VERMONT LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES
Research Paper No. 10-45

VERMONT LAW SCHOOL

Stop the Beach Renourishment: Why the Judiciary is Different

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August 2, 2010

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Electronic copy available at: http://ssrn.com/abstract=1652351

Stop the Beach Renourishment: Why the Judiciary is Different

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On June 17, 2010, after six months of undoubtedly contentious internal debate, the U.S. Supreme Court (minus Justice John Paul Stevens, who recused himself) produced an inconclusive outcome in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.[1] All of the justices participating in the case agreed on one point: that the Florida Supreme Court applied an interpretation of Florida property law consistent with Florida precedent defining the rights of coastal property owners. Thus, the Court rejected the claim that the Florida court, in the course of rejecting a takings challenge to a beach renourishment project, itself effected a taking by changing Florida property rules. But the Court split 4 to 4 on the fundamental question of whether a judicial ruling that does change property rules can constitute a taking. Justice Scalia's plurality opinion, joined by three other justices, embraced the judicial takings concept, while the other four justices declined to adopt it.

This essay has two purposes. First, it explores how the proposed judicial takings claim outlined by Justice Scalia conflicts with established takings doctrine, and explains how the justices' debate over the judicial takings concept reveals more fundamental disagreement on the Court about the purpose and scope of takings law. Second, this essay assesses the merits of the judicial takings concept by focusing on the relatively novel idea at its heart -- that court rulings, like actions by the other branches of government, can constitute "takings" within the meaning of the Takings Clause. Contrary to Justice Scalia's thesis that all branches of government should be treated the

[1] ___ S.Ct. ___ (2010).

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same under the Takings Clause, this analysis suggests that there are substantial reasons, only some of which have been adequately highlighted before, that the courts should be seen as different from the other branches and that the Takings Clause, therefore, should not extend to the "least dangerous" branch.[2]

The essay begins with a brief description of the three different opinions in the case, then addresses the two topics identified above, and ends with a brief conclusion commenting on federal constitutional grounds other than the Takings Clause for reviewing court rulings on property law issues.

Wildly Different Takes on the Judicial Taking Idea

On the merits of the judicial takings concept,[3] Justice Scalia's plurality opinion (joined by Chief Justice John Roberts, and Justices Samuel Alito and Clarence Thomas) comes down squarely in its favor. Justice Scalia argues that the Takings Clause should apply to all government actions equally, "no matter which branch is the instrument of the taking." He bases this argument on the text of the Takings Clause, which he reads as not exempting any particular branch of government from its mandate, and on the "common sense" argument that "[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." He also argues, with little real conviction, that several of the Court's precedents support the possibility of a judicial taking, at least in dictum.[4]

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[2] See Alexander M. Bickel, the Least Dangerous Branch: the Supreme Court at the Bar of Politics (1962).

[3] The justices vigorously debated whether it was possible to rule against the petitioner without actually resolving whether a judicial taking can occur under any circumstance, presenting a host of interesting questions that will not be explored in this essay.

[4] In Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), the Supreme Court might have treated the California Supreme Court's overruling of a precedent interpreting the California constitutional guarantee of free speech as a potential taking, but it did not, instead simply addressing whether the constitutional provision, as construed by the California court, effected taking. In Webb's Fabulous Pharmacies, Inc. v.

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Justice Scalia apparently believes that a judicial taking occurs whenever a court ruling changes an "established rule" of property law.[5] He says that every ruling that "eliminates" an established rule constitutes a taking, but since every ruling that changes a rule (as opposed to clarifying it) eliminates the rule as it existed before, Justice Scalia announces what amounts to a single, sweeping rule: every judicial change in the legal *status quo* is a taking. In the lexicon of takings doctrine, this represents a *per se* takings test; every change in established law is a taking. Just as a permanent physical occupation and a regulation eliminating all economically viable use are automatically takings, so too a court ruling that changes an established rule of property law is automatically a taking.

Justice Scalia says an owner should be allowed to sue to overturn an alleged judicial taking, rejecting the argument that the sole remedy should be financial compensation. In his view, an owner challenging a ruling in a case in which she was a party should be limited to pursuing the claim through the state court appellate process and via a petition for *certiorari* to the U.S. Supreme Court. If the claimant was not a party to the original suit, the claimant should be allowed to pursue the claim in federal trial court.

Justice Kennedy (joined by Justice Sonya Sotomayor) says that the Court need not resolve the viability of the judicial takings concept in this case, but offers a series of arguments debunking the concept, all the while suggesting that his thinking on the issue is only provisional. His most basic objection is that courts cannot be subject to takings claims because the taking power is vested in the political branches, not the courts. He

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Beckwith, 449 U.S. 155 (1980), the Court did suggest in *dictum* that a court could effect a taking, but ultimately analyzed the claim in terms of whether the state statute effected a taking.

[5] This seems to be the best reading of Justice Scalia's opinion and it is how the concurring justices read it, but there is some confusing counter-evidence. See Slip at 10 (stating that '[c]ondemnation . . . is always a taking," but "a legislative, executive, *or judicial* restriction of property use may or may not be, depending on its nature and extent'") (emphasis added).

bases this argument on his understanding that the decision whether to exercise the power of eminent domain – including whether it "makes financial sense" to do so – represents a policy choice that, "as a matter of custom and practice," is for the legislative and executive branches rather than the judiciary. He also argues that since a judicial taking claim should be viewed as raising a challenge to the legitimacy of the court ruling under the Due Process Clause, a meritorious claim would preclude a finding that the ruling was a taking for a "public use," barring a successful claim under the Takings Clause. He further suggests that the original understanding of the Takings Clause demonstrates that the drafters did not "envision" judicial takings.[6] Finally, he makes the legal policy arguments that applying the Takings Clause to judicial rulings might encourage courts to make more sweeping property rulings than they otherwise would, and that the concept raises complicated questions about which courts would adjudicate the claims.

In contrast to Justice Scalia, Justice Kennedy suggests that, if there were such a thing as a judicial taking, the exclusive remedy would be financial compensation. He also posits that any judicial taking claim would have to be filed in a state trial court. He offers no hint about what standard might govern a judicial taking claim.

As mentioned above, Justice Kennedy says that, in lieu of judicial takings claims, federal constitutional challenges to state court rulings that change property rules should be analyzed under the Due Process Clause. First, he says that the Due Process Clause, "in both its substantive and procedural aspects" is already a "central limitation" upon the exercise of the judicial power and, therefore, it is "natural" to read the Due Process

[6] Justice Scalia responds that this may be true but is irrelevant because courts did not explicitly assert the power to change common law rules until the 19th century. *But see Rogers v. Tennessee*, 532 U.S. 451 (2001) (arguing that courts were "fashioning and refining the law as it then existed in light of reason and experience" at the time of the drafting of the Bill of Rights).

Clause as a limit on state court property rulings. Second, based on his view that the constitutionality of a judicial ruling that changes a property rule should turn on the "legitimacy" of the ruling, rather than whether it warrants payment of compensation, he reasons that due process provides a "more appropriate" analytic framework than takings.

Justice Kennedy probably envisions that due process review would be less demanding than Justice Scalia's judicial takings test, but he is not entirely clear on this point.[7] He says the key issue under the Due Process Clause should be the degree to which a judicial ruling upsets "settled expectations," suggesting that some judicial evolution of property rules is permissible. Consistent with this understanding, he says that "owners may reasonably expect or anticipate courts to make certain changes in property law," without violating the Due Process Clause.

Justice Scalia objects on various grounds, though not very convincingly, to Justice Kennedy's invocation of due process. First, he makes the familiar argument that the courts should not invoke the "generalized notion" of substantive due process when the challenged government behavior is covered by a more particular provision of the Bill of Rights.[8] In this case, the argument appears to be answered by the fact that Justice Kennedy's due process test has a different focus from Justice Scalia's takings test. Second, he makes the sweeping objection that substantive due process does not encompass protection of economic interests, an idiosyncratic position rejected by most other justices, including Justice Kennedy.[9] Third, he objects that the Due Process Clause "will not do all that the Takings Clause does," which begs the basic question, because

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7 For example, at one point in his opinion he says that "the Due Process Clause would 'likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat,'" suggesting that his due process standard might not be so different from Justice Scalia's takings standard.

[S] See Albright v. Oliver, 510 U.S. 266, 273 (1994).

9 See Lingle v. Chevron USA, Inc., 544 U.S. 528, 548 (2008) (Kennedy, J., concurring).

providing wider latitude to state courts is apparently part of what Justice Kennedy seeks to achieve by applying the Due Process Clause. Finally, Justice Scalia argues, with more force, that it is hard to know what a due process constraint actually means, because due process "never means anything precise."

Justice Stephen Breyer, in his separate concurrence, declines to comment on the merits of the judicial takings concept. He only observes that "the approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of state law cases in an area of law familiar to state, but not federal judges." He also says the plurality's "failure . . . to set forth procedural limitations or canons of deference would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest – state property law." In sum, he is keeping his powder dry, but is plainly skeptical about the judicial takings concept.

What Kind of Taking Would a Judicial Taking Be?

It is difficult to know whether Justice Scalia's theory of judicial takings is intended to fit into, or instead subvert, established takings doctrine. In any event, the scope of the proposed new judicial takings claim is breathtaking.

Consider Justice Scalia's proposed *per se* test for a judicial taking. In embracing this test he expressly rejects the less rigid test that was advanced by petitioner and many of its *amici*. Under that test, originally proposed by Justice Potter Stewart in a concurring opinion in *Hughes v. Washington*,[10] a judicial ruling would constitute a taking when it results in "a sudden change in state law, unpredictable in terms of relevant precedents." Given that he was one vote short of a majority, and that the *Hughes* test seems to have a

[10] 389 U.S. 290, 294-98 (1967).

good deal in common with Justice Kennedy's "settled expectations" due process inquiry, it is remarkable that Justice Scalia would stake out such an extreme position.

Whatever his motivation, this proposed takings test would upend a good deal of apparently settled law. The Supreme Court has long recognized that common law courts have the power, without triggering the Takings Clause, to modify legal rules over time "in light of changed circumstances, increased knowledge, and general logic and experience."[11] In particular, in *Lucas v. South Carolina Coastal Council*,[12] Justice Scalia himself, in his opinion for the Court, recognized that "background principles" of state law capable of defeating a taking claim will evolve over time, because "changed circumstances or new knowledge may make what was previously permissible no longer so." Based on this understanding of the evolving content of the common law, the Court has "clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'"[13] If no one can claim an entitlement to any common law rule, a judicial modification of such a rule cannot represent a *per se* taking, or so we thought.

Justice Scalia's proposed *per se* test is also difficult to square with his insistence that he is seeking to apply the Takings Clause in the same fashion to all branches of government. Most takings claims based on legislative and executive actions are evaluated under the relatively deferential, *ad hoc Penn Central* analysis. Thus, Justice Scalia's rhetoric would seem to suggest that the same deferential standard should govern judicial takings claims, rather than a *per se* test. There are several ways to interpret this seeming contradiction. A relatively benign interpretation is that Justice Scalia believes a

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[11] Rogers v. Tennessee, 532 U.S. 451, 464 (2001).
[12] 505 U.S. 1003, 1031 (1992).
[13] Duke Power v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978), quoting Second Employers' Liability Cases, 223 U.S. 1, 50 (1912), in turn quoting Munn v. Illinois, 94 U.S. 113,134 (1877).

single array of *per se* and *ad hoc* takings tests applies to government actions, but that a *per se* rule happens to apply to alleged judicial takings given the nature of this particular type of government action. In support of this interpretation, it can fairly be contended that a judicial ruling that changes a private property interest into a public property interest, or that effectively transfers the property of owner A to owner B, represents a kind of direct appropriation that warrants *per se* treatment under the Court's precedents.[14] While certainly plausible, this interpretation suggests, at a minimum, that mechanical application of *per se* analysis in novel contexts can lead to quite extreme results.

Another, less benign interpretation is that Justice Scalia may believe that his principle that the Takings Clause should apply to all the branches in the same fashion means that a *per se* approach should apply to *all* takings claims. While this position is contrary to well established takings doctrine, it is consistent with Justice Scalia's abhorence for the kind of *ad hoc* balancing that *Penn Central* exemplifies.[15] In this light, it is telling that the plurality opinion relegates the *Penn Central* decision, which Justice Sandra Day O'Connor once described as the "polestar" of the Court's takings jurisprudence,[16] to a mere footnote. Thus, from the standpoint of Justice Scalia and other property rights advocates, the most important feature of the judicial takings concept might not be its application to certain court rulings, but the opportunity it presents to revisit takings doctrine generally.[17]

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[14] See Brown v. Legal Foundation of Washington, 538 U.S. 216, 235 (2003) (treating a forced transfer of ownership of client funds from a lawyer trust account to a non-profit entity as a *per se* taking).

[15] See Antonin Scalia, The Rule of Law as a Law of Rules,. 56 U. Chi. L. Rev. 1175 (1989).

[16] See Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

[17] This analysis also might shed some light on why Professor Barton Thompson, who as a Supreme Court Law Clerk assisted Justice William Rehnquist in drafting the dissent in *Penn Central*, selected judicial takings as an early research focus in his distinguished academic career. See Barton Thompson, Judicial Takings, 76 Va.L.Rev. 1449, 1515 (1990) (advocating the judicial takings idea); Looking Back on Penn

Thus, the plurality opinion can be viewed as Justice Scalia's effort to regain ground he may believe he lost in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[18] in which the Court, with Justice Scalia in dissent, affirmed the primacy of the *Penn Central* analysis and narrowly cabined the *per se* takings tests. Justice Stevens was, of course, the author of the opinion for the Court in *Tahoe-Sierra*, and his recusal from *Stop the Beach Renourishment* becomes especially significant when considered in light of this analysis. An ironic side point is that the Chief Justice, who joined the plurality opinion, served as counsel for the government in *Tahoe-Sierra* and successfully argued that *Penn Central* provided the appropriate framework in that case.

Equally arresting is Justice Scalia's suggestion that the appropriate remedy for a judicial taking is invalidation of the ruling, not payment of just compensation. If there is one thing we think we know about takings law, it is that, in the words of the Supreme Court, the purpose of the Takings Clause is "to secure compensation in the event of otherwise proper interference amounting to a taking."[19] On the other hand, the Court has said, the Takings Clause "is [not] designed . . . to limit the governmental interference with property rights *per se*." Consistent with this understanding, the Court has said that the normal remedy for a taking is compensation, and equitable relief is not an available option, at least so long as the usual compensatory relief is available in some forum.[20]

Thus, Justice Scalia's assertion that the remedy for judicial takings should not be limited to financial compensation is, to say the least, anomalous. To be sure, the

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Central: A Panel Discussion with the Supreme Court Litigators, 15 Fordham Envtl. L. Rev. 287 (2004).(describing Professor Thompson's role in the *Penn Central* case)

[18] 535 U.S. 302 (2002).

[19] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987).

[20] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984).

Supreme Court has identified a handful of narrow exceptions to the principle that compensation is the exclusive remedy for a taking, such as where the appropriate level of compensation would be impossible to calculate,[21] or where the alleged taking involves an obligation to pay money and it would be pointlessly circular to require the government to reimburse the claimant for payments he is making to the government.[22] But none of these exceptions is applicable in this case and there is no obvious rationale for creating another exception for judicial takings.[23]

In response to Justice Kennedy's objection that just compensation would be the appropriate remedy for a judicial taking, Justice Scalia says "[t]hat remedy is even rare for a legislative or executive taking, and we see no reason why it should be the exclusive remedy for a judicial taking." This statement is self-evidently obscure. If he is saying the Court has only rarely said that compensation is the exclusive remedy for a taking, he is plainly incorrect. If he is saying the courts rarely award compensation in takings cases, that is correct but beside the point, because it merely reflects the high threshold for a successful taking claim and has no bearing on the appropriate remedy if and when a taking actually occurs.

Justice Scalia may have wished to tinker with the remedy for a taking to avoid requiring claimants to present judicial claims in state courts. Under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, [24] a takings claim is not ripe in federal court if the claimant has failed to pursue a claim for compensation in

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[21] Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 71, n. 15 (1978).
[22] Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998) (plurality opinion).
[23] The Eleventh Amendment has generally been read to preclude claims for compensation under the Takings Clause against the states, see Brief Amcius Curiae of the American Planning Association, et al (collecting cases), but the state courts have consistently held that state sovereign immunity does not bar claims for compensation under the Takings against the states in state court. See, e g. , Manning v. N.M. Energy, Minerals & Natural Resources Dept., 144 P.3d 87 (N.M., 2006).
[24] 473 U.S. 172 (1985).

state court. Applying *Williamson County* produces the undeniably awkward prospect of state trial judges having to decide in the first instance whether state appellate courts have taken private property. But this awkwardness argues at least as strongly for jettisoning the judicial takings idea as it does for jettisoning the principle that the Takings Clause is designed to provide compensation for takings for public use.

A possible way of rescuing Justice Scalia's preference for an invalidation remedy would be to treat a judicial taking claim as involving a so-called "private taking." A traditional claim under the Takings Clause presupposes that the government action serves a "public use," that is, that it is not arbitrary and capricious or otherwise unlawful.[25] But an action that represents a "taking" but fails to satisfy the public use requirement is arguably subject to challenge as a private taking. Under this view, the Takings Clause not only provides compensation for takings for public use, but also prohibits takings not for a public use, and therefore provides a basis for a suit to overturn or enjoin such a taking.[26] Another view is that the Takings Clause only applies to takings for public use, and does not apply at all to actions that do not serve a public use.[27] Under this view, the Takings Clause does not authorize takings not serving a public use, but the Takings Clause of its own force does not bar such actions. The Supreme Court has issued decisions supporting both views,[28] but has never squarely resolved the issue.

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[25] First English, 482 U.S. at 315.

[26] See Armendariz v. Penman, 75 F.3d 1311, 1320-21 (9th Cir., 1996) (en banc) (applying the private takings theory).

[27] See Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir., 1988) (Posner, J.) (stating that the Takings Clause "specifies a consequence if property is taken for a public use but is silent on the consequences if property is taken for a private one. Perhaps the effect of this silence is to dump the case into the due process clause.")

[28] Compare *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896) (stating that an alleged taking for a private use violates the Due Process Clause, not the Takings Clause) with Hawaii Housing Authority v. Midkiff**,** 467 U.S. 229 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). *See also* Kelo

Treating a judicial taking claim as resting on the private taking theory would support Justice Scalia's preference for the invalidation remedy. The ultimate question, however, is whether there is some basis on which Justice Scalia might regard a judicial taking as not serving a public use. He might, for example, embrace Justice Kennedy's theory that judicial takings violate due process. That option, however, would run headlong into his opposition to reliance on the doctrine of substantive due process in the context of economic regulation. He might also embrace Justice Kennedy's notion that judicial takings are not merely invalid under the Due Process Clause but *ultra vires* as well, on the theory that courts lack the power to exercise the eminent domain power. However, that approach would seem to conflict with his starting principle that neither "the existence [n]or [the] scope" of a state's power to take should vary with the branch of government involved. Last but perhaps not least, a *sui generis* solution to the problem of judicial takings might undermine, rather than advance, a broader reform agenda.

While Justice Scalia's implicit rejection of the private takings theory is understandable, should Justice Kennedy logically embrace this alternative? Although he believes a judicial ruling that changes state property law is more appropriately viewed as raising a due process issue, why wouldn't he also view such a ruling as supporting a private takings claim? If, as Justice Kennedy contends, a judicial ruling that violates the Due Process Clause cannot serve a public use, then, logically, such a judicial ruling, if it otherwise amounts to a taking, might also be subject to an injunction under the Takings Clause. There are two potential explanations for why Justice Kennedy may reject, and at least implicitly has rejected, this alternative theory of judicial takings. First, Justice

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v. City of New London, 545 U.S. 469, 507 (2005) (Thomas, J., dissenting) ("the Takings Clause also prohibits the government from taking property except 'for public use'").

Kennedy may reject the private takings theory altogether If so, he would conclude from the fact that a judicial ruling violates the Due Process Clause, and that it therefore cannot meet the "public use" requirement, that the Takings Clause does not apply at all. Second, his view that the courts lack the power to engage in takings, because the eminent power is vested solely in the political branches, would also lead him to reject this theory of judicial takings. On the understanding that judicial takings would be *ultra vires*, alleged judicial takings cannot be challenged under the Takings Clause under any theory, regardless of whether the claim is for compensation or a declaration that the state court ruling is invalid.[29]

At the end of the day, there is no common ground between Justices Scalia and Kennedy. Justice Scalia says, in effect, that every judicial ruling changing an established rule of property law should be viewed as a taking. At the same time, he rejects the Due Process Clause as an inapposite and unprincipled alternative. Justice Kennedy makes various arguments against the judicial takings concept but his most sweeping critique is that takings doctrine, by definition, does not apply to courts because courts lack the power of eminent domain. At the same time, he firmly embraces the Due Process Clause as a proper constitutional foundation for review of judicial rulings changing property rules. Who has the better position?

What Makes Alleged Judicial Takings Different from Other Taking

Many of the arguments that have dominated the debate over the judicial takings concept appear, upon reflection, to not be terribly consequential. The justices' debate about the original understanding seems relatively thin. Given that the Court has

[29] See Hooe v. United States, 218 U.S. 322, 335-36 (1910) ("The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.")

acknowledged that the framers never envisioned that regulations can constitute takings at all,[30] it appears very late in the day to become punctilious about the original understanding. Likewise, arguments over the implications of the judicial takings doctrine for "our federalism" appear weak; after all, land use regulation is a quintessential state responsibility, just as shaping common law rules of property is a state responsibility, yet this has hardly dissuaded the Court from applying the Takings Clause to state (and local) land use regulations. Finally, the judicial takings concept raises difficult and sometimes awkward questions about the proper forum for resolving judicial takings claims. But, as Justice Scalia points out, it seems petty to resolve a question as momentous as the validity of the judicial takings concept based on niggling issues of forum selection.

The important, fundamental question presented by *Stop the Beach Renourishment* is the intuitively obvious one of whether it makes sense to apply the Takings Clause to the courts, or whether there are sufficient differences between the courts and the other branches to justify the conclusion that the Takings Clause should not apply to the judiciary. Regrettably, perhaps, this kind of comparative institutional analysis played little role in the briefing before the Supreme Court.

A threshold question in discussing judicial takings from this perspective is the potential scope of the claim. One of the oddities of this case is that the justices, the parties and the *amici* generally assumed that the judicial takings concept would be applicable to state courts, without addressing an obvious next question, whether the judicial takings concept would also apply to the federal courts.[31] Upon analysis, there is no reason to conclude that judicial takings, if they can occur at all, could not be

[30] See Lucas, 505 U.S. at 1028 n. 15.

[31] But see Brief for the States of California, et al, at 22-26 (discussing the potential application of the Takings Clause to the federal courts at length).

committed by federal courts. Federal courts commonly address questions about the nature and scope of federal property interests,[32] and they can just as easily make changes to federal property rules as state courts makes changes to state property rules.[33] If the judicial branch of state government is subject to the Takings Clause, which applies to the states via incorporation through the Fourteenth Amendment, then the judicial branch of the federal government must also be subject to the Takings Clause. In *McDonald v. Chicago*,[34] decided a few weeks after *Stop the Beach Renourishment*, the Court majority, which included several justices who embraced the judicial takings idea, rejected the suggestion that provisions of the Bill of Rights applicable to the states via the Fourteenth Amendment (such as the Second Amendment) should apply to the states in "watered down" fashion. It would seem to follow *a fortiori* that, if the Takings Clause applies to state courts, it must apply with at least equal force to the federal courts.

Turning to the substance of the justices' debate over the judicial takings concept, Justice Scalia's argument is essentially that there is no basis in the constitutional text or "common sense" for not for applying the Takings Clause to the judiciary. He says it should not matter which branch is doing the alleged taking, so long as an owner's property interest is affected in a way that would otherwise qualify as a taking, Moreover, he suggests, if a state court could avoid imposing financial liability on the state by redefining the relevant property interest, rather than addressing whether a

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[32] See, e g., Hash v. United States, 403 F.3d 1308 (Fed. Cir, 2005) (addressing the scope of private rights of way across federal public lands); Northwest Louisiana Fish & Game Preserve Commission v. U.S., 574 F.3d 1386 (Fed Cir., 2009) (discussing the scope of the federal navigational servitude).

[33] See Brief for the States of California, et al, 24 (discussing the fact that in Genessee Chief v. Fitzhugh, 53 U.S. 443 (1851), the Supreme Court overturned longstanding precedent to hold that, in light of importance of inland waters for commerce, non-tidal waters should be treated as navigable for the purpose of the Commerce Clause).

[34] ___ S.Ct. __ (2010).

compensable "taking" has occurred, the state courts would have a perverse incentive to modify state property rules to thwart valid takings claims.

While there is undeniable force to this argument, it also has the ring of over-simplification. Courts are, in many ways, different from the other branches in terms of their mission, institutional structure and method of operation, and these differences raise substantial doubts about whether the Takings Clause should apply to the judiciary in the same fashion that it applies to the other branches. There are at least five reasons to think courts are different.

First, as Justice Kennedy cogently explains, the eminent domain power should be regarded as being vested in the political branches, and not the courts.[35] If the courts lack the power to "take" within the meaning of the Takings Clause, their decisions obviously cannot give rise to takings claims. A basic premise of Justice Kennedy's argument is that exercises of the eminent domain power necessarily entail a government obligation to pay just compensation, a premise that Justice Scalia disputes. For the reasons discussed, above Justice Kennedy has the better of that argument. Given this understanding, Justice Kennedy correctly argues that exercising the eminent domain power necessarily involves policy making choices about whether – and at what price – it makes sense to take private property. These policy choices are appropriately viewed as being vested in the political branches, rather than the courts, because the political branches are directly responsible to the taxpayers whose funds are being expended and only the political branches are in a position to make the tradeoffs between potentially expensive takings and other public

[35] Apparently no party of amicus squarely presented this argument to the Court, providing a striking illustration of Justice Kennedy's originality in this field. Cf. Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (presenting several original arguments against the claim that the federal Coal Industry Retiree Health Benefit Act resulted in a taking).

funding priorities. The virtually unique money-mandating nature of the Takings Clause[36] requires an answer to the question of what entities have the power to take and obligate the public to pay compensation; the nature of the spending power, and the choices it entails, suggests that it must be the political branches, not the courts.

Moreover, as a practical matter, only the political branches can effectively exercise this policy making authority. Government agencies can and often do decide, after learning the cost of a planned project involving the use of eminent domain, to abandon the project and deploy the public funds elsewhere. In the regulatory takings context, if a regulation is held to effect a taking, the legislature or an agency can rescind the restriction and avoid financial liability for a permanent regulatory taking.[37] By contrast, it is difficult to imagine a court rescinding a ruling changing a common law rule upon learning its financial cost. It is even harder to imagine how this could happen if the court that changed the property rule were different from the court that declared the change to be a taking.

Second, the most traditional rationale for applying the Takings Clause to the political branches does not logically extend to the courts. Subjecting government to takings liability is said to force government officials to consider the potential costs of their decisions for property owners.[38] Under this understanding, the Takings Clause counter-balances the political branches' majoritarian impulse to take actions that benefit the citizenry as a whole, but at the expense of individual property owners. There are serious objections to this rationale, including that organized property owners often can

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[36] Another money-mandating provision of the Constitution is the Export Clause. See Cyprus Amax Coal Co. v. United States, 205 F.3d 1369 (Fed Cir.2000).

[37] See First English, supra, 482 U.S. at 321.

[38] See Robert Ellickson & Vicki Been, Land Use Controls: Cases and Materials ___ (2005).

and do protect themselves quite effectively in the political process, and the threat of expansive takings liability would probably over-deter government officials and prevent them from acting in a balanced fashion.[39] Despite these objections, however, the argument that the Takings Clause helps constrain majoritarian politics represents, at a minimum, a coherent argument.

However, the argument does not naturally apply to judicial rulings because the judiciary is not designed to speak for the majority, but is instead supposed to render justice in an even-handed fashion. Indeed, far from advancing majoritarian policies, a primary function of the courts is to check the majority, including, for example, by enforcing the Takings Clause against the legislative and executive branches. The judicial takings doctrine, in other words, seems to turn the world upside down.

During oral argument, Chief Justice John Roberts framed the question of whether the Takings Clause should apply to the courts in instructively provocative fashion. He presented an example of a state legislature enacting a law changing the coastal boundary between public and private property from the mean high water line to a higher point on the shore, and posited that, "of course," such a change in the law would result in a taking. He then asked: "[s]ay somebody runs for election for the Florida Supreme Court and says I'm going to change that law, [and] I'm going to say that it is not a taking. I think people should be able to walk right up to the land. Now . . . is that a judicial taking?"

The implicit point of the question, of course, is that a judicial takings doctrine might, in fact, help counter majoritrian judicial impulses, including on the part of the elected members of the Florida Supreme Court. But, for the reasons discussed, any

[39] See John Echeverria, Regulating Versus Paying Land Owners to Protect the Environment, 26 J. Land Resources Envtl. L. 1 (2005).

coherent judicial takings doctrine must include the federal courts. While it would be naïve to say that federal courts, including the Supreme Court,[40] are above politics, the function of secure life tenure is to insulate the federal courts as much as possible from majoritarain influence. Furthermore, while Florida and some other states do elect judges to their highest courts, the majority of the states do not.[41] Instead, state high court judges are mostly appointed to office either for lifetime or lengthy terms through a combination of merit selection managed by judicial commissions and gubernatorial and legislative appointments.[42] Thus, many state judges are as insulated from politics as federal judges, or nearly so.

Finally, even with respect to the elected state courts, the Chief Justice's hypothetical is unpersuasive, for several reasons. His hypothetical campaign pledge is not an impossibility, for the Supreme Court (led by the same wing of the Supreme Court that now advocates the judicial takings idea!) has ruled that the First Amendment prevents enforcement of canons of judicial ethics that would bar judicial candidates from taking a position on issues likely to come before them once elected.[43] But elected state judges are under significant public and professional pressure to maintain their independence from politics.[44] Furthermore, retired Justice Sandra Day O'Connor has launched an intensive public campaign to help persuade states to abandon judicial

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[40] See, e.g., Bush v. Gore, 531 U.S. 98 (2000). See also Adam Liptak, "Court Under Roberts is Most Conservative in Decades," The New York Times, July 24, 2010 ("If Ms. [Elena] Kagan wins Senate confirmation, all of the justices on the court may be expected to align themselves across the ideological spectrum in sync with the party of the president who appointed them.")

[41] See Judicial Selection in the United States, A Special Report, http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf.

[42] Ibid.

[43] See Republican Party of Minnesota v**.** White, 536 U.S. 765 (2002).

[44] See Justice at Stake Campaign, http://www.justiceatstake.org.

elections,[45] creating some momentum towards reducing the use of judicial elections. In short, the Chief Justice's hypothetical unnecessarily reflects our worst fears, not the reality of, much less our highest aspirations for, the state judicial systems.

In sum, to whatever extent *some* state court judges *sometimes* act, or appear to act, more like politicians than judges, these cases hardly support a sweeping doctrine of judicial takings. Moreover, a doctrine of judicial takings could not plausibly pick and choose between the federal and state courts, or between particular state court systems, or even among particular judicial rulings. Tellingly, though some members of the plurality may have supported the judicial takings concept in part because of judicial elections, the plurality opinion does not explicitly point to this factor.

Not only would applying the Takings Clause to the generally anti-majoritarian judiciary not further a central asserted function of takings doctrine, it would tend to seriously bias the evolution of common law rules to the detriment of the majority. Over history, the common law has constantly undergone evolution. In some cases the changes have expanded the legal rights of property owners, such as by limiting the ability of neighbors to bring nuisance claims.[46] In other cases these changes have expanded the public's rights in private property, such as by granting new public rights of accees.[47] Under current takings doctrine, there is no plausible basis for claiming a taking based on the elimination of a common law right of action,[48] and certainly nothing in the plurality

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[45] See O'Connor Judicial Selection Initiative, University of Denver, http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf.

[46] See, e.g., Pa. Coal Co. v. Sanderson, 6 A. 453, 464-65 (Pa. 1886) (explicitly narrowing the rights of riparian property owners to advance the interests of mining firms).

[47] State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (creating public rights of access to dry ocean beach based on the doctrine of custom).

[48] See Ileto v. Glock, 421 F. Supp. 2d 1274 (C.D. Cal. 2006) (citing cases), affirmed, 565 F.3d 1126 (9th Cir. 2009) (stating that every federal circuit court of appeal to address the issue has held that a cause of action is not "property" under the Takings Clause until reduced to final unreviewable judgment).

opinion supports this possibility. Thus, the judicial takings concept would apparently only apply to some types of judicial changes in property rules and not to others. A judicial taking doctrine that protected against judicial rulings that narrow property owners' abilities to control their properties, but did nothing to constrain legal change in the other direction, would systematically undermine the interests of the majority.

Justice Kennedy says it is "conceivable" that adopting the judicial takings concept would encourage judges to make more sweeping changes in property rules, on the theory that they would be more willing to embrace legal change if they knew that property owners burdened by the change would be compensated. This speculation seems questionable on several different grounds.[49] But it provides further support for the larger point that, since the judicial branch would neither be directly involved in paying takings awards, nor responsible to those who would have to pay such awards, it is problematic to conceive of takings liability as imposing a useful restraint on judicial decision-making.

A third problem with applying the Takings Clause to the state courts in particular is that it would threaten the nation's system of "cooperative judicial federalism."[50] Over time, the Supreme Court has developed a number of legal doctrines and practical procedures designed to enlist the state courts as partners in interpreting and applying federal law and also to safeguard the authority of the state courts to resolve matters of state law without interference from the federal courts Thus, the Court has repeatedly

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[49] Because, as Justice Kennedy explains, courts traditionally lack the "the right or responsibility" to decide upon the use of public funds, judges would be reluctant to issue rulings that would create major new financial liabilities. In addition, judges would probably be more restrained by a U.S. Supreme Court ruling that they committed an inadvertent taking than by the prospect of the availability of financial compensation. Finally, this logic suggests that the U.S. Environmental Protection and the Army Corps of Engineers should have vigorously enforced the Clean Water Act wetlands protection program secure in the knowledge that the Federal Judgment Fund would available to pay any and all taking claims; in fact, actual and threatened takings claims have seriously undermined the implementation of this program.

[50] Lehman Bros. v. Schein, 416 U.S. 386, 390 (1974).

affirmed "the constitutional obligation of the state courts to uphold federal law," and has "express[ed] . . . confidence in their ability to do so."[51] At the same time, the Court has also affirmed that "a State's highest court is unquestionably 'the ultimate expositor of state law,'" and that "the prerogative of [a state court] to say what [state] law is merits respect in federal forums."[52] Thus, under the Court's landmark decision in *Erie R.R. Co. v. Tompkins*,[53] the states are allowed to develop and apply common law rules without interference from overarching federal common law principles. The well-established abstention doctrine, which calls upon federal District Courts to defer to state courts to obtain a "definitive ruling" on state law issues, is based on what the Supreme Court has called its "scrupulous regard for the rightful independence of the state governments."[54] Likewise, the widely employed certification process, through which federal courts refer specific issues for resolution by state courts, is based on the idea that the state courts are the "final expositors" of state law.[55]

These principles and procedures would be seriously strained if state court rulings on property issues were subject to challenge under the Takings Clause. For example, it is hardly far-fetched to think that state courts might decline to accept certifications from federal courts in property cases if their decisions could expose the states to financial liability. The disruption of the tradition of respectful comity between federal and state courts would be even greater if judicial takings claims could be filed directly in federal court, as Justice Scalia proposes.

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[51] Allen v. McCury, 449 U.S. 90, 105 (1980).
[52] Riley v. Kennedy, 128 S. Ct. 1970, 1985 (2008), quoting Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).
[53] 304 U.S. 64 (1938).
[54] Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 501 (1941).
[55] Lehman Bros. v. Schein, 416 U.S. 386 (1974).

Fourth, the institutional structure of the state court systems also provides a basis for not applying the Taking Clause to the states courts in the same fashion that it applies to other state (and local) institutions. The political branches subject to the Takings Clause at the state and local level include the 50 state governments and territories and their numerous commissions and agencies, as well as local governments, which include over 3000 counties, over 30,000 cities and municipalities, and ten of thousands of other special local districts.[56] While units of local governments are legally subordinate to the states, they routinely take a variety of regulatory and other actions that can give rise to takings liability without any direct state oversight. On the other hand, the state court systems are organized in hierarchical fashion with high courts exercising at least discretionary appellate jurisdiction over all lower court rulings. In addition, local governments are sometimes staffed by volunteers or part-time employees with little relevant professional expertise. But states court judges, particularly at the high court level, are generally distinguished academics and experienced lawyers who operate within an institutional culture that prizes professionalism and fair-mindedness. All these distinguishing features of the state court systems reduce the risk of judicial rulings that will impair federal constitutional values relative to the risk posed by the other branches.

Finally, there is less reason to apply the Takings Clause to the courts than to the political branches because judicial changes in property rules tend to apply broadly across the community. The Takings Clause is primarily animated by a concern about the potential unfairness of government actions that single out a particular individual or small

[56] See National League of Cities, Cities 101, http://www.nlc.org/about_cities/cities101.aspx

groups to bear onerous burdens to achieve a public purpose.[57] Thus, the Court has generally rejected takings claims, or at least been more reluctant to finding a taking, where the claim arises from general rules affecting many members of the community rather than ad hoc decisions affecting one or a few persons.[58] This pattern is based on the understanding that government actions with broad impacts are more likely to produce a reciprocity of advantage for all, and perhaps also the perception that such actions are less likely to be based on invidious discrimination. Judicial rulings changing property rules, even if they are issued in the context of a particular litigation, usually do not single out one or a few individuals but apply broadly to many similarly situated owners. Thus, the generality of judicial rulings on property law issues provides another argument against the judicial takings concept.

Conclusion

The conclusion that the Court should explicitly reject the judicial takings concept, if and when it revisits the issue, does not mean that state court rulings on property issues should necessarily be immune from federal constitutional challenges on other grounds. Some of the reasoning set forth above argues against a judicial taking claim and some if it argues against any kind of federal constitutional review of property rulings. But review of state court rulings on the ground that they violate the Due Process Clause, or on the ground they lack a fair and substantial basis, offer protection for property interests while intruding less upon the judicial branch. The standard under the Due Process Clause is admittedly elusive, but due process appears to focus on the integrity and even-handedness

[57] Armstrong v. United States, 364 U.S. 40 (1960) (stating that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.")

[58] See John D. Echeverria, The Triumph of Justice Stevens and the Principle of Generality, 7 Vt. J. Envtl. L. 22 (2005-06).

of the state court law-making process, as well as the magnitude of legal change.[59] Similarly, the "fair and substantial" inquiry examines whether the state court may have issued a ruling for the purpose of defeating federal constitutional interests. As Justice Kennedy states, unless these alternatives prove inadequate, there is no good reason for the Court to embrace the problematic theory of judicial takings.

[59] The decision in Gibson v. American Cyanamid Co. 2010 WL 2465498 (E.D.Wis., June 15, 2010), striking down a Wisconsin court ruling on the proper allocation of tort liabilities, hardly seems a proper application of the federal Due Process Clause to state court rulings.