, person *B* would have held the future interest to that parcel of property.

- A state supreme court changes its law on creation of easements; as a result, an easement that would have been valid under the prior law no longer exists. The easement is effectively transferred from the person who would have been the easement holder (person *A*) to the person who owns the property that would have been subject to the easement (person *B*).

- The obverse of the previous scenario: a state supreme court changes its law on creation of an easement; as a result, an easement that would not have been valid is now valid. The easement is effectively transferred from the person whose property would have been free of the burden of the easement to the person who now owns the benefit of the easement.

- A state supreme court changes its rules on contracts (e.g., the statute of frauds or the parol evidence rule); as a result, person *A*

12. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026–29 (1992).

13. See discussion *infra* Part I.A.1.

loses a dispute over ownership of a parcel of property to person *B*; person *A* would have won under the old rule.

- A state supreme court changes its interpretation of its recording act; as a result, person *A*'s interest in a parcel of property is invalid, whereas it would have been valid under the prior law.
- A state supreme court changes its rules on adverse possession; as a result, person *B* owns the property whereas under the prior rule, person *A* would have owned the property.

Various distinctions might be made between these scenarios; some, for example, involve changes in substantive property law, while others involve changes in other areas of law that affect property ownership. For the purposes of this article, however, I will focus on the private-private nature of the transfer that is common to all of the scenarios.

2. Parties to the State Court Litigation v. Other Property Owners

Judicial takings challenges brought by parties to the state court litigation may be distinguished from judicial takings challenges brought by other property owners. Consider the beachfront property example, where the state supreme court redefined the public-private boundary from the mean high tide line to the vegetation line. The property owners who were parties to the litigation could attempt to petition for certiorari to the Supreme Court of the United States, or might attempt to bring a constitutional challenge to the state supreme court judgment in the federal district court. Other beachfront property owners who were not parties to the litigation before the state supreme court might also bring a judicial takings challenge against the state supreme court judgment in federal district court.

Although there may not be a difference between the substantive judicial takings standard applied in these types of cases, the distinction between cases brought by the litigants in the state supreme court and cases brought by other property owners looms large when issues of procedure and remedies are considered. I discuss these issues at length below.¹⁴

14. See discussion *infra* Part III.

3. Underlying Legislative Acts v. Unilateral Judicial Actions

Cases where a state judiciary changes its law of property in response to a takings challenge to a legislative or executive act may be distinguished from cases where a state judiciary unilaterally changes its law of property in the course of a dispute between private litigants.

In the first type of case, the court's change in property law would insulate the challenged legislative or executive act from a takings challenge by holding that the property owner had no protected property interest to be taken. As an example, consider a slight modification of the beachfront property scenario involving a change in the public-private boundary line from the mean high tide line to the vegetation line. In this modification, the change to the law is not made in the first instance by the state courts, and instead is made by the state legislature, which passes a law revising the public-private boundary line. Property owners bring a takings challenge to this law, and in the course of this litigation, the state judiciary interprets its case law to mean that the public-private boundary was located at the vegetation line. As a result, the judiciary rejects the takings claim on the grounds that the challenged law is consistent with the state's existing property law. In this scenario, the state court's interpretation of its prior case law is wrong, and its holding in the takings litigation in fact changes the state's property law. It is this judicial change in the law that is later challenged as a judicial taking.

In the second type of case, the court changes property law in the context of a dispute between private litigants that does not involve a challenge to a legislative or executive act. As an example, consider the original beachfront property scenario. In litigation between private parties (perhaps a trespass action against a beachgoer, or a declaratory judgment action seeking public access to the beach), the state supreme court changes the boundary between public and private property from the mean high tide line to the vegetation line. Here, the effect of the state court's action is the same as in the prior version of the scenario—the state's property law is changed—but the judiciary acted entirely on its own in making the change.

The distinction between these types of cases should not matter for the substantive question of whether a judicial taking has oc-

curred. The distinction may have some relevance, however, when considering procedural and remedies issues.¹⁵

B. *Judicial Takings Before and After Stop the Beach*

Prior to *Stop the Beach*, judicial takings was a relatively obscure area of law that never had received explicit consideration from the Supreme Court of the United States. The clearest reference to a judicial takings doctrine is this passage from Justice Stewart's concurrence in *Hughes v. Washington*:

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. . . . To the extent that the decision of the Supreme Court of Washington on [the property issue in dispute] arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.¹⁶

The Court raised by implication the idea of judicial takings in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,¹⁷ which involved a constitutional challenge to a state court decision declaring that funds held in certain types of accounts became public money.¹⁸ Justice Scalia signaled an interest in judicial takings in a dissent from the denial of certiorari in a case in 1994.¹⁹ In no case, however, had a majority of the Court explicitly adopted a judicial takings theory, nor had the Court ever granted certiorari specifically to consider the judicial takings issue.

15. See discussion *infra* Part III.

16. *Hughes v. Washington*, 389 U.S. 290, 295–97 (1967) (Stewart, J., concurring).

17. 449 U.S. 155, 160 (1980); see *infra* notes 60–62 and accompanying text.

18. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2602 (2010) (plurality opinion) (quoting *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 952 (Fla. 1979) (per curiam), *rev'd*, 449 U.S. 155 (1980)).

19. See *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of certiorari).

Judicial takings received an academic boost from the 1990 publication of Barton H. Thompson, Jr.'s landmark article *Judicial Takings*,²⁰ and the concept has received some recent attention from other scholars.²¹ Judicial takings, however, has received much less academic attention than other takings issues.

Stop the Beach inevitably will raise the judicial and academic profile of judicial takings. Because of the lack of precedential value of the various *Stop the Beach* opinions, virtually every major issue related to judicial takings—including whether it is even possible for the judiciary to take property within the meaning of the Just Compensation Clause—remains open as a matter of Supreme Court case law. *Stop the Beach*, however, leaves the general concept of judicial takings on stronger footing than it ever has been before. The Court granted certiorari expressly to consider the judicial takings issue, and all of the opinions issued by members of the Court engage in the issue at least to some extent. Four members of the Court have indicated strong support for a judicial takings doctrine, and two others have suggested that some judicial actions that abrogate property rights would be unconstitutional on due process grounds.²² Property owners therefore have a strong basis to bring judicial takings challenges in the federal courts, although virtually everything about the procedural and substantive law that will govern these challenges remains up in the air.

20. See generally Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990). Thompson's important work did not focus on the distinction between private-public and private-private transfers that I make above, and therefore may overstate the impact of some early cases on the idea of judicial takings. For example, he writes that "by the end of the New Deal, the concept of judicial takings seemed dead. Over and over, federal courts rejected the argument that courts could take property by changing the law." *Id.* at 1467. As authority for this proposition, he cites cases that involved private-private transfers. See *id.* at 1467 n.76 (citing *Carolina-Va. Racing Ass'n v. Cahoon*, 214 F.2d 830, 831-33 (4th Cir. 1954); *Sunray Oil Co. v. Comm'r*, 147 F.2d 962, 963-64 (10th Cir. 1945); *Baumann v. Smrha*, 145 F. Supp. 617, 625 (D. Kan. 1956)). I argue below that not all changes in precedent are the same, and limit judicial takings to private-public transfers. See discussion *infra* Part II.B.2.

21. See, e.g., David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487 (2004); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379.

22. See *supra* notes 4-5 and accompanying text.

II. THE SUBSTANTIVE STANDARD FOR JUDICIAL TAKINGS

In this Part, I consider the substantive standard that would apply to a judicial takings claim. In doing so, I presume that it is indeed possible for a judicial action to be an unconstitutional taking. I acknowledge that this presumption avoids a theoretical issue that may be the topic of some debate. There are, however, two good reasons to make this presumption. First, as the foregoing analysis shows, the judiciary is just as capable of taking property as either of the other branches of government.²³ Second, even though their positions are not binding precedent, six Justices in *Stop the Beach* signed on to opinions supportive of the idea that at least some judicial changes in property law would be unconstitutional: Justice Scalia, joined by the Chief Justice and Justices Thomas and Alito on takings grounds, and Justice Kennedy, joined by Justice Sotomayor, on procedural and substantive due process grounds. Justice Breyer, joined by Justice Ginsburg, did not disagree with these positions, and instead argued that there was no need to reach these issues.²⁴

In examining potential judicial takings standards, I first consider in subpart A whether the Supreme Court needed to resolve the judicial takings standard in deciding *Stop the Beach*. This issue, which was the subject of some debate among the Justices, will be important to lower federal courts considering judicial takings claims similar to those raised in *Stop the Beach*. I then consider alternative standards for judicial takings under the Just Compensation Clause in subpart B, and standards under Justice Kennedy's substantive due process approach in subpart C.

A. *The Supreme Court Did Not Need to Resolve the Judicial Takings Standard in Stop the Beach*

The three opinions issued by the Justices in *Stop the Beach* contain a significant amount of discussion of whether the Court

23. See Thompson, *supra* note 20, at 1451 (“Courts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections . . .”).

24. Indeed, Justice Breyer asked a question at oral argument that suggested that he thought at some point a judicial change in property law would be so drastic as to be unconstitutional. See Transcript of Oral Argument at 53, *Stop the Beach Renourishment*, Inc. v. Fla. Dep’t of Env’tl. Prot., 560 U.S. ___, 130 S. Ct. 2592 (2010) (No. 08-1151).

needed to reach the issue of the substantive takings standard applicable to judicial takings cases. Justice Scalia's plurality opinion argued that the Court needed to reach this issue;²⁵ Justices Kennedy and Breyer each argued in concurrence that the Court did not need to reach this issue.²⁶

On the surface, this debate might seem to be of largely academic interest, because none of the opinions issued in *Stop the Beach* commanded a majority of the Court. If Justice Scalia's opinion had commanded a majority, then whether the Court needed to reach the issue of the substantive standard might have mattered a great deal—if the Court did not need to reach this issue, then Justice Scalia's discussion of the standard might be discounted as mere dicta. Because Justice Scalia did not command a majority for his position, his discussion of the substantive judicial takings standard is not binding precedent, dicta or not. On further consideration, however, resolving the issue of whether the Supreme Court needed to reach the substantive standard will be critical to lower federal courts deciding judicial takings challenges, because those courts themselves will have to decide whether and when they need to address the substantive judicial takings standard.

Justice Scalia's argument for the proposition that the Court needed to resolve the substantive standard is straightforward: the Court cannot decide whether there has been a judicial taking until it decides what constitutes a judicial taking.²⁷ Thus, in critiquing Justice Breyer's position that the Court need not reach the issue, Justice Scalia wrote: "Justice B[reyer] cannot decide that petitioner's claim fails without first deciding what a valid claim would consist of."²⁸ Justice Breyer responded by asserting that "courts frequently find it possible to resolve cases—even those raising constitutional questions—without specifying the precise

25. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2602–05 (plurality opinion).

26. *Id.* at ___, 130 S. Ct. at 2613 (Kennedy, J., concurring); *id.* at ___, 130 S. Ct. at 2618–19 (Breyer, J., concurring).

27. *Id.* at ___, 130 S. Ct. at 2603–05 (plurality opinion). As part of his back-and-forth with Justice Breyer on the issue of whether it was necessary to reach the standard for judicial takings, Justice Scalia analogized "the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking" to the "perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?" *Id.* at ___, 130 S. Ct. at 2603. The question of the woodchuck, however, is not nearly as perplexing as Justice Scalia suggests: a woodchuck would chuck as much wood as a woodchuck could chuck if a woodchuck could chuck wood.

28. *Id.* at ___, 130 S. Ct. at 2604.

standard under which a party wins or loses.”²⁹ Justice Breyer also noted the consistent theme in the Court’s prior decisions of the importance of deciding only the narrow issue presented by a case.³⁰ For his part, Justice Kennedy also argued that it was a bad idea for the Court to reach out and decide issues that it need not reach before those issues had been considered in the lower courts and by commentators.³¹

Justices Breyer and Kennedy have the better argument. Justice Scalia, of course, was correct that a court needs to have at least some idea of the applicable substantive standard before it resolves a party’s claim. But Justice Breyer was also correct that in some cases a court need not resolve the specific standard before it rejects a claim. Consider a common law court deciding for the first time whether to recognize a doctrine of felony murder in a case where it turns out the victim is still alive. The court would be entirely correct to decide the case without resolving the specific felony murder standard, because on any conceivable analysis, a murder prosecution requires the victim to be dead. Although the law on judicial takings is still wide open, everyone would agree that to state a judicial takings claim, a property owner would have to demonstrate that a state court judicial action was a departure from, or inconsistent with, the prior property law in that jurisdiction. If a state court holding is consistent with the state’s prior property law, then nothing has been taken from the property owner. Alternatively, this same point can be made in terms of a comparison to takings by the legislature or the executive branch. Under no theory of judicial takings could a judicial action be a taking if it would not be a taking for the legislature or the executive branch to do the same thing. A legislative or executive action is not a taking if it is consistent with the state’s background principles of property law.³² For a takings claim to be made, the prop-

29. *Id.* at ___, 130 S. Ct. at 2619 (Breyer, J., concurring).

30. *See id.* at ___, 130 S. Ct. at 2619 (quoting *Whitehouse v. Ill. Cent. R.R.*, 349 U.S. 366, 373 (1955)).

31. *See id.* at ___, 130 S. Ct. at 2617–18 (Kennedy, J., concurring).

32. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Justice Scalia’s opinion for the plurality in *Stop the Beach* can be read as a shot across the bows of state courts that might be tempted to misuse the background principles exception to protect the state from takings liability. If there was no precedential support for the state court’s use of the background principles exception, then the state court decision itself might constitute a judicial taking. Quoting *Lucas*, Justice Scalia wrote,

[A] regulation that deprives a property owner of all economically beneficial use of his property is not a taking if the restriction “inhere[s] in the title it-

erty owner must establish that something was taken. In *Stop the Beach*, the Court unanimously concluded that the Florida Supreme Court's holding was consistent with the prior Florida law on beachfront property.³³ Under no conceivable standard, then, could the Florida Supreme Court's holding be a judicial taking, and the Supreme Court of the United States therefore did not need to reach the specific substantive standard for judicial takings to reject the petitioner's claims.

Justices Kennedy and Breyer were also correct to argue that it is unwise to reach an issue if it is unnecessary to do so. An overarching theme of this article is that the issues presented by judicial takings are far more complex than the Court's opinions in *Stop the Beach* (including those by Justices Kennedy and Breyer) might suggest. Had the Court finally resolved any of these issues in *Stop the Beach* without recognizing their complexity, it might have created more problems than it solved.

Lower federal courts considering judicial takings claims would therefore be wise to resolve only the narrow issues presented by any particular case. Under any conceivable theory of judicial takings, a judicial taking can only occur if the challenged state court holding is inconsistent with the state's prior property law. If a court concludes that the challenged state court holding is consistent with the prior law in that state, then the court should reject the judicial takings claim without reaching the issue of the specific judicial takings standard.

B. *When Should a Judicial Action Be Considered a Taking Under the Just Compensation Clause?*

In this section, I consider the substantive issue of when a judicial action should be understood to constitute a taking in violation of the Just Compensation Clause. I first argue that there is no

self, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.

Stop the Beach, 560 U.S. at ___, 130 S. Ct. at 2609 (plurality opinion) (quoting *Lucas*, 505 U.S. at 1029); see also *id.* at ___, 130 S. Ct. at 2612 (majority opinion) ("The Florida Supreme Court decision before us is consistent with these background principles of state property law.").

33. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2612 (majority opinion).

need for a unique judicial takings standard and that a judicial action should be a taking if the equivalent action performed by the legislature or executive branch would also be a taking. I then argue that the takings doctrine under the Just Compensation Clause—whether judicial or otherwise—should only include private-public transfers, and not private-private transfers. Finally, I consider the degree of deference that a reviewing federal court should give to contested state court property decisions.

1. There Is No Need for a Unique Judicial Takings Standard

The logic of judicial takings rests on two basic points. First, the judiciary is a state actor, and is subject to the Constitution.³⁴ Second, the judiciary is capable of taking property.³⁵ The first point seems incontrovertible, and the examples of judicially mandated private-public transfers discussed above demonstrate that the second is true as well. As Justice Scalia argued in his *Stop the Beach* plurality opinion, “[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.”³⁶

On this logic, there is no need for a unique test for judicial takings. A judicial action should be considered a taking under the Just Compensation Clause if the equivalent action would be a taking if performed by the legislature or the executive branch.

The prototypical judicial takings fact pattern involves a change in property law by a state judiciary. Although this fact pattern may appear to be superficially different from the standard regulatory takings case, it in fact fits very well into the structure of the Court’s existing regulatory takings jurisprudence. The Court has considered takings challenges to legislative changes to property law that are similar to changes that might be made by the judiciary. In *Hodel v. Irving*, for example, the Court held that a legislative change to rules relating to the transfer of property at death was an unconstitutional taking.³⁷ It is important to note, as I will discuss further below, that *Hodel* involved a private-public trans-

34. U.S. CONST. art. VI, cl. 2.

35. See Thompson, *supra* note 20, at 1451 (“Courts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections . . .”).

36. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2602 (plurality opinion).

37. 481 U.S. 704, 717–18 (1987).

fer—the change in law resulted in the property interests in question escheating to the state at death, rather than transferring to another private person.³⁸ For now, it is sufficient to recognize that it is easy to imagine a state court making the type of change in law that the legislature made in *Hodel*. It is similarly easy to imagine state court decisions making other types of changes to the law that would fit into other branches of the Court's regulatory takings case law. The private-public transfer scenarios discussed above provided examples of judicial alterations of use rights in property that could easily be analyzed under cases such as *Penn Central Transportation Co. v. New York City*³⁹ and *Lucas v. South Carolina Coastal Council*,⁴⁰ and of judicial requirements of public access to private property that are similar to those at issue in cases like *Kaiser Aetna v. United States*⁴¹ and *Nollan v. California Coastal Commission*.⁴²

There can be little question that a legislative or executive action simply declaring that previously recognized property rights no longer existed would be a regulatory taking under the Court's existing takings jurisprudence. The dominant theme of the Court's most recent regulatory takings cases is that a government action is a taking if it is the equivalent of an exercise of eminent domain,⁴³ and Justice Scalia's *Stop the Beach* plurality opinion prominently featured his principle of equivalence.⁴⁴ The declaration that a property right no longer exists is certainly the equivalent of the taking of that property right through eminent domain. Prior to each government action, owners held private property rights; after each, the public held those rights.⁴⁵ Thus, as Justice Scalia argued in *Stop the Beach*, "[i]f 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

38. See *infra* notes 58–59 and accompanying text.

39. 438 U.S. 104 (1978).

40. 505 U.S. 1003 (1992).

41. 444 U.S. 164 (1979).

42. 483 U.S. 825 (1987).

43. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.>").

44. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2601 (2010) (plurality opinion).

45. See *id.* at ___, 130 S. Ct. at 2602.

State had physically appropriated it or destroyed its value by regulation.”⁴⁶ In his opinion, Justice Scalia placed his emphasis on “*or a court.*”⁴⁷ Here, I would place the emphasis on “a legislature.” The branches of government are equivalent in this context, and there is no need to create a unique standard for judicial takings.

2. The Just Compensation Clause Should Apply to Private-Public Transfers, but Not to Private-Private Transfers

My argument that the Just Compensation Clause should apply to private-public transfers, but not to private-private transfers, has three parts. First, private-private transfers do not “destroy” or “take” property in the same sense as private-public transfers. Second, there is scant support in the Court’s regulatory takings jurisprudence for applying the Just Compensation Clause to private-private transfers. Third, there is no support in Justice Scalia’s *Stop the Beach* plurality opinion for including private-private transfers within a judicial takings doctrine.

a. Private-Private Transfers Neither “Destroy” Nor “Take” Property in the Same Sense As Private-Public Transfers

Recall the examples of private-private transfers discussed in Part I.A.1.⁴⁸ Some of these scenarios involve what fairly could be termed the destruction of a private property right. The example involving a change in future interests law, for example, might involve the invalidity of an interest that would otherwise have been

46. *Id.*

47. *Id.*

48. I discussed the private-public v. private-private distinction in a blog post written just after certiorari was granted in *Stop the Beach*. D. Benjamin Barros, *What’s At Stake in Stop the Beach Renourishment*, PROPERTYPROF BLOG (July 1, 2009), <http://lawprofessors.typepad.com/property/2009/07/whats-at-stake-in-stop-the-beach-renourishment.html>. Lior Strahilevitz, responding to a hypothetical by Jerry Anderson, had some very thoughtful comments on the subject after the opinion in *Stop the Beach* was issued. See Lior Strahilevitz, *Stop the Beach Renourishment, Kelo, and the Future of Judicial Takings*, U. CHI. L. SCH. FAC. 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>. Eduardo Peñalver also had some very thoughtful comments. See Eduardo Peñalver, *Judicial Takings*, PRAWFSBLAWG (June 22, 2010, 2:56 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/06/judicial-takings.html>. The distinction made here also bears a slight resemblance to Joseph Sax’s distinction between government acting as enterpriser and government acting as mediator between conflicting private claims. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62 (1964).

valid. It is not a stretch to call this change a destruction of the future interest in question. So, too, with the example of the easement that otherwise would have been valid under the prior law; the change in law can fairly be termed a destruction of the easement.

These two examples, however, do not involve the destruction of a property right in the sense that it was used to describe the examples involving private-public transfers. In the private-public transfers, the private property right was destroyed as an interest in private property; those rights are no longer held by any private person and are public, not private, property. In the private-private examples involving the future interest and the easement, in contrast, the interests are best conceptualized as being transferred to another private person, rather than as being destroyed outright as private property interests.

This distinction can be illustrated by comparing the easement-destruction example and the beachfront land example involving judicial redefinition of the public-private boundary line. If the easement is destroyed, the property interests represented by the easement effectively transfer from the person who would have been the holder of the benefit of the easement (person *A*) to the holder of the property that would have been burdened by the easement (person *B*). Person *B* could later grant those interests to person *A* or another person. That is, person *B* could recreate the destroyed easement. In the beachfront land example, in contrast, no private property owner could recreate the destroyed property interests. In the first beachfront example, the state supreme court moved the boundary between public and private property from the mean high tide line to the vegetation line. This action destroyed the private property between the mean high tide line and the vegetation line. The private property interests at issue no longer exist—no private person could recreate them under any circumstance. Rather, these interests have become public property. The public, of course, could act through a government entity to recreate the destroyed private property interests—for example, by legislatively granting the land at issue to a private person. The private-public transfer involved in this example, however, truly destroys private property in that the property interest is no longer private, while the private-private transfer at issue in the easement example preserves the interests as private property, albeit in a different private owner.

Similarly, a private-public transfer “takes” property in a way that a private-private transfer does not. It is natural to read the word “taken” in the Just Compensation Clause as applying to those circumstances where the government action transfers the property interest from a private person to the government. The development of the Court’s regulatory takings jurisprudence shows a consistent recognition that the government can take property in this sense without an exercise of eminent domain.⁴⁹ The foregoing discussion of the beachfront property scenario demonstrates that property can be taken through judicial action just as it can be taken by regulation—the effect on the property owner in the version of the scenario involving an underlying legislative action is the same as it is in the version where the judiciary acts on its own.

In a private-private transfer, in contrast, the government action does not take property in the same way. To be sure, it does not do violence to the word “take” to say that the examples of the private-private transfers discussed above take property from one person and transfer it to another. There is good reason, however, to focus on both ends of the transaction in interpreting the Just Compensation Clause. The historical evidence suggests that the Just Compensation Clause was inspired by private-public transfers,⁵⁰ and the Supreme Court’s recent regulatory takings jurisprudence has increasingly focused on the equivalence of the contested regulatory act to an exercise of eminent domain.⁵¹ By its nature, eminent domain involves a private-public transfer. It is true—at least under the Supreme Court’s case law—that the government is able to transfer private property taken by eminent domain to another private party.⁵² Even here, however, the transfer would be private-public-private, rather than simply private-private. That is, even when eminent domain is used to transfer property from one private person to another, there is an intervening period of government ownership.

49. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177–78 (1871).

50. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 828–32 (1995).

51. See *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2601 (plurality opinion); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

52. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 484 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231–32 (1984); *Berman v. Parker*, 348 U.S. 26, 33 (1954).

Even if private-private transfers do not “take” property from an owner in the sense used here, they do “deprive” the owner of property. At the beginning of the transfer, the private person owned certain property. At the end of the transfer, he or she did not. Following the text of the Fifth Amendment,⁵³ this distinction between “take” and “deprive” suggests that there is a textual basis to apply the Just Compensation Clause to private-public transfers, but not to private-private transfers. The relevant portion of the Fifth Amendment reads: “No person shall . . . be *deprived* of life, liberty, or property, without due process of law; nor shall private property be *taken* for public use, without just compensation.”⁵⁴ The Due Process Clause of the Fourteenth Amendment echoes the language of the Fifth Amendment: “[N]or shall any State *deprive* any person of life, liberty, or property, without due process of law.”⁵⁵ Focusing on both the front and back ends of the transfer provides a natural demarcation of which types of transfers are subject to the Just Compensation Clause and the Due Process Clause. Both private-public and private-private transfers imposed by a government actor “deprive” owners of private property and are subject to the requirements of the Due Process Clause. Only private-public transfers, in contrast, “take” property and are subject to the requirements of the Just Compensation Clause.

b. There Is Little Support in the Court’s Contemporary
Regulatory Takings Jurisprudence for the Application of the
Just Compensation Clause to Private-Private Transfers

The Supreme Court’s regulatory takings case law has largely involved challenges to government actions that result in private-public transfers. The regulatory takings case that most resembles the prototypical judicial takings scenario of a change in substantive property law is *Hodel*, which involved a legislative alteration of an owner’s power to transfer certain types of property at

53. See U.S. CONST. amend. V.

54. *Id.* (emphasis added).

55. *Id.* amend. XIV (emphasis added). The Just Compensation Clause is applied to the states through incorporation by the Fourteenth Amendment’s Due Process Clause. *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234 (1897). Takings cases involving challenges to state laws therefore routinely refer to the Fourteenth Amendment, even if they are not applying procedural or substantive due process concepts rooted in the Due Process Clause.

death.⁵⁶ The legislation at issue, however, changed the law so that at the owner's death, the property at issue would escheat to the State, rather than transfer to another private person.⁵⁷ The legislative change thus created a private-public transfer, rather than a private-private transfer. Similarly, *Webb's Fabulous Pharmacies*,⁵⁸ which features prominently in discussions of judicial takings,⁵⁹ involved a court holding that certain private funds had become "public money."⁶⁰

The land-use regulation cases that are at the core of the Court's contemporary regulatory takings jurisprudence also involve private-public transfers. As discussed above, land-use restrictions transfer the use rights at issue from the affected private property owners to the public.⁶¹ In *Lucas*, for example, South Carolina's Beachfront Management Act prohibited David Lucas (or any other owner of the subject property) from building on two parcels of beachfront property that he owned.⁶² The use rights that Lucas had previously held were therefore transferred to the public. Similarly, in *Penn Central*, the owners of Grand Central Terminal claimed that New York's Landmarks Preservation Law prevented them from building in the air space above the terminal.⁶³ The Supreme Court rejected this takings claim, but the property owner's theory was that the government had transferred⁶⁴ its claimed use rights from the owner to the public.⁶⁵

The early regulatory takings case of *Pennsylvania Coal Co. v. Mahon* involved, at least in part, a private-private transfer.⁶⁶ Pennsylvania's Kohler Act prohibited the mining of coal beneath inhabited structures unless the owner of the coal also owned the

56. *Hodel v. Irving*, 481 U.S. 704, 709 (1987).

57. *Id.* (quoting Indian Land Consolidation Act, Pub. L. No. 97-459, § 207, 96 Stat. 2515, 2519 (1983) (repealed 2000)).

58. 449 U.S. 155 (1980).

59. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't Env'tl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2602 (2010) (plurality opinion).

60. *Id.* at ___, 130 S. Ct. at 2602 (quoting *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 952 (Fla. 1979) (per curiam), *rev'd*, 449 U.S. 155 (1980)).

61. *See discussion supra* Part I.A.1.

62. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007 (1992).

63. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115–17 (1978).

64. *Id.* at 138.

65. *Id.* at 122.

66. *See* 260 U.S. 393, 412–13 (1922).

structure.⁶⁷ In circumstances where the owner of the coal was different from the owner of the structure, the Kohler Act transferred the right to mine the coal at issue from the coal company (private) to the owner of the structure (also private).⁶⁸ There are good reasons, however, to see *Mahon* as a substantive due process case rather than a regulatory takings case in the mold of contemporary cases like *Penn Central* and *Lucas*.⁶⁹ The Supreme Court recently recognized in *Lingle v. Chevron U.S.A. Inc.* that the substantive due process inquiry in early cases differs in important respects from the contemporary regulatory takings inquiry.⁷⁰ If *Mahon* is understood as a substantive due process case, then it does not lend support for applying the Just Compensation Clause to private-private transfers. As noted above, a private-private transfer constitutes a "deprivation" within the meaning of the Due Process Clause, and both procedural and substantive due process concepts apply to private-private transfers.

Contemporary physical invasion cases such as *Nollan* and *Kaiser Aetna* involved a transfer of the right to exclude from private property owners to the public.⁷¹ Indeed, each case involved private property being subject to access by the public.⁷² Similarly, *PruneYard Shopping Center v. Robins* involved access to a mall by members of the public,⁷³ and *United States v. Causby* involved overflights by military airplanes.⁷⁴

One contemporary physical invasion case did involve a type of private-private transfer: *Loretto v. Teleprompter Manhattan CATV Corp.*⁷⁵ *Loretto* involved a challenge to a New York law that required private property owners to allow cable companies to install wiring and equipment on their property, and prohibited the

67. *Id.* (citing Act of May 27, 1921, 1921 Pa. Laws 1198 (codified at 52 PA. STAT. ANN. 661 (1998))).

68. *See id.*

69. *See generally* Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal v. Mahon*, 106 YALE L.J. 613, 666-70 (1996); William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 816 (1998).

70. 544 U.S. 528, 540-45 (2005).

71. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 165-66 (1979); *supra* note 10 and accompanying text.

72. *See Nollan*, 483 U.S. at 827; *Kaiser Aetna*, 444 U.S. at 165-66.

73. 447 U.S. 74, 77 (1980).

74. 328 U.S. 256, 258 (1946).

75. 458 U.S. 419, 421 (1982).

owners from demanding compensation from the cable companies in return.⁷⁶ Unlike the other physical invasion cases discussed above, the right to exclude in *Loretto* was transferred not from a private property owner to the public generally, but was instead transferred from private property owners to cable companies, which are private corporations.⁷⁷ Put another way, all of the physical invasion cases involve what effectively is the transfer of an easement from a private property owner to another party. In most physical invasion cases, this easement is transferred to the public. In *Loretto*, it was transferred to a private corporation.⁷⁸

Loretto thus presents a challenge to my assertion that the Supreme Court's contemporary regulatory takings jurisprudence has typically involved private-public transfers. There are a number of responses to this challenge. First, the cable companies at issue in *Loretto* were public utilities, not ordinary private corporations.⁷⁹ The distinction between private and public entities is a permeable one, and utilities, like common carriers, enjoy something of a quasi-public status.⁸⁰ For example, utilities are often delegated the power of eminent domain.⁸¹ In this context, it is notable that the equipment involved in *Loretto* was part of the larger cable network used to serve the public as a whole.⁸² The transfer in *Loretto* therefore has elements of a private-public transfer. Similarly, in *Causby*, the airplane overflight case, the outcome likely would not have changed if the overflights were by commercial airliners rather than military planes. Although commercial airlines are private entities, as common carriers they serve the public at large, and an invasion of private property by a common carrier can fairly be seen as an invasion by the public. Second, it can be argued that *Loretto* is simply wrong on its facts, even if its rule that regulations requiring physical invasions by

76. *Id.* at 423.

77. *See id.* at 421.

78. *See id.*

79. *See id.*

80. *See* Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 LAND & WATER L. REV. 101, 120 (1999).

81. *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 974 (2003); Nancy A. McLaughlin, *Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (Or Not)*, 26 VA. ENVTL. L.J. 399, 408–26 (2008); Amanda R. Gaddis, *Comment, Taking Away Local Control: The Risks of Regulating a Public Utility's Eminent Domain Authority*, 2 J. MARSHALL L.J. 153, 153 (2009).

82. *See Loretto*, 458 U.S. at 422.

the public are per se takings is sound. Third, and related to the second point, it can be argued that the Court in *Loretto* applied the wrong law to its facts, and was therefore led into an incorrect holding. I admit that it is a stretch to reconceptualize *Loretto* as a substantive due process case, because its analysis is stated expressly in terms of regulatory takings concepts and cases.⁸³ But if *Loretto* is understood as involving a private-private transfer, then under the approach that I advocate here, it should be evaluated under due process concepts, not takings concepts. Even under the relatively robust substantive due process inquiry advocated by Justice Kennedy,⁸⁴ the law at issue in *Loretto* would likely have been deemed constitutional, because the trivial impact on private property owners was imposed by a law for the easily justifiable purpose of allowing the cable companies to provide cable service to the public.

This brings us to the line of recent regulatory takings cases that most clearly involve private-private transfers. Most of the cases in this line involved regulatory takings and due process challenges to the retroactive imposition of monetary liability, typically in the pension context. So long as the newly imposed monetary liability is owed to another private person, rather than the government, this type of case involves a private-private transfer. Two earlier cases in this line, *Connolly v. Pension Benefit Guaranty Corp.* and *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, Inc.*, rejected takings claims to this type of retroactive imposition of liability,⁸⁵ and therefore do not provide strong support for the application of the Just Compensation Clause to private-private transfers.

The most recent case in this line, *Eastern Enterprises v. Apfel*, did hold that a retroactive imposition of liability for health benefits was unconstitutional.⁸⁶ The Justices' positions in *Apfel*, however, were highly fractured, and no position commanded a majority. Justice O'Connor's opinion for the plurality applied a regulatory takings analysis to find the imposition of liability un-

83. See *id.* at 426–38.

84. See discussion *infra* Part II.C.

85. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 605 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 213, 228 (1986).

86. 524 U.S. 498, 538 (1998) (plurality opinion).

constitutional.⁸⁷ There are four reasons why Justice O'Connor's plurality opinion does not provide strong support for applying the Just Compensation Clause to private-private transfers. First, it is only a plurality opinion. Second, and relatedly, Justice Kennedy dissented from the plurality's regulatory takings analysis.⁸⁸ Justice Kennedy's opinion did express some concern that the government could avoid takings liability by mandating private-private transfers.⁸⁹ As I will argue further below, however, Justice Kennedy's positions in *Stop the Beach* and other cases strongly suggest that he would address these concerns through the application of substantive due process doctrines, not regulatory takings doctrines.⁹⁰ Third, as the fragmented opinions in *Apfel* suggest, the underlying question in these cases of whether the imposition of monetary liability can fairly be understood as a taking remains controversial and unresolved. Fourth, *Apfel* was decided before *Lingle*. In *Lingle*, the Court recognized that its regulatory takings jurisprudence had been inadvertently infected with substantive due process concepts.⁹¹ As a result, the Court held that the "substantially advances" test, which had appeared to be well established in the Court's regulatory takings jurisprudence, should be rejected as an artifact of now-outdated substantive due process doctrine.⁹² A close look at the *Apfel* plurality reveals that it is based on vested rights and nonretroactivity concepts that historically have been grounded in substantive due process, not takings.⁹³ As the Court later recognized in *Lingle*, it is wrong to incorporate substantive due process concepts into the regulatory takings analysis.⁹⁴

Finally, one case in this line, *United States v. Security Industrial Bank*, applied a regulatory takings analysis to a private-private transfer⁹⁵ in a way that is hard to discount. Unlike *Apfel*, *Connolly*, and *Concrete Pipe*, *Security Industrial Bank* did not involve the retroactive imposition of monetary liability. Rather, it

87. *Id.* at 529.

88. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

89. *Id.* at 544.

90. See discussion *infra* Part II.C.

91. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 531–32 (2005) (citations omitted).

92. *Id.* at 540.

93. See *Apfel*, 524 U.S. at 533–34.

94. *Lingle*, 544 U.S. at 540–45.

95. 459 U.S. 70, 77–78 (1982).

involved the retroactive application of a lien avoidance statute.⁹⁶ The retroactive termination of a lien under the statute would have amounted to a private-private transfer of the lien interest from the lien holder to the owner of the property subject to the lien.⁹⁷ To avoid constitutional retroactivity problems, the Court interpreted the statute to apply only prospectively.⁹⁸ Although the Court noted that the case fit awkwardly into the regulatory takings framework, it rested its retroactivity concerns on regulatory takings cases.⁹⁹ Most important to the present issue, the Court specifically rejected the government's argument that takings concepts should not apply because the case involved a private-private transfer rather than a private-public transfer.¹⁰⁰ In a prior case, *Armstrong v. United States*, the Court had held that the destruction of a lien on government property through the operation of sovereign immunity constituted a compensable taking of the lien.¹⁰¹ In *Security Industrial Bank*, the government attempted to

distinguish *Armstrong* on the ground that it was a classical "taking" in the sense that the Government acquired for itself the property in question, while in the instant case the Government has simply imposed a general economic regulation which in effect transfers the property interest from a private creditor to a private debtor.¹⁰²

The Court rejected this argument in one sentence: "While the classical taking is of the sort that the Government describes, our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself."¹⁰³ In support of this proposition, the Court cited *Loretto*, *PruneYard*, and *Mahon*.¹⁰⁴ As discussed above, these three cases provide only limited support for the application of the Just Compensation Clause to private-private transfers.¹⁰⁵ The Court's position in *Security Industrial Bank* therefore had relatively weak precedential support, but the case itself now provides the clearest example of the Court

96. *Id.* at 72-73.

97. *See id.* at 71-72.

98. *See id.* at 82 (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979)).

99. *Id.* at 75-78.

100. *Id.* at 77-78.

101. 364 U.S. 40, 48-49 (1960).

102. *Sec. Indus. Bank*, 459 U.S. at 77-78.

103. *Id.* at 78.

104. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

105. *See supra* notes 67-85 and accompanying text.

applying a regulatory takings analysis to a private-private transfer.

Although its discussion is relatively explicit, *Security Industrial Bank* provides thin support for the application of the Just Compensation Clause to private-private transfers. The Court's cursory discussion of the subject was not well supported by precedent. Further, the Court used the regulatory takings analysis as a justification for construing the statute narrowly, rather than as a justification for invalidating the entire statute.¹⁰⁶ The Court could have used due process-based nonretroactivity concepts to reach the same point. Finally, as with the other cases in the *Apfel* line, the overall thrust of the Court's opinion in *Security Industrial Bank* is inconsistent with *Lingle's* recognition of the importance of separating the takings and substantive due process analyses.¹⁰⁷ Post-*Lingle*, constitutional concerns about the retroactive imposition of private-private transfers that historically have been rooted in substantive due process should not be seen as a part of the regulatory takings analysis. Understanding that this type of retroactivity claim is the province of substantive due process will further the significant clarification that *Lingle* has brought to regulatory takings doctrine.¹⁰⁸

Security Industrial Bank and *Loretto* therefore should be seen as the outliers in the Supreme Court's regulatory takings jurisprudence. The Court's regulatory takings cases—including the iconic cases such as *Penn Central* and *Lucas*—overwhelmingly have involved private-public transfers. The Court's case law therefore provides very little support for applying a regulatory takings analysis to private-private transfers, whether mandated by the legislature, executive branch, or judiciary.

106. See *Sec. Indus. Bank*, 459 U.S. at 82 (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979)).

107. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545, 548 (2005).

108. See *id.* at 543–45.

c. There Is No Support in Justice Scalia's Plurality Opinion for the Application of the Just Compensation Clause to Private-Private Transfers

Justice Scalia's plurality opinion in *Stop the Beach* had a very strong focus on private-public transfers.¹⁰⁹ The opinion, for example, noted that *Webb's Fabulous Pharmacies* closely resembled the claimed taking in *Stop the Beach*, and repeatedly emphasized the private-public transfer involved in that case.¹¹⁰ The opinion does contain two passages that, taken in isolation, might be seen as support for the application of the Just Compensation Clause to private-private transfers. On closer inspection, however, neither passage in fact provides this support.

In the first of these passages, Justice Scalia wrote: "Moreover, 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."¹¹¹ Taken alone, the words "to another private party" might be interpreted as providing some support for applying the regulatory takings inquiry to private-private transfers. This sentence is the beginning of a paragraph that highlights the trend in the Court's regulatory takings jurisprudence of equating certain regulatory acts to exercises of eminent domain,¹¹² and it is true that under *Kelo v. City of New London* and similar cases the government may use eminent domain to transfer property from one private person to another.¹¹³ As discussed above, however, these exercises of eminent domain are private-public-private, not private-private. The paragraph closes with a sentence that emphasizes the private-public transfer that was involved in *Webb's Fabulous Pharmacies*,¹¹⁴ and in context of the overall private-public thrust of the

109. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2601–02 (2010) (plurality opinion).

110. See *id.* "States effect a taking if they recharacterize as public property what was previously private property." *Id.* at ___, 130 S. Ct. at 2601 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–65 (1980)). The Court in *Stop the Beach* emphasized that *Webb's Fabulous Pharmacies* involved the recharacterization of private funds as "public money." *Id.* at ___, 130 S. Ct. at 2602 (citing *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 952 (Fla. 1979) (per curiam), *rev'd*, 449 U.S. 155 (1980)).

111. *Id.* at ___, 130 S. Ct. at 2601.

112. See *id.* (citations omitted).

113. See 545 U.S. 469, 489–90 (2005).

114. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2601 (plurality opinion).

plurality opinion, the words “to another private party” should be taken simply as an accurate statement of the Court’s post-*Kelo* eminent domain jurisprudence. Further, both Justices Scalia and Thomas dissented in *Kelo*,¹¹⁵ and it is fair to presume that both Chief Justice Roberts and Justice Alito would likewise be hostile to *Kelo*-type uses of eminent domain. There would be a certain level of dissonance involved with maintaining a position that *Kelo* is wrong and maintaining that the regulatory takings inquiry should apply to private-private transfers because of *Kelo*. This passage from the *Stop the Beach* plurality opinion therefore should not be read as support for applying principles grounded in the Just Compensation Clause to private-private transfers.

In the second passage, Justice Scalia wrote: “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.”¹¹⁶ Some of the private-private transfer scenarios discussed above might involve the “declar[ation] that what was once an established right of private property no longer exists.”¹¹⁷ For example, the scenarios involving changes to the law of future interests and the law of easements in one sense each declared that a private property interest no longer existed.¹¹⁸ As discussed above, however, these scenarios do not involve the elimination of interests as interests in private property; rather, they are better seen as involving the transfer of property interests from one private person to another.¹¹⁹ Any suggestion that this passage provides support for applying the Just Compensation Clause to private-private transfers, however, can be refuted simply by placing the passage into its context in Justice Scalia’s plurality opinion:

In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter:

115. See *Kelo*, 545 U.S. at 494 (Scalia, J., dissenting); *id.* at 505 (Thomas, J., dissenting). For a contrary view of the *Stop the Beach* plurality opinion’s applicability to private-private transfers, see Timothy M. Mulvaney, *The New Judicial Takings Construct*, YALE L.J. ONLINE 247, 258–64 (2011), available at <http://yalelawjournal.org/2011/2/18/mulvaney.html>.

116. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2602 (plurality opinion).

117. *Id.* at ___, 130 S. Ct. at 2602.

118. See discussion *supra* Part I.A.1.

119. See *supra* notes 53–54 and accompanying text.

Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. 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. “[A] State, by *ipse dixit*, may not transform private property into public property without compensation.”¹²⁰

Every other sentence in this paragraph is focused solely on government actions that result in transfers of private property to the public. In context, the passage at issue, like the remainder of Justice Scalia’s plurality opinion, should be read as being concerned with private-public transfers, not private-private transfers.

3. Deference and Standards of Review in Judicial Takings Claims Made Under the Just Compensation Clause

I argued above that judicial takings do not require a unique standard different from those applied to the other branches of government. The classic judicial takings fact pattern involves a change in state property law. If such a change in law would have been a taking if performed by the legislature or the executive branch, then it should also be a taking if performed by the judiciary.

The judicial takings fact pattern, however, does present some unique issues that typically are not present in equivalent cases involving the legislature or executive branch. If any of the branches made an explicit change in property law, then a reviewing federal court would have relatively little difficulty in evaluating the constitutionality of this change. If the change were implicit, however, a constitutional review would require interpretation of the state’s property law. Generally speaking, this interpretive task is the responsibility of the state courts. In reviewing an implicit change in state property law, a federal court could be seen as usurping the role of state courts as the authoritative interpreters of state property law. On the other hand, taken to its logical extreme, complete deference to the state courts’ interpretive role would allow state courts to insulate changes to property law from

120. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2602 (plurality opinion) (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

constitutional challenge through the simple expedient of engaging in a creative “reinterpretation” of the prior law. As a result, federal courts must maintain an ability to evaluate for themselves whether a state action has taken a property right, just as they maintain an ability to evaluate the constitutionality of state court actions in other contexts.¹²¹

Judicial takings, then, require a degree of deference that strikes a balance between maintaining constitutional protections of private property and respecting the role of state courts as primary interpreters of state law. In this section, I analyze the standards of deference built into both the opinion of the Court and the plurality portions of Justice Scalia’s *Stop the Beach* opinion. The plurality portions of the opinion represent the high water mark of the idea of judicial takings in the Court’s takings jurisprudence to date. The standards of deference reflected in this portion of Justice Scalia’s opinion therefore provide a baseline for the likely minimum standards of deference that would be applied if and when a majority of the Court does fully recognize a judicial takings doctrine in the future.

The portion of Justice Scalia’s opinion that represents the opinion of the Court—and therefore is binding precedent—contains two points that are important to the issue of deference. First, state law defines private property rights.¹²² It therefore is not the federal courts’ place to review the wisdom of a state’s property law. Second, the property owner has the burden of showing both that the property interest at issue existed in the first place, and that the challenged government action eliminated that private property interest.¹²³

121. See *id.* at ___, 130 S. Ct. at 2608 n.9. In the plurality opinion, Justice Scalia wrote
It is true that we make our own determination, without deference to state judges, whether the challenged decision deprives the claimant of an established property right. That is unsurprising because it is what this Court does when determining state-court compliance with *all* constitutional imperatives. We do not defer to the judgment of state judges in determining whether, for example, a state-court decision has deprived a defendant of due process or subjected him to double jeopardy.

Id. at ___, 130 S. Ct. at 2608–09 n.9.

122. See *id.* at ___, 130 S. Ct. at 2597 (majority opinion). “Generally speaking, state law defines property interests . . .” *Id.* (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

123. See *id.* at ___, 130 S. Ct. at 2610–11.

The plurality portion of Justice Scalia's opinion contains two other points about deference. First, Justice Scalia noted that for a change in law to be a taking, it must in fact be a change in the law.¹²⁴ A clarification of previously ambiguous law is not a change in the law in this sense.¹²⁵ Second, a property right must be "established" before its elimination can be considered a taking.¹²⁶ This requirement, according to Justice Scalia, "contains within itself a considerable degree of deference to state courts. 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."¹²⁷

Combining these points, to win a claim, a property owner has the burden of showing that the contested government action eliminated a clearly established property interest. Because the burden is on the property owner, ambiguity and indeterminacy in the state's property law help the state and hurt the property owner. If there is ambiguity in the existing law, and the contested court decision can be seen as a clarification of this ambiguity, then the property owner will lose. Put another way, if there is a "fair and substantial basis" in the existing state law for the contested state court's decision, then the property owner will lose.¹²⁸

The actual holding in *Stop the Beach* was very deferential to the Florida Supreme Court, and provides a practical application of these principles.¹²⁹ The interpretation of property law articulated by the Florida Supreme Court provoked strong dissents by two Florida justices,¹³⁰ and was contrary to the lower Florida appellate court's interpretation in the case.¹³¹ The complaining property owners therefore at least had a colorable case to make, and the United States Supreme Court's opinion acknowledged that

124. See *id.* at ___, 130 S. Ct. at 2606–07 (plurality opinion).

125. See *id.* "If no 'settled principl[e]' has been abandoned, it is hard to see how property law could have been 'change[d],' rather than merely clarified." *Id.* (alterations in original). "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." *Id.* at ___, 130 S. Ct. at 2610.

126. See *id.* at ___, 130 S. Ct. at 2610.

127. *Id.* at ___, 130 S. Ct. at 2608 n.9.

128. See *id.* at ___, 130 S. Ct. at 2608.

129. See *id.* at ___, 130 S. Ct. at 2611–12 (majority opinion).

130. See *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1121 (Fla. 2008) (Wells, J., dissenting); *id.* at 1121–28 (Lewis, J., dissenting).

131. See *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot.*, 27 So. 3d 48, 56–60 (Fla. Dist. Ct. App. 2006).

“some may think the question [of the littoral property rights at issue] close.”¹³² The Court nonetheless rejected the property owners’ claim because there was a fair basis for the Florida Supreme Court’s holding in prior Florida case law. Emphasizing the role of the claimant’s burden, the Court stated:

Under petitioner’s theory, 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, the Florida Supreme Court’s judgment in the present case abolished those two easements to which littoral property owners had been entitled. This puts the burden on the wrong party. There is no taking unless petitioner can show that, before the Florida Supreme Court’s decision, 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.¹³³

This passage is important in part because it highlights the ambiguity that can be present in state property law. A series of cases might clearly establish that property owners have certain littoral rights, but might not show that they are superior to other rights held by the State or the public. In a related and frequently litigated context, clear precedent in a state might establish that beachfront property owners own the land down to the mean high tide line. This precedent alone, however, might not resolve the issue of whether there was a public right of access to the land immediately above the mean high tide line. Reasonably well-established public trust doctrine, for example, held that fishermen had a common-law right to dry their nets on the private property above the mean high tide line.¹³⁴ As a result, the well-established private property above the mean high tide line was subject to a limited right of the public.¹³⁵ Similarly, the mere recitation in a number of cases that private property along the Great Lakes extends to the ordinary high water line¹³⁶ might not alone establish that there are no public rights of access to the land immediately above this line. To be sure, if a prior case involving contested access had established that no such public access rights existed, then the property owner’s right to exclude the public would

132. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2611 (majority opinion).

133. *Id.* at ___, 130 S. Ct. at 2610–11.

134. *See Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 359, 365 n.7 (N.J. 1984).

135. *See id.* at 365–66.

136. *See, e.g., Glass v. Goeckel*, 703 N.W.2d 58, 73 (Mich. 2005).

also be established. But if the prior cases involved property issues that did not raise the issue of public access, then the exact relationship between public and private rights at this boundary might not be established.

As a consequence, a property owner may not be able to demonstrate that a property right is established unless prior case law in the state has considered and rejected the competing public interests that are at issue in the later takings litigation. Many Florida cases found that beachfront property owners had certain littoral rights.¹³⁷ These cases, however, were not sufficient to establish that these littoral rights were superior to competing public rights recognized in prior cases. The property owners in *Stop the Beach* were therefore unable to show that their private property interests had been “established” in the sense that Justice Scalia used the term.¹³⁸ Even though a colorable contrary argument could be made, the Court demonstrated deference to the Florida courts and rejected the property owners’ judicial takings claim.¹³⁹

C. *Judicial Takings Under Justice Kennedy’s Approach to Substantive Due Process*

The distinction between regulatory takings and substantive due process is a matter of some dispute, but the Court’s unanimous decision in *Lingle* suggests that the two doctrines ask different types of questions. The regulatory takings inquiry, according to *Lingle*, focuses on the impact of the government action on the property owner and asks whether that impact was the equivalent of an exercise of eminent domain.¹⁴⁰ Substantive due process, in contrast, focuses more generally on the legitimacy of the government exercise of power.¹⁴¹

When economic rights are at issue, courts generally apply a substantive due process standard of review that is so deferential the government almost always wins.¹⁴² This state of affairs is un-

137. See, e.g., *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2610–12 & n.11 (majority opinion) (citations omitted); *Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. Dist. Ct. App. 1973).

138. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2612–13 (majority opinion).

139. *Id.* at ___, 130 S. Ct. at 2612.

140. See *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 539–40 (2005).

141. See *id.* at 542.

142. Nisha Ramachandran, *Realizing Judicial Substantive Due Process in Land Use*

likely to change anytime soon, in part because many of the Justices who tend to be most sympathetic to economic rights are hostile to the general idea of substantive due process.¹⁴³ The controversy about the use of substantive due process in other contexts helps explain the griping about the doctrine that takes up a good amount of Justice Scalia's plurality opinion in *Stop the Beach*.¹⁴⁴

Justice Kennedy is unique among the current Justices in that he is both sympathetic to the use of substantive due process in individual liberty contexts and sympathetic in many cases to the protection of economic rights. Consistent with both positions, Justice Kennedy has advocated for an increased role for substantive due process in various takings contexts, of which *Stop the Beach* is only the most recent example.¹⁴⁵

Justice Kennedy's views are of particular importance because of his role as the swing Justice on many issues. In the judicial takings context, property owners are not likely to win before the current Court unless they can get Justice Kennedy's vote. In his *Stop the Beach* concurrence, Justice Kennedy, joined by Justice Sotomayor, expressed the view that at least some changes in property law could be unconstitutional on substantive due process grounds.¹⁴⁶ Justice Kennedy's position therefore should give property owners hope that in the right case they can garner at least six votes for a constitutional challenge to a judicial change in property law.

Even if they are somewhat idiosyncratic, Justice Kennedy's views on substantive due process protection of property rights merit special attention. In his *Stop the Beach* concurrence, Justice Kennedy sketched a view of substantive due process review of

Claims: The Role of Land Use Statutory Schemes, 36 *ECOLOGY L.Q.* 381, 382–85 (2009).

143. Substantive due process, of course, is at issue in cases like *Roe v. Wade*, 410 U.S. 113 (1973), and *Lawrence v. Texas*, 539 U.S. 558 (2003). Justices Scalia and Thomas are on the record as being hostile to the use of substantive due process in these contexts, and Justice Scalia's critique of substantive due process in *Stop the Beach*, see 560 U.S. at ___, 130 S. Ct. at 2604–07 (plurality opinion), should be understood in this larger context. Chief Justice Roberts and Justice Alito might be expected to evince similar hostility. All four justices, however, are generally sympathetic to economic rights, as the *Stop the Beach* plurality opinion suggests.

144. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2604–07 (plurality opinion).

145. See, e.g., *id.* at ___, 130 S. Ct. at 2614–15 (Kennedy, J., concurring); *Lingle*, 544 U.S. at 548–49 (Kennedy, J., concurring); *Kelo v. City of New London*, 545 U.S. 469, 490–93 (2005) (Kennedy, J., concurring); *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

146. See *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2615 (Kennedy, J., concurring).

changes in state property law that would give property interests both broader and narrower protection than the takings analysis presented in Justice Scalia's plurality opinion.

Justice Kennedy's substantive due process approach is broader than the regulatory takings approach in that it more clearly applies to both private-public and private-private transactions.¹⁴⁷ As discussed above, private-private transactions may "deprive" owners of property interests within the meaning of the Due Process Clause even if they do not "take" those interests within the meaning of the Just Compensation Clause.¹⁴⁸ Justice Kennedy's position is also broader in that it encompasses "substantial changes" to property interests as well as the elimination of those interests: "The Court would be on strong footing in ruling that a judicial decision that eliminates or *substantially changes* established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause."¹⁴⁹

Justice Kennedy's approach is narrower in that it recognizes a need to maintain some flexibility for states to change their property law. Justice Kennedy noted that "[s]tate courts generally operate under a common-law tradition that allows for incremental modifications to property law, but this 'tradition cannot justify a *carte blanche* judicial authority to change property definitions wholly free of constitutional limitations."¹⁵⁰ Further, because the substantive due process approach focuses on the broad legitimacy of the contested government action, it leaves more room for the consideration of the government's purpose in making the change than the regulatory takings approach, which focuses on the impact of the government action on the property owner.¹⁵¹

147. See *id.* at ___, 130 S. Ct. at 2613–16. One of Justice Kennedy's opinions contains language that might be read as calling into question the distinction between private-public and private-private transfers. In his opinion in *Apfel*, Justice Kennedy asserted that "the Government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another." 524 U.S. at 544 (Kennedy, J., concurring in the judgment and dissenting in part). Read in the context of Justice Kennedy's larger position on substantive due process, and of *Lingle's* subsequent clarification of the difference between takings and substantive due process, this passage is best taken to reflect Justice Kennedy's view that private-private transfers should not be immune from constitutional review.

148. See *supra* notes 54–56 and accompanying text.

149. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2615 (Kennedy, J., concurring) (emphasis added) (citations omitted).

150. *Id.* (quoting Walston, *supra* note 21, at 435).

151. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540–45 (2005).

Under Justice Kennedy's substantive due process approach, then, reviewing courts need to identify the boundary line between permissible "incremental modifications" and unconstitutional "eliminat[ions] or substantial[] changes."¹⁵² Although this approach can be fairly criticized for its fuzziness,¹⁵³ it is possible to identify examples of each type of change. Justice Kennedy cites a change in property owner liability for encroachment of tree branches as a possible example of a permissible change: "This might be the type of incremental modification under state common law that does not violate due process, as owners may reasonably expect or anticipate courts to make certain changes in property law."¹⁵⁴ At the other extreme, it is possible to come up with a change in property law so radical that it would likely be unconstitutional under any analysis. Imagine, for example, that a state court held that the fee simple estate no longer existed, that all property was held under a life estate, and that at the current holder's death the property escheated to the state. Because this example involves a private-public transfer, it likely would violate the Just Compensation Clause. If the example was changed, however, so that at the current holder's death the property transferred to another private party (say, the poorest person in a particular community), then it would involve a private-private transfer that should not implicate the Just Compensation Clause. As modified, the change would be such an extreme departure from our current system of property ownership that it would certainly be labeled "arbitrary" and unconstitutional on substantive due process grounds under Justice Kennedy's approach.¹⁵⁵

In their *Stop the Beach* opinions, Justice Kennedy and Justice Scalia disagreed about whether the regulatory takings or substantive due process inquiries should have priority. Justice Kennedy suggested that a court should start with the substantive due process inquiry and only proceed to the takings inquiry if substantive due process principles prove inadequate to protect property owners.¹⁵⁶ Justice Scalia, in contrast, argued that substantive

152. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2615 (Kennedy, J., concurring).

153. *See id.* at ___, 130 S. Ct. at 2604–07 (plurality opinion).

154. *Id.* at ___, 130 S. Ct. at 2615 (Kennedy, J., concurring).

155. Justice Thomas would likely argue that the retroactive application of this change in property law would violate the Ex Post Facto Clause. *See E. Enters. v. Apfel*, 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring).

156. *See Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2618 (Kennedy, J., concurring).

due process should not be applied when a more specific constitutional provision, such as the Just Compensation Clause, is applicable.¹⁵⁷ Following the distinction between private-public and private-private transfers developed above, courts should not apply the Just Compensation Clause at all to private-private transfers. Substantive due process therefore should offer the only avenue for review of the substance of a government act that results in a private-private transfer. In a case involving a private-public transfer, Justice Scalia's argument for considering the takings inquiry before reaching the substantive due process inquiry has some weight. Given the unsettled state of the case law, however, lower federal courts may have to reach both the takings and substantive due process issues in a case that presents both.

III. PROCEDURE AND REMEDIES

In this Part, I discuss procedural and remedies issues raised by judicial takings. I begin with the procedural due process issues that may arise in judicial takings contexts. Although these issues involve substantive constitutional protections, they are presented here because they are closely related to the procedural issues discussed in this Part. I then discuss three specific procedural issues: the exhaustion requirements imposed by *Williamson County*, the *Rooker-Feldman* doctrine, and the statute of limitations. Finally, I discuss the remedies that may be available if a property owner can establish that a judicial action is an unconstitutional taking.

A. *Procedural Due Process*

The procedural due process ramifications of a judicially imposed change in the law depend on when the change is made in the course of litigation. If the change is made in the lower state courts, and later affirmed on appeal, then there is a good chance that the requirements of procedural due process have been met. The losing property owners in the lower state court presumably would have the opportunity to challenge this change in property law in the state appellate courts. If the property owner has had

157. See *id.* at ___, 130 S. Ct. 2606 (plurality opinion) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)).

the opportunity to argue that the deprivation of property was unconstitutional or wrong as a matter of state law, then the requirements of procedural due process would have been met.

If the change is made by the state supreme court, however, there is a good chance that procedural due process has not been met. The most problematic scenario would involve a change to the law made sua sponte by a state supreme court. If the state supreme court later denied a petition for rehearing, and the Supreme Court of the United States denied certiorari, then the property owner would have been deprived of property without any opportunity to be heard on either the decision to change the law or on the constitutionality of the change.

Two Supreme Court of Hawaii decisions from 1973 provide good examples of this type of deprivation of a property interest without procedural due process. In *County of Hawaii v. Sotomura*, the Supreme Court of Hawaii sua sponte changed Hawaii law to establish the vegetation line as the boundary of beachfront private property.¹⁵⁸ In *McBryde Sugar Company v. Robinson*, the Supreme Court of Hawaii sua sponte replaced established Hawaii water law with common law riparian rights doctrines, eliminating some traditionally recognized water rights.¹⁵⁹ Constitutional challenges were brought in federal district court to both decisions. The district court found the *McBryde Sugar* decision to be unconstitutional in *Robinson v. Ariyoshi*,¹⁶⁰ although that decision was vacated for procedural reasons that were probably erroneous and will be discussed further below.

In *Sotomura v. County of Hawaii*, the district court likewise found that the Supreme Court of Hawaii had violated the Constitution.¹⁶¹ Unlike *Robinson*, however, *Sotomura* was not appealed, and still remains good law. The district court noted that the Hawaii Supreme Court sua sponte had introduced the property ownership issue into the litigation.¹⁶² When the property owners petitioned for rehearing, they “specifically contended that the

158. See 517 P.2d 57, 64 (Haw. 1973); *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 476, 477 (D. Haw. 1978).

159. See 504 P.2d 1330, 1344 (Haw. 1973); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1470 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986) (citing *McBryde Sugar Co.*, 504 P.2d at 1344).

160. 441 F. Supp. 559, 585–86 (D. Haw. 1977), *affd in part, vacated in part*, 753 F.2d 1468, 1474–75 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

161. 460 F. Supp. at 482–83.

162. *Id.* at 477.

redefinition of [the public-private boundary line] effected a taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution, and that they were denied their constitutional right to a hearing and presentation of evidence regarding that taking.”¹⁶³ The Supreme Court of Hawaii denied the petition “without argument, evidence or opinion,” and the Supreme Court of the United States later denied certiorari.¹⁶⁴ The district court held that the Supreme Court of Hawaii’s actions deprived the owners of property without due process of law.¹⁶⁵ Along the way, the district court reviewed the prior Hawaii law to establish that the Supreme Court of Hawaii’s decision deprived the owners of a property right.¹⁶⁶ The court also held that the retroactive application of the Supreme Court of Hawaii’s decision was an unconstitutional taking in violation of the Just Compensation Clause as incorporated by the Fourteenth Amendment.¹⁶⁷

The district court’s procedural due process analysis in *Sotomura* is sound. If a court is going to change the law, it should give the parties the opportunity to be heard on the issue. Procedural due process problems like this are easy for courts to avoid—the Supreme Court of Hawaii, for example, simply could have granted the property owners’ petition for a rehearing. If the Supreme Court of Hawaii had affirmed its prior decision after a rehearing, substantive judicial takings issues may have remained, but the procedural due process issue would have been eliminated.

It bears repeating that many cases involving judicial changes in property law will not have procedural due process problems. Procedural due process issues are particularly acute when the judicial change in law is made by a state supreme court, because there is no nondiscretionary avenue for appeal available to the losing property owner.¹⁶⁸ In contrast, when the change in law is

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 477–81.

167. *See id.* at 482–83.

168. Justice Kennedy’s *Stop the Beach* concurrence mentions procedural due process in passing, 560 U.S. ___, ___, 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring) (“The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power”), but does not discuss procedural due process doctrine in any depth. Procedural due process is similarly neglected in Justice Scalia’s opinion for the plurality. This omission is unfortunate, because *Stop the Beach* would have fit the

made by lower state courts in contexts where the losing party can appeal as of right, disappointed property owners likely will have had an opportunity to be heard that will satisfy procedural due process.

B. *Procedural Issues Arising From Judicial Takings Claims*

Justice Kennedy emphasized the potential procedural complexities of judicial takings claims in arguing that the Court should avoid the details of a judicial takings doctrine in *Stop the Beach*.¹⁶⁹ In response, Justice Scalia dismissed these potential complexities as “either nonexistent or insignificant.”¹⁷⁰ Justice Kennedy plainly had the better of this exchange, and the procedural issues presented by judicial takings claims are even more complex than he suggested they might be.

This section considers how three procedural issues may play out in different procedural scenarios: (1) *Williamson County* exhaustion requirements; (2) the *Rooker-Feldman* doctrine and related res judicata concerns; and (3) the statute of limitations. As discussed in Part III, the distinction between judicial takings claims brought by the losing state court parties and claims brought by other property owners looms large in each of these procedural contexts.¹⁷¹

1. *Williamson County* and Exhaustion Requirements

In the 1985 *Williamson County Regional Planning Commission v. Hamilton Bank* case, the Supreme Court of the United States held that a regulatory takings claim was premature for two reasons. First, the complaining property owners had not sought a variance from a regulatory agency. Second, the property owners had not sought compensation for the alleged taking under procedures provided by the State.¹⁷² The requirement that the property owners proceed further before bringing a takings claim implicates two

judicial takings fact pattern that most strongly implicates procedural due process if it actually had involved a deprivation of a property interest.

169. *Id.* at ___, 130 S. Ct. at 2616–18.

170. *Id.* at ___, 130 S. Ct. at 2607 (plurality opinion).

171. See discussion *infra* Part III.B.

172. 473 U.S. 172, 188–94 (1985).

related concepts: finality and administrative exhaustion.¹⁷³ The former is based on the requirement that a decision be final before it is judicially reviewable.¹⁷⁴ The latter is based on the prudential concern that judicial review should be delayed until a claimant has exhausted available administrative avenues for redress.¹⁷⁵ The portion of *Williamson County* that was concerned with the property owner's failure to seek a variance is expressly based on the issue of finality.¹⁷⁶ The portion that was concerned with the failure to administratively seek compensation is implicitly based on exhaustion concerns.¹⁷⁷ This specific compensation issue might be of questionable direct relevance to the judicial takings context, because it is far from clear that a compensation remedy would be available for a judicial taking.¹⁷⁸ In judicial takings cases where there is an underlying legislative or executive act that would have been a taking but for the challenged state court decision, both a compensation remedy and state-law provided administrative avenues for pursuing an award of compensation might be available.¹⁷⁹ Even if a compensation remedy is not available, the larger exhaustion concern reflected in that portion of *Williamson County* may be relevant to judicial takings cases.

These finality and exhaustion requirements are based on legitimate and important policy concerns. It makes little sense for a reviewing court to prematurely wade into a regulatory takings dispute. Indeed, *Penn Central*, the case at the heart of the Court's regulatory takings jurisprudence, would have benefited greatly from further administrative proceedings.¹⁸⁰

173. *See id.* at 188–93.

174. *See id.* at 192–93.

175. *See id.* at 193.

176. *See id.*

177. *See id.* at 196–97.

178. *See discussion infra* Part III.C.

179. *See discussion infra* Part III.C.

180. In *Penn Central*, the owners of Grand Central Terminal argued that the New York City Landmarks Preservation Commission engaged in a regulatory taking when it denied permission to build large office towers over the terminal. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 104 (1978). The owners, however, did not seek approval from the Commission to build a smaller tower on the site. *Id.* at 118–19. As the Court noted in *Penn Central*, the original design for the terminal included an office tower. *Id.* at 116–17. The Commission might have had a hard time denying permission to build a tower consistent with the original design of the terminal, but we will never know how they might have ruled because the property owners went to court without any further administrative proceedings. *Id.* at 118–19. As a result, the Supreme Court engaged the property owner's regulatory takings claim without knowing precisely what, if anything, could be built above

This said, there is potential for finality and exhaustion requirements to be abused or manipulated to avoid review of state actions. Indeed, concern over the perceived role of the case in frustrating property owners' attempts to assert potentially valid takings claims has led a number of members of the Court to call for reconsideration of *Williamson County*.¹⁸¹ In his *Stop the Beach* concurrence, for example, Justice Kennedy anticipated the day that "*Williamson County* is reconsidered," and dismissed the relevant portions of the case as "dicta."¹⁸² Even if *Williamson County* is a dead case walking, however, it still remains good law, and lower federal courts will have to grapple with the issues that it raises.

A good example of the potential for abuse of *Williamson County*'s finality and exhaustion requirements is the tortured path of the *Robinson* litigation discussed above.¹⁸³ The property owners initially won on their claim that the Supreme Court of Hawaii had engaged in a judicial taking in the district court.¹⁸⁴ The United States Court of Appeals for the Ninth Circuit affirmed most of the district court judgment.¹⁸⁵ Before reaching its decisions, the Ninth Circuit certified a series of questions to the Supreme Court of Hawaii, which responded with a remarkably self-serving set of answers that were plainly designed to insulate its prior decision from constitutional challenge.¹⁸⁶ Although the Supreme Court of Hawaii's attempt to avoid review was rejected in the initial Ninth Circuit opinion, it later proved successful.¹⁸⁷ The Supreme Court of the United States decided *Williamson County* while a petition for certiorari was pending on the Ninth Circuit's initial judgment in *Robinson*.¹⁸⁸ The Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded for further consideration in

the terminal.

181. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2618 (Kennedy, J., concurring); *San Reno Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, J., concurring).

182. *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2618 (Kennedy, J., concurring).

183. See *supra* notes 163–65 and accompanying text.

184. *Robinson v. Ariyoshi*, 441 F. Supp. 559, 580, 584–86 (D. Haw. 1977), *aff'd in part, vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

185. *Robinson v. Ariyoshi (Robinson I)*, 753 F.2d 1468, 1474–75 (9th Cir. 1985).

186. See *Robinson v. Ariyoshi*, 658 P.2d 287, 294–300 (Haw. 1982).

187. Compare *Robinson I*, 753 F.2d at 1473–75, with *Ariyoshi v. Robinson*, 477 U.S. 902 (1986).

188. See 477 U.S. 902.

light of *Williamson County*.¹⁸⁹ On remand, the district court reaffirmed its prior holding, and patiently explained why the Supreme Court of Hawaii decision at the root of the litigation had finally resolved the property rights at issue as a matter of Hawaii law, therefore making a judicial takings claim ripe for review.¹⁹⁰ The Ninth Circuit, however, accepted the contention that some issues might be clarified with further litigation, and reversed the district court's decision.¹⁹¹

The *Robinson* litigation illustrates the potential perils of overinterpreting the *Williamson County* finality and exhaustion requirements. In the decision that was the subject of the litigation, the Supreme Court of Hawaii sua sponte changed the entire Hawaii law of water ownership.¹⁹² The Supreme Court of Hawaii later admitted that this ruling would be the law of the case in the litigation and would be binding precedent on all Hawaii courts.¹⁹³ On any fair reading, the Supreme Court of Hawaii's change in the law was therefore final, and was a binding determination of the scope of property rights in water in Hawaii. Under the United States Supreme Court's recent administrative exhaustion jurisprudence, the Supreme Court of Hawaii's decision was ripe for review.¹⁹⁴

As a practical matter, it is hard to see what benefit would accrue from forcing a litigant whose rights (or lack thereof) have been established by a state supreme court to engage in further proceedings in lower state courts that are bound to follow the state supreme court's decision. In this context, there is a tremendous difference between the failure to apply for a variance that was at issue in *Williamson County* and the failure to engage in further state court litigation that was at issue in *Robinson*. If the variance in *Williamson County* had been granted, the property owner would have had nothing to complain about. If the variance had been denied, then the denial would have clarified the exact scope of the property owner's rights. In *Robinson*, in con-

189. *Id.*

190. *Robinson v. Ariyoshi*, 676 F. Supp. 1002, 1004-10, 1020-21 (D. Haw. 1987), *vacated*, 887 F.2d 215 (9th Cir. 1989).

191. *Robinson v. Ariyoshi (Robinson II)*, 887 F.2d 215, 216, 218-19 (9th Cir. 1989).

192. *See McBryde Sugar Co. v. Robinson*, 504 P.2d 1330, 1335, 1338-39, 1341, 1344 (Haw. 1973).

193. *Robinson v. Ariyoshi*, 658 P.2d 287, 295-99 (Haw. 1982).

194. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

trast, the lower courts were institutionally incapable of granting the property owner relief inconsistent with the Supreme Court of Hawaii's decision, or of clarifying the scope of that decision.

Justice Scalia argued in *Stop the Beach* that *Williamson County* "would require the claimant to appeal a claimed taking by a lower court to the state supreme court."¹⁹⁵ This requirement is eminently sensible. State supreme courts speak authoritatively about matters of state law, and a change in the law by a lower state court would have a good possibility of being reversed on appeal. Once the state supreme court has made a decision on property ownership, however, it makes little sense to require further, almost certainly futile, proceedings in the state courts.

Concerns about finality and exhaustion, then, suggest that an owner litigate in the state courts until a decision on ownership has been made by the state supreme court, or until the owner has exhausted the ability to appeal to the state supreme court if that court denies discretionary review. Once this requirement has been met, the owner should be free to bring a judicial takings claim in the federal courts, at least as a matter of finality and exhaustion.

How should the finality and exhaustion requirements apply to property owners who were not parties to the original litigation? Justice Kennedy noted in his *Stop the Beach* concurrence that the state courts are presumptively competent to hear constitutional claims, and suggested that these property owners would also have to pursue their claims in state court.¹⁹⁶ Justice Scalia, in contrast, suggested that these owners could bring judicial takings claims in federal court.¹⁹⁷ The answer to this question might depend in part on whether or not these new property owners are similarly situated to the owners in the original litigation. If the new owners' factual situation is sufficiently different to raise questions about the applicability of the contested state court decision to them, then it would make sense for the new owners to have to litigate, at least in the first instance, in the state courts. Factual distinctions loom large in property law, and the state courts should have the opportunity to decide that a controversial

195. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2609 (2010) (plurality opinion).

196. *Id.* at ___, 130 S. Ct. at 2618 (Kennedy, J., concurring).

197. *See id.* at ___, 130 S. Ct. at 2609–10 (plurality opinion).

decision should not apply to a new context. Similarly, if the state supreme court in the original litigation merely has denied discretionary review, and has not yet addressed the issue on the merits, it would make sense to require the new owners to bring their judicial takings claim in the state courts to give the state supreme court the opportunity to address the issues.

If the new property owners are similarly situated to the owners in the original litigation, however, then they should be able to bring their claims directly in federal court. At least where the state supreme court has issued an authoritative and binding decision on the underlying property issues, it would be a tremendous waste of litigant and state court resources to force the new owners to litigate in state court. Consider, for example, the scenario described above where a state supreme court redefines the public-private boundary for beachfront property to be the vegetation line, rather than the mean high tide line. It would be futile for beachfront property owners who were not parties to the original action to bring their judicial takings claims in state court, because the lower state courts would be bound to follow the state supreme court's binding precedent.

It is true, as Justice Kennedy noted, that the state courts are presumptively competent to hear constitutional claims.¹⁹⁸ This presumption of competence, however, is rebutted in the judicial takings context, because inferior state courts are institutionally incapable of holding that a state supreme court opinion was unconstitutional. In our hierarchal court system, inferior courts simply are not in a position to evaluate the constitutionality of the actions of superior courts. In a case where the new property owners are not similarly situated to the owners in the original litigation, a lower court might be able to factually distinguish the state supreme court's precedent. Where the property owners are similarly situated, however, lower state courts would be bound by hierarchy to follow, rather than challenge, the binding precedent of a superior court. Property owners similarly situated to those in the original litigation therefore should be able to bring judicial takings claims directly to federal court.

198. See *id.* at ___, 130 S. Ct. at 2618 (Kennedy, J., concurring).

2. *Rooker-Feldman* and Res Judicata

Broadly stated, the *Rooker-Feldman* doctrine prevents lower federal courts from hearing “cases brought by ‘state-court losers’ challenging ‘state-court judgments rendered before the district court proceedings commenced.’”¹⁹⁹ In recent years, the Supreme Court has emphasized the narrowness of the doctrine, and has clarified that it only applies to the actual parties involved in the state court litigation.²⁰⁰ *Rooker-Feldman* therefore clearly does not bar consideration by the lower federal courts of judicial takings claims brought by property owners who were not parties to the dispute in state court.

The *Rooker-Feldman* doctrine has been so narrowed that there are reasons to doubt its continued viability.²⁰¹ If it does still exist, it is not clear that the doctrine should apply in judicial takings cases brought by losing state court parties. The basic idea of the *Rooker-Feldman* doctrine is that losing parties in state court cases should not be able to use the lower federal courts to challenge state court judgments.²⁰² Rather, in the typical case, the only avenue for federal court review is through a petition for certiorari to the Supreme Court of the United States.²⁰³ In the typical case, however, the losing party would be arguing that the state courts simply got the case wrong. At least two, and often three, levels of state courts would have heard the losing party’s arguments, and would have therefore afforded the losing party procedural due process.

In a judicial takings case, however, the complaining property owner is not arguing that the state courts simply decided a legal issue incorrectly. Rather, the complaining property owner is arguing that the state court violated the Constitution by taking property without compensation. It is very troubling to think that the only possible avenue for redress of this constitutional viola-

199. *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (per curiam) (quoting *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)).

200. *See id.* at 464.

201. *See id.* at 468. (Stevens, J., dissenting) (describing *Rooker-Feldman* as having been “finally interred”); Samuel Bray, *Rooker Feldman (1923–2006)*, 9 GREEN BAG 2D 317–18 (2006) (mock obituary for the doctrine).

202. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.1(b), at 129–30 (8th ed. 2002).

203. *Id.*

tion is a petition for certiorari to the Supreme Court of the United States. Supreme Court certiorari petitions are rarely granted, and under the Court's rules, error on the part of the lower court alone typically is not enough to warrant the grant of review.²⁰⁴

Perhaps the best case in this context for property owners would be one in which a state supreme court sua sponte changed the state's property law. Presuming that the court denied a subsequent petition for rehearing, the property owners in this scenario would likely have been deprived of property without procedural due process.²⁰⁵ *Rooker-Feldman* is based on an interpretation of a statute,²⁰⁶ and this statute should not be interpreted in a way that deprives property owners of their constitutional right to procedural due process. On the other hand, in a case where the property owners had the opportunity to argue their judicial takings claim before the state courts, procedural due process likely would be satisfied. Further, in this type of case, a lower federal court reviewing the case would be placed in the position of second-guessing the state court's rejection of a judicial takings claim. In the fact pattern involving a sua sponte judicial taking by a state supreme court, in contrast, no court had actually engaged in the property owners' judicial takings claim.

In at least some cases, then, there are good reasons not to apply *Rooker-Feldman* to federal court judicial takings cases brought by disappointed state court litigants. The Supreme Court has recently cautioned lower courts not to overread the *Rooker-Feldman* doctrine,²⁰⁷ and the doctrine should not be applied when property owners have been deprived of opportunities guaranteed by procedural due process to contest a judicial deprivation of property.

Procedural due process concerns are also relevant to the related issue of res judicata. In his *Stop the Beach* plurality opinion, Justice Scalia presumed that res judicata would preclude the

204. See *id.* § 4.17, at 255. The Court's rules ordinarily prevent the consideration of claims that were not presented to the state court. *Id.* § 4.17, at 255–58. This bar will not apply, however, “where the state-court decision itself is claimed to constitute a violation of federal law.” *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2600 n.4 (2010) (majority opinion).

205. See discussion *supra* Part III.A.

206. See 28 U.S.C. § 1257(a) (2006); *Lance*, 546 U.S. at 463.

207. See *Lance*, 546 U.S. at 464; *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005).

property owners who were the losing parties in the state court litigation from bringing a judicial takings claim in the lower federal courts.²⁰⁸ Res judicata, however, presumes that the party had an opportunity to litigate the claim being precluded.²⁰⁹ In at least some judicial takings cases, the property owners will not have had this opportunity. As Justice Kennedy stated in his *Stop the Beach* concurrence, “until the state court . . . changes the law, the party will not know if his or her property rights will have been eliminated. So res judicata probably would not bar the party from litigating the takings issue in [a later case].”²¹⁰ Res judicata therefore should only bar later litigation of a judicial takings claim where the disappointed property owner has had a chance to litigate the judicial takings issue—for example, where a lower state court engages in a judicial taking, and the property owner has the opportunity to challenge the constitutionality of this judicial action in appeals to higher state courts.

Whether *Rooker-Feldman* and res judicata bar judicial takings claims in the lower federal courts therefore depends on the particular circumstances of the case. Neither doctrine should bar a claim by property owners who were not litigants in the state court proceedings. If the complaining property owner was a losing party in the state court, and litigated the judicial takings claim during those state court proceedings, then both doctrines may bar the owner from bringing a later claim in the lower federal courts. If the property owner did not have the opportunity to litigate the judicial takings claim in state court, then neither doctrine should bar a later claim in the lower federal courts.

3. Statute of Limitations

The statute of limitations for bringing a federal court judicial takings claim should run from the time that the state supreme court reaches a binding decision on the disputed property issue. Even if the alleged judicial taking was performed by a lower state court, the exhaustion and finality requirements discussed above would likely require that the claim be litigated up to the state supreme court. In these circumstances, starting the statute of limi-

208. See *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2609–10 (plurality opinion).

209. See *id.* at ___, 130 S. Ct. at 2617 (Kennedy, J., concurring).

210. *Id.*

tations clock for bringing a federal claim at the time of the lower state court opinion would force property owners into bringing premature claims to maintain their ability to assert a judicial takings claim in federal court.

The statute of limitations should be the same for property owners who were parties to the state court litigation and those who were not. The claims of nonlitigant property owners would become ripe as soon as the state court issued a binding opinion taking property. For example, if a state supreme court issued a binding opinion redefining the beachfront property boundary from the mean high tide line to the vegetation line, then that opinion would immediately take the property of nonlitigant property owners by changing the state's law of property.

Justice Scalia's plurality opinion in *Stop the Beach* contains language that seemingly would support claims by property owners who were not parties to the state court litigation even years or decades after the state court reached its decision changing the law.²¹¹ In the context of discussing the substantive standard for judicial takings, Justice Scalia wrote:

[A] judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking. If, for example, a state court held in one case, to which the complaining property owner was not a party, that it had the power to limit the acreage of privately owned real estate to 100 acres, and then, in a second case, applied that principle to declare the complainant's 101st acre to be public property, the State would have taken an acre from the complainant even though the decision was predicable.²¹²

This passage is problematic in several respects. First, if either dicta or holdings in prior case law "foreshadow" that a property interest might not exist, then it is hard to see how that interest could be "established" as a matter of state law. Put another way, the existence of this foreshadowing in the prior case law would likely undercut the property owners' ability to meet their burden of proving that they had a property right to begin with, and that there was not a fair and substantial basis in the prior law for the contested state court holding.

211. See *id.* at ___, 130 S. Ct. at 2609–10 (plurality opinion).

212. See *id.* at ___, 130 S. Ct. at 2610.

Second, Justice Scalia's example suggests that there is no time limit whatsoever on property owners' judicial takings claims. If a state court has held "years in advance" that a property interest does not exist, property owners should not be able to manufacture judicial takings claims by bringing state court cases seeking to assert these long-abolished property interests. Justice Scalia may have wished to keep open the possibility of claims by property owners contesting past state court opinions as in *Stevens v. Cannon Beach*, where he dissented from the denial of certiorari on judicial takings grounds.²¹³ If this is what Justice Scalia intended this passage to mean, then by his logic property owners could bring judicial takings challenges to changes in property law dating to the founding of the United States of America. The statute of limitations and the related equitable doctrine of laches, however, exist to bar stale claims and settle the law. These rules should similarly bar late claims by property owners in judicial takings cases, just as they bar late claims by property owners claiming takings by the legislature or executive branch.

C. Remedies for Judicial Takings

Two types of remedies might be available for a taking that is not the result of an affirmative exercise of eminent domain. First, a court could declare the contested government action unconstitutional. In certain circumstances, this declaration could be accompanied by an injunction against enforcement of government action.²¹⁴ This type of remedy can be labeled as "invalidation" of the government action.²¹⁵ As a result of this invalidation, the contested government action is rendered ineffective, and any affected private property interests are reestablished to their original state.²¹⁶ Second, a court could award compensation to the com-

213. See *Stevens v. Cannon Beach*, 510 U.S. 1207, 1214 (1993) (Scalia, J., dissenting from denial of certiorari); Michael C. Blumm & Elizabeth B. Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY ENVTL. L. & POL'Y L. REV. (forthcoming) (manuscript at 30-33), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669707 (explaining that in *Cannon Beach*, Justice Scalia suggested that the property owners should be able to bring a constitutional challenge because they had not been parties to a case that arguably had changed the law roughly two decades previously).

214. See *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 477 (D. Haw. 1978); *Robinson I*, 753 F.2d 1468, 1474-75 (9th Cir. 1985), vacated, 477 U.S. 902 (1986).

215. See *Kamaole Pointe Dev. LP v. County of Maui*, 573 F. Supp. 2d 1354, 1371 (D. Haw. 2008).

216. See *Sotomura*, 460 F. Supp. at 483.

plaining property owner.²¹⁷ With this type of remedy, typically labeled "inverse condemnation," the property interests at issue are transferred to the public in return for compensation.²¹⁸ The contested government action is made valid by the payment of compensation.

As a preliminary matter, it should be noted that inverse condemnation, to the extent that it is available at all, can only be had in a case involving a taking under the Just Compensation Clause.²¹⁹ It should not be available for cases seeking redress for deprivations of property in violation of substantive or procedural due process.²²⁰ The theory of inverse condemnation is that the government action is the equivalent of an exercise of eminent domain, and therefore should be accompanied by just compensation.²²¹ Substantive and procedural due process cases may include a broader range of injuries to property,²²² and because they are based on the Due Process Clause, they do not directly implicate the compensation requirement of the Just Compensation Clause. Both *Sotomura* and *Robinson* were examples of due process cases, and in each case the aggrieved property owners obtained invalidation relief.²²³

The Supreme Court's jurisprudence on remedies for government actions that do not involve explicit exercises of eminent domain, but nonetheless violate the Just Compensation Clause, is somewhat confused. For many years, invalidation was the presumed remedy for a regulatory taking,²²⁴ and it was an open question as to whether a winning property owner could pursue an inverse condemnation remedy.²²⁵ The Supreme Court finally established in the 1987 *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* case that the inverse

217. See *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

218. *Fountain v. Metro. Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982).

219. See *id.*

220. *Palazzolo v. Rhode Island*, 533 U.S. 606, 638 (2000).

221. *Fountain*, 678 F.2d at 1043.

222. See discussion *supra* Parts II.C. and III.A.

223. See *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 477 (D. Haw. 1978); *Robinson I*, 753 F.2d 1468, 1472, 1475 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

224. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 628 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 259 (1980).

225. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 310 (1987).

condemnation remedy was available to property owners.²²⁶ The exact circumstances in which a winning property owner can get each remedy remains somewhat open. This already clouded remedies picture was made even less clear by the Court's 1984 holding in *Ruckelshaus v. Monsanto Co.* that equitable relief cannot be awarded in a regulatory takings case where the property owner can bring a suit for compensation against the government.²²⁷

The opinions in *Stop the Beach* reflect the prevailing uncertainty over remedies available in non-eminent domain takings cases. Justice Kennedy, citing *Ruckelshaus*, wrote that "[i]t appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief."²²⁸ In response, Justice Scalia's plurality opinion asserted that the compensation "remedy is even rare for a legislative or executive taking," and suggested that invalidation is the default remedy.²²⁹ Justices Kennedy and Scalia, then, appeared to differ on the fundamentals of the remedies generally available in non-eminent domain takings. Justice Kennedy asserted that only compensation is available, while Justice Scalia asserted that the typical remedy is invalidation, with compensation being available only as a relatively rare exception.

Justice Scalia had the better argument on this issue. A long line of regulatory takings cases have applied or presumed the availability of an invalidation remedy.²³⁰ The only case law support that Justice Kennedy offered for his position is *Ruckelshaus*, which, on close examination, is far narrower than Justice Kennedy suggested. In that case, Monsanto sought an injunction against the application of a federal statute that required the disclosure of its trade secrets.²³¹ The Supreme Court held that the federal statute took Monsanto's trade secrets, but also held that Monsanto was not entitled to an injunction because it could sue for damages under the Tucker Act.²³² This holding highlights three factors that distinguish *Ruckelshaus* from many regulatory

226. *Id.* at 321–22.

227. 467 U.S. 986, 1016 (1984).

228. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2617 (2010) (Kennedy, J., concurring).

229. *Id.* at ___, 130 S. Ct. at 2607 (plurality opinion).

230. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 628 (1981); see *Agins v. City of Tiburon*, 447 U.S. 255, 259 (1980).

231. *Ruckelshaus*, 467 U.S. at 990.

232. *Id.* at 1016.

takings cases. First, in defending the lawsuit, the government argued against the invalidation remedy and for the compensation remedy.²³³ This turned the typical remedy dynamic on its head—in the typical case, the property owner seeks compensation and the government seeks invalidation to avoid monetary liability.²³⁴ Second, Monsanto expressly sought an injunction, rather than simply seeking a declaration of invalidity.²³⁵ In many regulatory takings circumstances, the government is unlikely to try to act under a statute that has been declared unconstitutional, and a simple declaration of invalidity on constitutional grounds will resolve matters. Third, because Monsanto expressly sought an injunction, the familiar rule that injunctive relief is not available when a party can obtain adequate monetary relief came into play.²³⁶ The Court held that the Tucker Act provided an avenue to seek compensation and so denied injunctive relief.²³⁷ In many state law regulatory takings scenarios, the availability of a statutory basis for monetary relief may not be so clear.

The Court's case law, therefore, is best read as reflecting support for both invalidation and compensation remedies in legislative and executive takings cases that do not involve eminent domain, although the circumstances in which each remedy might be available remains opaque. At the least, the Court's case law should not be read as establishing compensation as the exclusive remedy for property owners who have suffered a non-eminent domain taking.

Further, there are good arguments for being cautious in allowing a compensation remedy, particularly in judicial takings cases. The invalidation remedy negates the original governmental action, and gives the government actors two choices on how to proceed. Either the government can abandon its original objective, or it can use an exercise of eminent domain to take the property rights at issue in return for compensation so it can proceed with the original objective.²³⁸ Depriving the government of this choice

233. *Id.* at 998–99.

234. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 310 (1987); *San Diego Gas & Electric Co.*, 450 U.S. at 628; *Agins*, 447 U.S. at 259.

235. *Ruckelshaus*, 467 U.S. at 998.

236. *Id.* at 1019.

237. *Id.* at 1016.

238. Even if the government acquiesces to the invalidity and abandons its original ob-

by allowing a compensation remedy may force substantial and unexpected monetary liability on the public. In a legislative or executive takings case, the government may be able to mitigate this liability by agreeing not to apply the contested government action to other property owners who were not parties to the original case. For example, if a legislative act is held to be a taking and compensation is awarded, the legislature may be able to insulate the State from further liability to other property owners by repealing the act. The judiciary, in contrast, cannot easily change course, because its opportunities to act are limited by the cases that come before it. For example, if a state supreme court decision was held to be a taking and compensation was awarded, that court would have to wait until it was presented with a later case to overrule its prior decision. If constitutional challenges to the original case are allowed to be brought in federal court, then the state supreme court might never be presented with the opportunity to reconsider its original decision.

Justice Scalia's position that invalidation is the default remedy in judicial takings cases therefore seems to be superior to Justice Kennedy's position that compensation is the default remedy. Even if compensation is eliminated as an option, however, the judicial takings remedies issue remains highly complex. Justice Scalia dismissed Justice Kennedy's concerns about remedies by asserting that "[i]f we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question."²³⁹ The remedy in *Stop the Beach*, then, would have been a type of invalidation—reversal of the state supreme court's judgment. This remedy would work in a judicial takings case brought by way of a petition for certiorari to the Supreme Court of the United States.

The picture is more complex, however, if a judicial takings case is brought in the lower federal courts. In this type of case, a property owner would contest a state court decision by bringing a lawsuit in federal district court. In the certiorari scenario, the state

jective, there remains the possibility that it incurred temporary takings liability for the time between the original act and the declaration of invalidity. See *First English Evangelical Lutheran Church*, 482 U.S. at 310.

239. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. ___, ___, 130 S. Ct. 2592, 2607 (2010) (plurality opinion).

court decision at issue is before the federal court as a matter of appellate procedure. In the district court scenario, the state court decision would be challenged as an unconstitutional government act. The district court would therefore be sitting in judgment of the state supreme court. This is an odd, though not unprecedented, position for a federal district court to find itself in.

The federal district court's position might initially seem to be more straightforward in a case where there is an underlying legislative or executive action that would have been a taking but for the state court decision holding that the property rights at issue did not exist.²⁴⁰ In this type of case, the federal district court could hold that the legislative or executive act was unconstitutional. The invalidation of this government act alone, however, would not give the property owner full redress, because the judicial act that upheld the legislative or executive act also took property. Take, for example, the scenario involving a legislative act that redefined the beachfront property line from the mean high tide line to the vegetation line. The state supreme court later upheld the statute on the ground that the property line as a matter of common law was located at the vegetation line, not the mean high tide line. Presume that the prior state law had clearly established the property line at the mean high tide line, and that this judicial decision therefore amounted to a clear change in the law. In this scenario, a federal district court could not give the property owners full redress simply by holding that the legislative act was unconstitutional, because the judicial action would, standing alone, eliminate the private property interests at issue. Even in a case involving an underlying legislative or executive act, therefore, the lower federal court would have to review the constitutionality of the state court decision.

IV. RECOGNIZING A JUDICIAL TAKINGS DOCTRINE WILL NOT RESULT IN FEDERAL COURT REVIEW OF ALL STATE COURT PROPERTY DECISIONS

A concern that has been raised about recognizing a doctrine of judicial takings is that it would result in a flood of federal court challenges to state court decisions. As Justice Breyer noted in his *Stop the Beach* concurrence:

240. See discussion *supra* Part I.A.3.

Property owners litigate many thousands of cases involving state property law in state courts each year. Each state-court property decision may further affect numerous nonparty property owners as well. 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.²⁴¹

As Justice Breyer noted, the federal courts might not only become the courts of last resort for state court property disputes, but might also become a forum for challenges to state court decisions by property owners who were not parties to the original litigation.²⁴² Further, if cases that affect property ownership but that do not directly involve property law are included, such as the scenario involving a change in contracts law discussed above,²⁴³ then the scope of the potential problem may be even greater than Justice Breyer suggested.

If, as I argue above, the scope of the Just Compensation Clause is properly limited to government actions that result in private-public transfers, this prudential concern largely disappears. Compared to the number of cases that involve property ownership generally, the number of cases that involve purported private-public transfers is small. Only a relatively small number of these private-public cases would support colorable judicial takings claims.²⁴⁴ While cases involving private-private transfers might be subject to review in federal court on substantive or procedural due process grounds, the standards applicable in those contexts are sufficiently deferential to discourage an inordinate amount of litigation.²⁴⁵ Finally, the procedural hurdles discussed above will provide a further impediment to property owners who seek to bring judicial takings claims in federal court.²⁴⁶ As a result, judicial takings claims are likely to be brought in federal court, but these claims are unlikely to grow into an unmanageable flood.

241. See *Stop the Beach*, 560 U.S. at ___, 130 S. Ct. at 2619 (Breyer, J., concurring).

242. See discussion *supra* Part I.A.2. (discussing challenges by nonparties to the original litigation).

243. See discussion *supra* Part I.A.1.

244. See discussion *supra* Part II.B.3.

245. See discussion *supra* Parts II.C. and III.A.

246. See discussion *supra* Part III.B.

V. CONCLUSION

Stop the Beach dramatically raised the profile of judicial takings, but left all of the important issues open. I have argued that these issues are remarkably complex, and their resolution depends, in part, on three factual distinctions between types of cases. The first distinction, between cases involving private-public transfers and cases involving private-private transfers, is important to the substantive issue of whether a judicial action has violated the Constitution. So long as claims under the Just Compensation Clause are limited to private-public transfers, judicial takings scenarios fit well within the Court's existing regulatory takings jurisprudence. Indeed, judicial takings claims can be resolved under existing takings tests, and there is no need to create a standard specific to judicial takings scenarios.

The second distinction is between cases brought by losing state court litigants and cases brought by other similarly situated property owners. The third distinction is between cases where there is an underlying legislative or executive action and cases where the judiciary acts unilaterally. These two distinctions matter a great deal to procedural and remedies issues. The critical preliminary question of whether a complaining property owner can even bring a claim in federal court may turn on one or both of these distinctions.

The complexities of the judicial takings issues demonstrate the wisdom of approaching constitutional issues carefully and narrowly. As judicial takings litigation progresses in the aftermath of *Stop the Beach*, courts should be careful to resolve only the issues before them, and be mindful of the distinctions between different types of cases.