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**JUDICIAL TAKINGS: MUSINGS ON *STOP THE BEACH***

*James E. Krier*\*

Judicial takings weren't much talked about until a few years ago, when the *Stop the Beach* case made them suddenly salient.<sup>1</sup> The case arose from a Florida statute, enacted in 1961, that authorizes public restoration of eroded beaches by adding sand to widen them seaward. Under the statute, the state has title to any new dry land resulting from restored beaches, meaning that waterfront owners whose land had previously extended to the mean high-tide line end up with public beaches between their land and the water. This, the owners claimed, resulted in a taking of their property, more particularly their rights under Florida common law to receive accretions to their frontage on the water, and to have their property remain in contact with the water. The state supreme court disagreed, concluding that the owners never had the rights they claimed. The owners then sought (and were granted) review by the Supreme Court, the question now being whether the state supreme court's decision worked a *judicial* taking because it was contrary to Florida common law. They lost, all of the participating justices concurring in the view that the Florida court's decision did not contravene any established property rights.

So there was no judgment of a judicial taking in *Stop the Beach*, nor, indeed, any judgment that "there is such a thing as a judicial taking," because only

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An earlier version of this paper was presented at the Tenth Annual Brigham-Kanner Property Rights Conference, William & Mary Law School, October 17-18, 2013. I thank John Echeverria for his comments and suggestions, and Tom Merrill for lending me some of his thoughts on judicial takings.

<sup>1</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot. (Stop the Beach)*, 560 U.S. 702 (2010).

four members of the Court think that.<sup>2</sup> The plurality opinion, written by Justice Scalia as a part of his opinion for the Court, concludes that the Fifth Amendment's Takings Clause plainly applies to all the branches of government, not just the executive and legislative. "If a legislature *or a court* declares that what was once a private right of ownership no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."<sup>3</sup>

These views have already provoked a fairly considerable literature. I don't claim to have read all the articles, but I have sampled many and learned a lot. The literature about *Stop the Beach* is way more illuminating than the opinions in the case itself, the plurality opinion especially, but like the plurality opinion the literature is provocative. And just as *Stop the Beach* has moved scholars to muse, so their musing has led me to do the same. What follows are some riffs on the case and the scholarship alike, part primer and part critique.

## I

The law of takings distinguishes between (1) explicit takings of private property under the government's inherent power of eminent domain, and (2) implicit takings of private property caused by legislation, administrative regulation, or other governmental actions. In type 1 cases, the government sues in a condemnation action; in type 2 cases, the property owner sues in an inverse

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<sup>2</sup> *Id.* at 718. Justice Scalia wrote the opinion for the Court, in which all of the justices concurred, and the plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Alito. There were two separate opinions concurring in the judgment but not in the plurality's views on judicial takings – one by Justice Kennedy, joined by Justice Sotomayor, the other by Justice Breyer, joined by Justice Ginsburg. Justice Stevens did not participate in the case.

<sup>3</sup> *Id.* at 715.

condemnation action. There is no issue about a taking in type 1 cases, the very point of the lawsuit being to force the sale of the property in question (which the government may do, provided the transfer is for a public use and that just compensation is paid). There is always an issue about a taking in type 2 cases, where the property owner claims that the government's actions amount to a taking, even though the government insists otherwise.

Judicial takings, if there ever is such a thing, would be takings of type 2, governed by a cluster of Supreme Court rules conventionally referred to as the law of "regulatory takings." The label is inaccurate, because type 2 cases commonly arise in instances where the consequences of the governmental action in question have no relation whatsoever to any proximate regulatory provision, whether legislative or administrative. It is better to think in terms of explicit and implicit takings, and I take the license to do so at times in the discussion that follows.

## II

### A

As mentioned above, only a plurality of the Court believes that there can even be such a thing as a judicial taking. Skeptics suggest that logically judicial takings can't really exist. A common version of the argument based on logic runs as simply as this: Courts lack the power of eminent domain. Since they are thus incapable of explicitly taking property, they are also incapable of implicitly taking property.

I find this line of argument unpersuasive. Eminent domain is an inherent power of government. Nothing in the Constitution confers it; the Takings Clause operates to limit it. The clause's constraints apply to the government generally. No language indicates or even suggests that courts are excluded from the generalization. Professor Thompson, after reviewing historical materials regarding the drafting of the Takings Clause, concludes that it occurred to no one to consider its applicability to the judiciary. "The original understanding of a taking," he says, "was simply too narrow to raise the issue: the fifth amendment's takings provision was addressed not to the type of indirect, regulatory taking that most judicial property changes resemble, but to traditional exercises of eminent domain."<sup>4</sup>

Such a history hardly puts judicial takings logically out of constitutional bounds. It tells us nothing about what the original understanding might have been had judicial takings been on the table. But they weren't; the focus was on explicit exercises of the eminent domain power (the idea, and thus the law, of implicit takings developed many years later). And I suppose no court had ever entertained the notion that it could explicitly condemn property, or that it should. That would have been an audacious challenge to convention shaped by "traditional exercises of eminent domain," as Thompson puts it. So we can say for sure that there was and is no practice of explicit condemnation by courts, but that hardly denies the power of courts to do what traditional practice has left to the other branches.

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<sup>4</sup> Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1458 (1990). Thompson's article, though published two decades before the opinions in *Stop the Beach*, is as valuable now as it was before.

**B**

But let us suppose, for the sake of argument, that there clearly is no power in the courts to engage in explicit condemnation. It would be an obvious non-sequitur to conclude from this that judicial decisions cannot work implicit takings. The logical fault is illustrated by Professors Dana and Merrill in their indispensable text on the law of takings.<sup>5</sup> They observe, correctly, that condemnation and regulation are substitute means by which governments can control the use and ownership of property. If condemnation is used, the government has to pay; if regulation is used, it does not, unless some body of law says otherwise. The Court's law of implicit takings says otherwise, for the obvious reason: If government could choose freely between condemnation and regulation, it would be inclined to favor regulation in order to evade the obligation to pay compensation.<sup>6</sup> To control against undesirable substitution effects, the Court's rules of decision aim to force compensation when regulation "has an impact [on property rights] functionally equivalent to an exercise of eminent domain."<sup>7</sup> But "courts, unlike legislatures and many executive agencies, do not have the power to take property by eminent domain. Consequently, the basic logic for the [implicit] takings doctrine . . . does not apply to courts: It is difficult to say that a court, by changing the law, is seeking to evade any obligation that it has . . . ."<sup>8</sup>

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<sup>5</sup> DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* (2002).

<sup>6</sup> *Id.* at 4-5. We can draw an analogy to federal estate and gift taxes. An estate tax must sensibly be accompanied by a gift tax in order to prevent estate tax avoidance by making inter vivos gifts.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 229-30.

The fault in the argument is apparent. Dana and Merrill simply assume that the power of eminent domain *necessarily* entails the power to take by explicit condemnation, which I have suggested is a contestable proposition. Yet, in my view, it doesn't matter. Whether or not courts have the power of eminent domain, governments surely do, and courts, as the plurality in *South Beach* correctly observes, are indisputably a branch of the government. Governments also have the purse power, and thus the means, unavailable to the judicial branch, to pay compensation for judicial takings.<sup>9</sup> And just as governments should not be able to evade the obligations of the Takings Clause by substituting regulatory activity for explicit condemnation, they should not be able to evade the obligations by substituting judicial activity for regulatory activity.

### III

Even if there are no logical reasons to fuss about judicial takings, there are prudential ones. Before we get into these, it is important to have in mind what judicial takings are about – better, what they would probably be about should the *South Beach* plurality someday win another vote.

Judicial takings are *solely* concerned with court decisions that re-allocate existing property rights by changing established property doctrine.<sup>10</sup> Note two points: While statutes and administrative regulations can change doctrine too, thus triggering the Takings Clause, legislative and executive actions can also work takings in ways that judicial actions cannot.<sup>11</sup> Relatedly, statutes and regulations

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<sup>9</sup> Actually, courts may have the means to pay, in a way. See *infra* note 38.

<sup>10</sup> See Thompson, *supra* note 4, at 1450; DANA & MERRILL, *supra* note 5, at 228-29.

<sup>11</sup> The obvious example is explicit condemnation. Another is government enterprises that interfere with private property (as when a public sewer system causes flooding).

might change doctrine and reallocate rights, yet still *not* amount to takings under the Supreme Court's rules. Whether this is true of judicial decisions as well is a nice question, as we shall see.

At least from the standpoint of the Takings Clause, courts and the other governmental branches are free to change established property *rules* so long as there is no alteration in existing property *rights*. The Court made this plain long ago: "A person has no property, no vested interest, in any rule of the common law."<sup>12</sup> An illustration: Four states (Delaware, Maine, Massachusetts, and Rhode Island) still recognize the common law fee tail. They could abolish it, but only as to fees tail created after the date of the abolition. Retroactive abolition would probably be a taking, because it would wipe out property rights already created, namely any vested remainders and reversions.<sup>13</sup> Never mind that those rights are worthless or nearly so, because in fact, though not in law, they are contingent to a fault, little more than expectancies.

Retroactive abolition of the fee tail might be accomplished by legislation or by independent judicial decision, but there could be a judicial taking in either case, as *Stop the Beach* makes clear. The point is obvious in the case of judicial abolition. As to legislative abolition, a judicial taking looms if a party sues in state court claiming that the abolition works a taking, and the court upholds the

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<sup>12</sup> *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

<sup>13</sup> *See, e.g., Green v. Edwards*, 77 A. 188 (R.I. 1877) (holding that retroactive abolition of the fee tail is an unconstitutional deprivation of property without due process of law). So the Court in *Munn* observed: "*Rights of property* which have been created by the common law cannot be taken away without due process." 94 U.S. at 134. Today, I presume, these decisions would talk about takings rather than due process. On judicial takings versus due process, *see* Eduardo M. Peñalalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305 (2012).

legislation in light of state common law. The party could then seek review in the Supreme Court or sue in federal district court, claiming a judicial taking in that the state court changed the state's established property law doctrine. The federal court would have to determine whether the state common law really is what the state court said it was. Federal oversight could also result from claims filed by property owners who were not parties to the initial litigation that led to judicial takings challenges, but sue independently, asserting in federal court that the judicial decision upholding the retroactive abolition of the fee tail takes their property rights.

#### IV

The path to federal oversight of alleged state takings is complicated by various procedural rules developed by the Court. The details of this part of the story are well treated elsewhere, so I leave them aside.<sup>14</sup> Whatever the path, the end point finds one federal court or another involved in the interpretation of state property law. So, critics argue, even if judicial takings are not logically out of bounds, they are objectionable for prudential reasons: Judicial takings would flood the federal courts with litigation involving issues beyond their immediate expertise, intrude unduly on the state's acknowledged authority to define property rights, and impose financial obligations that compromise the prerogative of the states' *political* branches (the judiciary is not such a branch) to manage the expenditure of public funds.

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<sup>14</sup> See D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903 (2011).

The weightiness of these concerns is a function of, among other things, the frequency with which judicial takings would be found to have occurred, but I don't see how anyone can provide even a rough estimate of that. One would need to know, first of all, how often property owners find occasion to assert in law suits that judicial decisions “declare that what was once an established right of property no longer exists”<sup>15</sup> – more to the point, how often property owners *would* find occasion to make such an assertion were a doctrine of judicial takings to become the law of the land. After all, the doctrine might constrain courts from declaring what they otherwise would have declared. If the universe of relevant instances is or would be tiny, then so too the consequences of the doctrine, at least insofar as the obligation to pay compensation is concerned.

Second, whatever the size of the universe, the number of instances *in which judicial takings would actually be found* is sure to be smaller, and maybe substantially so, or even overwhelmingly so. But to make a rough guess about this we need to know exactly what the plurality opinion *means* in saying that judicial takings would arise whenever courts declare that established property rights no longer exist. The statement might seem clear, but it isn't, as evidenced by the divergent interpretations of it found in the literature. Below I consider some ambiguities and what various commentators make of them.

## A

We might suppose that since the courts are just another branch of government, they should be treated just like the other branches when it comes to takings. The plurality opinion in *South Beach* can be read to stand for this

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<sup>15</sup> *Stop the Beach*, 560 U.S. at 715.

proposition. In its little exegesis on “some general principles of our takings jurisprudence,” the plurality notes that “our doctrine of regulatory takings ‘aims to identify regulatory actions that are functionally equivalent to the classic taking [by condemnation under the power of eminent domain].’”<sup>16</sup> For examples, the plurality cites several of the Court’s rules: when government action works a permanent physical occupation of private land, there is a taking; when government action wipes out all economically beneficial use of private property, there is a taking; when government action re-characterizes as public property what before was private property, there is a taking.

Anyone familiar with takings law knows there is more to it than this. The plurality’s examples refer to several of the Court’s *per se* or categorical takings rules – rules of the form “if X happens, that is always a taking.” The rules are not quite so hard-edged as the plurality opinion suggests. It notes that temporary physical occupations are not takings *per se*, but leaves unmentioned that this is also true of wipeouts of value (the latter of which, moreover, are never takings if they are the consequence of controlling common law nuisances, and not *per se* takings if they wipeout the value of only *part* of a parcel).<sup>17</sup> Putting the common law nuisance exception aside, all of the instances above – and many others involving government actions that impact the value or use of private property – might still work takings under the multi-factor, *ad hoc* test laid out in the *Penn*

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<sup>16</sup> *Id.* at 713, quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

<sup>17</sup> For most purposes, the Court considers takings challenges by looking at the impact of a government action on the whole piece of property involved, as opposed to just a part of it. This is to say that the Court rejects a practice of “conceptual severance.”

*Central* case.<sup>18</sup> The probability of a property owner winning a takings claim under that test, however, is very low. So is the probability of a property owner being able to rely on any of the *per se* rules, because government agents have learned to abstain from activities that cause permanent physical occupations and permanent wipeouts of entire parcels.

## B

It seems to follow from the foregoing that if (1) courts are subject to the same constraints as the other branches, then (2) successful judicial takings challenges would be rather few and far between. But point (2) follows only if point (1) holds, and on this the plurality is unclear and the commentators divided. Professor Somin, for example, agrees with point (2) because he reads the plurality opinion to say that point (1) does hold. His interpretation relies on Justice Scalia's statement that condemnation by eminent domain "is always a taking, while a legislative, executive, *or judicial* restriction of property use may or may not be, depending on its nature and extent."<sup>19</sup> The emphasis in that statement is Somin's. He could as well have emphasized the last words of the statement –

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<sup>18</sup> *Penn Central Transportation Co. v. City of New York*, 438 U. S. 104, 124-25. Most simply stated, the multi-factor test considers the diminution in value of property caused by the government action, the extent to which the action interferes with the owner's distinct investment-backed expectations, and the character of the government action. For a fuller statement and examination of the factors, *see* DANA & MERRILL, *supra* note 5, at 131-64.

<sup>19</sup> *Stop the Beach*, 560 U.S. at 715; Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL'Y 91, 105 (2011). There are other statements in the plurality opinion that support Somin's interpretation. *See Stop the Beach*, 130 S. Ct. at 2601 (Takings Clause "is concerned simply with the act, and not with the governmental actor"); ("There is no textual justification for saying that [the existence or scope of government power to take property without just compensation] varies according to the branch of government"); ("Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment").

“depending on its nature and extent” – because those words also suggest that the plurality would apply to the judicial branch the rather forgiving body of rules that the Court applies to the legislative and executive, lock, stock, and barrel. This includes, Somin infers, the multi-factor test of *Penn Central*, which “[c]ourts generally apply . . . in ways that favor the government.”<sup>20</sup>

Contrast the view of Professor Echeverria. “It is difficult to know,” he says, “whether Justice Scalia’s theory of judicial takings is intended to fit into, or instead subvert, established takings doctrine,”<sup>21</sup> but he worries that subversion is the aim. His interpretation – just as reasonable as Somin’s – suggests that Justice Scalia means to establish a *per se* rule that “every change in established law is a taking,”<sup>22</sup> and to apply the rule not just to the courts but “to all the branches” of the government.<sup>23</sup> “In any event, the scope of the proposed new judicial takings claim is breathtaking.”<sup>24</sup>

So we have two academic experts on takings fairly interpreting the same opinion and reaching dramatically different conclusions about what it promises, or threatens, to stand for. Both interpreters invoke *Penn Central*. Somin, as we saw, figures the case would play the same role in judicial takings doctrine that it does in takings by the other branches. Echeverria worries that the opposite could

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<sup>20</sup> Somin, *supra* note 19, at 104.

<sup>21</sup> John D. Echeverria, Stop the Beach Renourishment: *Why the Judiciary is Different*, 35 VERMONT L. REV. 475, 479 (2010).

<sup>22</sup> *Id.* at 477.

<sup>23</sup> *Id.* at 481. Professor Echeverria has told me in a recent conversation that he considers his interpretation in this respect supported by the Court’s subsequent opinion in *Arkansas Game & Fish Comm’n v. United States*, 133 S.Ct. 511 (2012). He reads the case to say that whereas only *permanent* physical invasions or occupations are *per se* takings, direct government seizures or forced transfers of ownership are always takings, regardless of the temporal duration of the seizure or transfer.

<sup>24</sup> Echeverria, *supra* note 21, at 479.

happen, noting that the plurality opinion mentions *Penn Central* nowhere but in a footnote<sup>25</sup> – a slight “consistent with Justice Scalia’s abhorrence for the kind the kind of ad hoc balancing that *Penn Central* exemplifies.”<sup>26</sup>

Who has the better of this particular debate I cannot say. Divining the meaning of the plurality opinion is pure guesswork, and I know nothing of Somin and Echeverria’s records in that regard. I have to suppose that their contrasting interpretations might be influenced (and appropriately so) by their views about the law of takings generally. Professor Somin is an advocate of “stronger rules for regulatory takings rules,” with “stronger rules” meaning rules that protect property owners, and constrain the government, more than do the present ones. Professor Echeverria probably doesn’t share that sentiment; his professional career, teaching, and research interests reflect an ongoing commitment to resource conservation and environmental quality. I find it interesting, though, that someone like Somin, who wants the plurality opinion to portend much, argues that it portends little, whereas someone like Echeverria, who wants it to portend little, argues that it portends much. Or maybe this is exactly as one would expect.

## V

It should be apparent by now that even very careful readings of *Stop the Beach* provide little basis for guessing about the likely impact of the plurality opinion, were it to become the law. So much depends on what the plurality has in

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<sup>25</sup> *Stop the Beach*, 560 U.S. at 716 n.6.

<sup>26</sup> Echeverria, *supra* note 21, at 481. Nor does the plurality opinion make any mention of conceptual severance (on which see *supra* note 17), perhaps another indication that Justice Scalia and company would just as soon dispense with much of conventional implicit takings doctrine. Cf. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1374-75 (2nd ed. 2010).

mind, and on what (if anything) it would have to surrender to garner a fifth vote. The law could end up being something like what Somin foresees, or what Echeverria foresees, or somewhere in between, and in any event could be expected to morph over time.

If Somin's interpretation of *Stop the Beach* proves to be on the money, there would be little occasion for drama. We would have a unified and familiar doctrine of implicit takings law, equally applicable to all branches of the government, the judiciary included. To be sure, that doctrine makes it very difficult to avoid takings liability when the *consequences* of government actions are permanent physical occupations or permanent wipeouts of the value of entire parcels that can't be justified on nuisance control grounds. Note, however, that it is easy to avoid the *circumstances* that would give rise to those consequences. The instances triggering the Court's *per se* takings rules arise mostly from accidents or stupidity. Hence most takings cases would continue to be reviewed, just as most cases are now, under the *Penn Central* multi-factor test, which cuts the government a lot of slack.

Suppose, on the other hand, that Echeverria's worst-case reading holds. There would be a *per se* rule applicable to all governmental branches, across the board: There is a taking when any government action alters the status quo such "that what was once an established right of property no longer exists," period.<sup>27</sup>

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<sup>27</sup> *Stop the Beach*, 560 U.S. at 715. Of course, there could be a *per se* rule limited just to the courts; that approach would fall on the spectrum somewhere between the extremes represented by views like Somin's and views like Echeverria's. No doubt there are other variations that might occupy the middle ground, but I want to consider only the one that would confine the *per se* rule to the courts. It is an especially interesting variation, and my thinking about it has been provoked by conversations with Tom Merrill about a

The problem, though, is that such a rule might well mean less than all it could. There are all sorts of ways the rule could be narrowed but still stand; and there are ways to limit the rule's consequences in any event, even if it stands in full. What follows are some illustrations of each observation. Many of them have already been discussed at considerable length elsewhere, so at times I settle for brief mention accompanied by references that provide an abbreviated guide to some of the relevant literature.

### A

As to narrowing the rule, consider what it might mean to speak of a "right of property" and what it might mean to say that the right "no longer exists." Lawyers, for better or worse, commonly speak of property as "a bundle of rights" – conventionally the right to exclude, the right to use, and the right to transfer. The question for present purposes is whether the "right of property" is to be taken as referring to any twig within any one of these rights, or to the entirety of any one of these rights, or to the whole bundle of rights and their twigs. From the latter rendition – call it "conceptual integration" – it could follow that government action destroying only one or several of the twigs or even the rights would not necessarily be a taking under the *per se* rule because the bundle itself has not been

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thought experiment in his property book, MERRILL & Smith, *supra* note 26, at 1373. This is my riff on the experiment, with apologies to Tom if I have missed the point or otherwise mucked things up: Suppose a state statute would pass muster under the conventional implicit takings rules regarding physical invasions, wipeouts, and the *Penn Central* multi-factor test. The statute is challenged as a taking in state court, which upholds it on the ground that the rights alleged to have been taken do not exist under state law, whereas actually they do. Would this amount to a judicial taking, even though the court's misinterpretation of state law didn't matter to the correct result? Might the state court decision simply be ignored, on grounds of harmless error? *Cf.* Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 619 (2012).

destroyed but only depleted; it still exists. My own view, with which there might be wild disagreement, is that the Court has been ambivalent regarding the relevant “property right,” sometimes tolerating the destruction of one particular twig or right (not the whole bundle) and other times not, especially if the particular right is the right to exclude.

An obvious narrowing technique – one already mentioned in section III – is for a court to make any changes in existing law *prospective*. As we have seen, there is no entitlement to particular rules of property, and this suggests that prospective changes in the rules would not work takings. But a closer look at the matter leads me to conclude that this technique might not always work. After all, *prospective* changes in property *rules* can constrain and reduce the value of *existing* property *rights*. The advent of zoning illustrates the point. Nonconforming uses were allowed to continue (subject to various limitations), on the thought that retroactive application of the new zoning rules to existing *uses* would result in government liability for takings. Application of the zoning rules to undeveloped land, on the other hand, was regarded as purely prospective in its effects. This is obviously incorrect. Before zoning, owners of undeveloped land had existing property *rights* (the right to develop, constrained only by nuisance law) the value of which was adversely affected by the new zoning rules, and sometimes very substantially. In *Euclid*,<sup>28</sup> the Court avoided the difficulty by reasoning that the zoning rules were essentially regulating nuisances, but that was bogus then and would certainly be considered bogus now, after *Lucas* and its

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<sup>28</sup> *Euclid v. Ambler*, 272 U.S. 365 (1926).

stress on *common law* nuisances.<sup>29</sup> In short, prospective zoning was actually retroactive (the same problem arises today in the context of zoning amendments), and the same is true of much prospective lawmaking. To figure out whether and how this point matters turns on the property rights issues discussed at the beginning of this section, and it is impossible to say how the Court would resolve those issues.

Another narrowing technique is suggested by Professor Barros.<sup>30</sup> He argues that any law of judicial takings (actually, the law of implicit takings generally) should apply only to private-public transfers, and not to private-private transfers.<sup>31</sup> After all, the latter do not destroy private property rights but merely transfer them, whereas the consequence of public-private transfers is that private property rights no longer exist, because they have been rendered public property rights.

The literature mentions several other related methods by which to narrow the *per se* rule. Consider Justice Scalia's opinion for the Court in *Lucas*, in particular his reference to "background principles of the State's law of property" that limit the nature of any property owner's title from the outset.<sup>32</sup> The question in *Lucas* was whether development activity subject to a regulation enacted by South Carolina could be viewed as a common law nuisance under state law; if it could, there would be no liability for a taking. The Court referred the question to

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<sup>29</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

<sup>30</sup> Barros, *supra* note 14, at 919-32.

<sup>31</sup> He notes that his idea "bears a resemblance to Joseph Sax's distinction between government acting as enterpriser and government acting as mediator between conflicting private claims." *Id.* at 919 n. 48, citing Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 62 (1964).

<sup>32</sup> *Lucas*, 505 U.S. at 1029.

the South Carolina Supreme Court, which held that the activity in question was not a nuisance under state common law, and so there was a taking. Suppose it had held otherwise, not because there was a precedent holding that the activity in question was a nuisance, but because there were precedents from which it could fairly be gathered that the activity was covered by the state's *principles* regarding nuisance law. Would that be a "change" in doctrine triggering a judicial taking?<sup>33</sup>

Nobody knows, but the answer might turn on how deferentially federal courts would review state court interpretations of state law. Justice Scalia addresses the matter in a footnote, explaining that the plurality's vision of judicial takings "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."<sup>34</sup> Professor Fennell notes that a deferential posture would be particularly appropriate given the Court's practice of pronounced deference to state governments on the question of what sorts of projects meet the public use requirement of the Takings Clause.<sup>35</sup>

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<sup>33</sup> As Professor Fennell puts the matter, "When we assess whether property law has 'changed,' we must make some assumption about whether property law is made up of narrow doctrinal rules, broad overarching principles, or something in between." Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 101 n.141 (2012).

<sup>34</sup> *Stop the Beach*, 560 U.S. at 726 n.9.

<sup>35</sup> Fennell, *supra* note 33, at 100. Regarding deference, *see also* Barros, *supra* note 14, at 932-36, noting among other things that the holding in *Stop the Beach* reflected considerable deference to the state supreme court's reading of the law. And indeed it did. The Court relied on a state supreme court precedent that the state court's opinion did not itself so much as mention, which precedent seemed to lead to "counter-intuitive" and "arguably odd" results. *Stop the Beach*, 560 U.S. at 732. In the Court's view, the question is what the state law is, not whether the state law is dumb. *See generally* Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the IUS Naturale and Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL'Y 37 (2011).

**B**

The discussion above concerns matters determining the *event* of a judicial taking. Even given the event, its *consequences*, financial consequences in particular, could perhaps be mitigated in several ways. Recall that critics of judicial takings object that they would give rise to financial obligations payable from public funds. This is thought to be inappropriate because it interferes with the exclusive prerogative of the political branches, the executive and the legislative, to manage the state fisc. I don't see this argument as a weighty one, mainly because state courts make all sorts of decisions that call for public expenditures.<sup>36</sup> The plurality opinion dismisses the argument on the ground that the default remedy for takings would be to reverse an offending judicial decision, not to order that compensation be paid.<sup>37</sup> The difficulty here is that a taking might have occurred in the meanwhile, prior to reversal, and under the Court's decision in *First English*<sup>38</sup> compensation would be due for that meanwhile period. But the plurality opinion makes no mention of *First English*.

Tom Merrill has suggested to me a related point, the essence of which is that suits for declaratory judgment could be used to determine whether some challenged government action would work a compensable taking. A judgment in the affirmative would simply give the government an option to alter or abandon the action in question, or instead go forward and be liable for compensation. It

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<sup>36</sup> A similar sentiment is expressed in Bloom & Serkin, *supra* note 27, at 589 (2012).

<sup>37</sup> *Stop the Beach*, 560 U.S. at 723.

<sup>38</sup> *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987). For discussion of whether *First English* should apply to judicial takings, see Fennell, *supra* note 33, at 111-12. Professor Fennell also discusses instances in which courts could find funds for takings by, in essence, requiring parties in disputes to pay each other. *Id.* at 99, 104, 111-14.

bears mention that *First English* could still come into play, but even then the approach would limit the financial burdens of judicial takings.

A final limiting device mentioned in the literature is statutes of limitations. Professor Barros argues that the limitations period 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,”<sup>39</sup> and that the limitations period should be the same for property owners who were, and those who were not, parties to the state court litigation. He notes, however, that the plurality opinion has language suggesting that suits by owners not parties to state litigation would be permitted decades after a state court decision changing the law.<sup>40</sup> This is another instance of the ambiguity that runs through *Stop the Beach*.

## VI

As we have seen, nothing in *Stop the Beach* tells us what the future holds, *even if* judicial takings become the law of the land. The consequences could be moderate or extreme or somewhere in the middle, but the ambiguities in the plurality opinion itself provide no basis for divining which. Looking elsewhere, however, may provide at least a clue.

The law of implicit takings developed by the Supreme Court, in my view, is usefully considered as if it were designed to maintain and reinforce two important but often conflicting ideological and political commitments rooted in the Nation’s traditions – one to strong rights of property, the other to the imperatives of an active and effective state. The Court honors the first

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<sup>39</sup> Barros, *supra* note 14, at 951.

<sup>40</sup> *Id.* at 952-53.

commitment with its *per se* rules, which are narrow in their application but nevertheless important for their rhetoric. For the sake of property rights, the right to exclude is protected against even the most trivial permanent encroachments. The Court honors the second commitment with exceptions and *ad hoc* rules that weaken the *per se* rules and provide the government with enormous leeway to act free of any obligation to pay compensation. For the sake of the state, it tolerates extraordinary impositions on property values.

To paraphrase Justice Holmes, government could hardly go on if it had to pay for every change in the law, but, he added, there have to be limits to that proposition.<sup>41</sup> What limits we have at present are those observed in the Court's rules on implicit takings. The pattern we see has been pretty stable for a long time; if it holds, then we can expect any law of judicial takings that develops to be relatively inconsequential. But that's a big "if."

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<sup>41</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).